COLUMBUS BAR

Lawyers QUARTERLY

SUMMER 2009

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CBA
COLUMBUS BAR ASSOCIATION

The Columbus Bar - *You'll Get What You Need*

You can't always get what you want
You can't always get what you want
But if you try sometimes, you just might find
You'll get what you need
— *Rolling Stones, Let It Bleed Album, 1969*

By Elizabeth J. Watters

Like most Columbus Bar presidents, I am honored and excited by the opportunity to take on such a leadership role in one of the most respected bar associations in the country and to work with all of you - its members. I have been preparing for this year for a while now, and last fall I was flushed with ideas about projects to initiate and issues to emphasize in the coming year. And then in the middle of the annual conference of metropolitan bar leaders the unthinkable happened: Lehman Brothers went under, the banking industry faltered and the economy came to a screeching halt. Quickly all of those ideas and plans were put on the back-burner as the Columbus Bar focused like a laser-beam - yes, President Clinton was right, "it's the economy, stupid" - on what it does best: providing members with what they need, when they need it most.

So, while I never expected to quote the Rolling Stone's in my first president's article, the refrain from the song "You Can Always Get What You Want," seems to have become the unofficial "theme" for my year as Columbus Bar president. When you think about it, I think that you will agree with me that the following is true: The Columbus Bar may not be able to give you the career of your dreams and solve all of life's problems, but, if you try, you will find that the Columbus Bar has what you need most, right now, for a successful legal practice.

Easy Pass - CLE Made Easy

If you are like the attorneys at my firm, you are getting your CLE this year from the Columbus Bar for the insanely low price of 12 hours for $100 - an incredible value and a great reason to renew your membership. Members told us in our February 2009 survey that the best way for the association to assist them was to offer low cost CLE programming that was high quality and more specialized. So, Executive Director Alex Lagusch and the Bar's leadership put on their thinking caps and created the CLE Easy Pass. With the Easy Pass, members can obtain 12 hours of quality CLE for one flat fee of $100 (in addition to appropriate membership dues). The CLE Easy Pass purchase equals a savings of approximately $320 if you were to buy the same number of hours at the Columbus Bar. Plus, our new CLE task force is already hard at work making sure the CBA offers CLE courses of the highest quality and that interest you.

Does the CBA expect to make money from the CLE Easy Pass program? No. Does the CBA expect to increase its membership numbers because of CLE Easy Pass? Not necessarily. Was it the right thing to do and what our members needed right now? Absolutely.

CBA Economic Toolkit/Job Assistance

Aside from CLE costs, the second area where our membership asked for assistance and where you will find enhanced membership benefits this year is with case referral and job assistance. The Columbus Bar will continue, through its subsidiary, Columbus Bar Services, to offer ColumbusLawyerFinder.com. CLF, which some of you may recall was initially called Liam Law, connects consumers and small business owners who are interested in finding an attorney to local attorneys in a straightforward, informative and friendly way. This program has continued to build on its initial success and is becoming a reliable source of referrals for the attorneys who use this marketing service. It has also been enhanced to give attorneys more flexibility with their marketing budgets and commitments, including a month by month option. In addition, the Columbus Bar has its Lawyer Referral Service. Last year, 325 attorneys with an average of over 14 years of experience assisted over 50,000 people in matters covering all areas of the law. This year looks to be even stronger in terms of attorney participation and referrals. Not bad for a program that just celebrated its 50th Anniversary.

Joining these programs is the Columbus Bar's new Economic Toolkit. This recently created program is exclusive for members. It provides members with 24/7 access to the latest tips, news, and resources for managing a law practice. If you want to know more about the Columbus legal market and what is going on right now, all you have to do is go to the Columbus Bar website and sign-in. Again, this is a members' only benefit.

It is my hope that these programs and the others that our Bar will institute this year will help you face the challenges created by the economy and will provide you with the tools you need to succeed. Look for our Pro Bono Committee's "Just Take One" initiative, new programs from our seniors group and events such as our recently free Recession Recovery Teleconference Series. While we may not be able to give you everything you want (I never did get the child care facility I wanted while my daughter was in preschool), I hope you will find that the Columbus Bar has what you really do need. As always, if you have any thoughts on what our Bar can do for you or ways to enhance to your membership benefits, do not hesitate to drop me a line.

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Elizabeth J. Watters,
Chester Willcox & Saxbe

President's Page

MEMORANDUM TO ELIZABETH J. WATTERS

Re Your Term as President of the Columbus Bar

By Frank A. Ray

With reasonable assurance, you can anticipate that on or about June 11, 2010, your successor as President of the Columbus Bar Association will rise at the podium at the Association's annual meeting, describe your year of service in nearly immortal terms, and hand you a plaque with the following inscription: "Elizabeth J. Watters, President, Columbus Bar Association, 2009-2010, In grateful appreciation of your unselfish efforts and valuable service in furtherance of the legal profession." It has been so engraved – so many times.

At that moment, you may have the same reaction that my uncle offered about his ownership of a boat. He told me that for the period of time that he possessed his boat, "The two best days were the day that I got it and the day that I got rid of it." Of course, with respect to your upcoming service as the President of the Columbus Bar, you will experience many highs and many lows as you deal with responsibilities associated with the job. In all probability, after you complete your year as President of the Bar, you will look back on your service much as I now recall my high school baseball career. In my mind, my prowess as a hitter and fielder has dramatically improved with the passage of time.

CBA President Sam Weiner (2003-2004) offered the following comments:

"As a solo practitioner elected to the Presidency of the Columbus Bar Association, I can say that it was one of the highlights of my legal career. The honor or being chosen by my peers to lead their organization is an honor without equal."

See what I mean, Elizabeth? I stand by my comment that passage of time creates an attractive memory. As a solo practitioner, Sam Weiner masterfully tackled time-consuming demands of the position during his year in the barrel. Truly, I do not know how Sam and Heather Sowald, President in 1998-1998, as solo and small-firm practitioners, delivered such stellar service to the CBA during their years as President. Somehow, they did it and did it so well.

Your law partner and CBA President (1994-1995) Steve Fitch, offers the following commentary:

"My first thought for you is to emphasize the fact that you will be the President of the Columbus Bar Association. There are many fine state and local bar associations throughout the country. You will realize, however, as you travel to meetings and conferences that the Columbus Bar has a well-deserved reputation for being the model bar organization in the U.S. Being the president of any organization is an honor, but being the President of the Columbus Bar is a special recognition of your talents and ability which you will come to appreciate even more after your year as President is over.

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For me, being the President of the Columbus Bar meant that I was being given the opportunity to, in Woody's words, "pay forward" for the many benefits and rewards that come with being an attorney in Columbus, and to do so through an organization that had the resources, both financial and human, to make a real difference in the lives of people in the Columbus community. I am grateful that being President of the CBA gave me the opportunity to be a part of that effort.

Have a wonderful year. We are all very proud of you."

I would wager that almost every President of the CBA would confess that their year at the helm of the organization caused them to become a better lawyer. The CBA President will find himself or herself outside the comfort zone of practice areas that would consume his or her normal business day. For me, during my term of service, the word of primary importance in my self-described title as a "trial lawyer" became the second word in the title. The CBA President represents the interests of all lawyers in furtherance of the legal profession and our justice system. The CBA President must confront the reality that he or she represents no special interest group. The breadth of the organization is marvelously described within Article II of the Code of Regulations of the Columbus Bar Association as follows:

"The purposes of [the CBA] are:

A. To uphold the Constitution of Ohio;
B. To uphold high standards of integrity and honor in the legal profession;
C. To encourage and assist lawyers in maintaining and improving their competence so that they can better serve their clients and the public;
D. To assist in making legal services available to all in the Columbus area who need such services;
E. To aid and educate the public with reference to law and the administration of justice;
F. To exert the Association's influence in connection with issues involving the profession of law and the administration of justice to the end that it will enhance the quality of life in the community; and
G. To cultivate a spirit of good fellowship among members of the legal profession."

Lofty stuff, these "purposes." For the next twelve months, the CBA's purposes have landed squarely in your lap as the chief steward of the Association.

In no small measure, CBA Executive Director Alex Lagusch and his staff will continue to perform with excellence as full-time custodians of our organization. Your predecessor as the president, Kathleen Trafford, offers the following thoughts and acknowledges Alex and the CBA staff's first-rate operation:

"John Adams was heard to say: 'No man who ever held the office of president would congratulate a friend on obtaining it.' Au contraire, Jacques! I congratulate my friend, Elizabeth, because the CBA Presidency is a wonderful journey. The path is well worn by the many great leaders who preceded us. Alex is a world-class guide. And the great Bar staff takes care of all the maps, provisions, postcards and other logistics, while the President simply enjoys a great ride to the finish line. Enjoy your year, Elizabeth!"

Sorta heavy. But you will probably find yourself saying what I have heard every CBA President say, "My Board of Governors is the best." You are fortunate that the people on the Board of Governors have distinguished themselves with professional accomplishments, recognition and credibility with the local bar, with proven work ethic, and with loyalty to the profession. Do not forget to deploy the commitment, talents, and energy of your Board.

Make no mistake about it, Elizabeth, you have earned and you deserve your election as President of the Columbus Bar. As a trial lawyer, your stellar work on the State Attorneys General "tobacco litigation" with your partner, Rocky Saxbe, as counsel for the State of Ohio against the tobacco industry, produced an eye-popping $10 billion settlement for the State of Ohio. Your willingness to represent individuals as well as businesses in advancement of claims and in defense of litigation reflects well on you as a person, not just as a trial lawyer. You certainly have enjoyed a fast professional track, amassing an impressive list of achievements and awards since your graduation from the Moritz College of Law at The Ohio State University in 1990.

Remember to enjoy your year. Probably no one enjoyed the presidency more than Jim Readey, 1985-1986. Jim reflects as follows:

"The year of being president was the best and most memorable year of my 38 years as a lawyer. I had a blast. What Alex remembers about my year as President is that I almost bankrupted the CBA with my ideas and projects. What my kids remember is that their Dad held a press conference to announce a judicial poll result, but nobody showed up except him and Alex."

To be sure, Jim's experience with the no-show press conference offers an anecdotal reminder that the CBA President might undertake responsibility for important matters, but the importance will not capture headlines. Satisfaction in your year as President will not arise from public adulation but will occur from your private knowledge that you did the right thing and that you did your best.

Of course, if you need reliable advice on how to discharge your duties as President of the association, you have an expert located just down the hall from you at Chester, Willcox & Saxbe – Steve Fitch.

On behalf of Kathleen and the past presidents of the Columbus Bar, we welcome you to an incredible journey over the next 12 months in your time-honored position as president of our amazing local Bar.

fray@cwslaw.com

Frank A. Ray,
Chester Willcox & Saxbe

THE HIGH ART OF THE WHEEDLE

By Bruce Campbell

The glossy sheets of wood pulp dotted with black smudges at which you are peering did not drop spontaneously into the cosmos fully formed. Like Nature, they had a Mother. In this case, the aptly-named Esther birthed them.

Ms. E. Kash, a University of Michigan-trained journalist, is and has been since 1982, the Prime Mover behind almost anything that comes out of the Columbus Bar requiring editorial scrutiny and shepherding through commercial printing processes. Her offspring include not only this rag but the Columbus Bar Directory and, for many years, the CBA's Daily Reporter pages. To be sure, many others among the CBA membership and staff play yeoperson roles in making these chronicles materialize, but Esther is the sharp pin around which this compass pivots.

Those who encounter Esther – and it is pretty hard to be in the CBA orbit without coming into contact with Esther – know her as a supremely helpful, engagingly quirky and unnecessarily self-deprecating person.

A very different Esther persona presents itself, however, to those she singles out in her ceaseless, voracious quest for content for her various print progeny. The Little-Shop-of-Horrors Esther ("Feed Me Seymour! Feed Me!") is a terror to be avoided by the timid. "Dogged" does not adequately convey the extent of her determination in coming up with something to put to print.

A less skillful Esther might be called a nudnik (defined in Leo Rosten's *Joys of Yiddish* as one who nudges, pesters or nags). But this Esther has developed the cunning ruse of being a helpless waif, ragged cap in hand, begging for any morsel of prose you might throw her way to stave off the imminent death of one of her publication children. She plays the pity ploy like a Yo-Yo Ma of the guilt trip. She is so good at it, you never realize you have been had. An easy mark like me who suffers under the delusion of adequacy as a wordsmith or someone with a passionate message to get out (e.g. Jason Dolan whose provocative, thoughtful article appears elsewhere in this issue) stands no chance of escaping her beguiling inveiglements for copy.

If Esther's GPS beams you in and she starts working you for an article, just give up and start writing. She will not relent. You might just as well write two articles while you are at it; the millisecond she has one in hand, she will begin to hector you (in her own sweet way) for the next. A phalanx of CBA Presidents and their de rigueur columns will attest to this.

Postscript: Knowing Esther would not publish this piece voluntarily, I deliberately delayed submitting it until her choice was going to press with it or with a blank page. I am counting on the fact that her journalistic pride will not allow her to resort to the latter.

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Bruce Campbell,
Columbus Bar Counsel

Web 2.0 for Lawyers – *Benefits and Risks*

By Alvin E. Mathews Jr. and Barbara Wayman

"It's not what you know, it's who you know." In our ever-changing economic climate, this truism has never been more relevant. Lawyers depend more than ever on their network of contacts for the next referral, the next case and the next job.

Advances in technology have brought networking online, but many are unsure how to apply the new techniques to their practice. Between Twitter, Facebook, LinkedIn, Plaxo, MySpace and YouTube, social networking can seem confusing. Technology is constantly changing and lawyers hear conflicting advice about which sites are the most useful, what if anything they should be posting online, and what kind of results they can expect.

To simplify the matter, let's start with a definition. Web 2.0 means anything that has user-generated content. Social networking sites are all examples of Web 2.0 because the users are inputting the information that appears on these sites. We now know Web 2.0 is not a flash in the pan, and it's not just for kids. Facebook, for example, has over 175 million active users. The fastest growing segment of Facebook is people over 30 years old. According to data by Nielsen Online, social networking sites have grown anywhere from 54% to 343% per year. Clearly this is a trend that's here to stay.

That's good news for lawyers, because it means that even if you haven't yet tried social networking, the programs will still be around when you're ready to explore.

There are many reasons why legal professionals might want to pick a site and get started. A top reason is the efficiency of taking networking online. By posting and reading status updates, you can keep in touch with a wide group of business associates with little effort. It can be a powerful way to maintain visibility during times when you're busy with your caseload and have little time for in-person networking.

For professional development, sites like LinkedIn and Facebook have many subgroups related to all aspects of law. You may know only a few attorneys in your town who work in your particular niche, but online you can tap into best practices of a large percentage of your peers around the world. If you want to improve your negotiation, mediation, or public speaking skills, online user groups provide significant free information you can access immediately. They also allow you to post quick questions and gain immediate feedback from others who have experience in solving a particular problem.

Social networks can help you grow your legal practice by providing a platform to showcase your expertise to a wider audience. Lawyers can author articles and post or submit them online to sites like www.ezinearticles.com to help inform others who are looking for that specific information. Each website that picks up the article then becomes a potential conduit leading prospects to the author. By steadily delivering quality online content, a lawyer demonstrates that he or she is knowledgeable and trustworthy, which can dramatically reduce the timeframe in which a prospect becomes a client.

Getting started? Say that you've set up your account, connected to a few friends and are now wondering what to do next. Well, just as time is money, so is attention. In the online world, you earn people's attention by steadily delivering quality content. Join subgroups in your specialty and interest areas. Review topics of discussion and contribute to the conversation. Look for ways to connect people to resources they need. Look for opportunities to inform and assist others. As with many marketing initiatives, the best approach is to take consistent small steps over a long period of time.

You can track your return on investment by noticing opportunities that come your way as a result of your online efforts. A tool called Google Alerts (www.google.com/alerts) will send you an email every time your name appears online, so you can watch the ripple effects as your presence grows. If you've made a significant contribution, when someone Googles "Your Town" plus "Your Practice Area," your name may appear on the very first page that pops up, which can help grow your practice and career.

While there are many benefits to marketing law practices through web-based social networking sites, there are a variety of risks the careful lawyer must consider before building an extensive profile on an online networking site and freely communicating with other site users. Ultimately, the content a lawyer chooses to post or allows others to post in their social networking account dictates whether character, ethical or employment issues will be of concern.

Some of the apparent risks include:

Character and Fitness – Many recent law school graduates have used online social networks throughout high school or college. They should be mindful that professional licensure carries with it a set of obligations. For example, an applicant's history of substance abuse might lead a bar admissions board to question the character and fitness of the applicant when current images of the applicant in a state of intoxication are found on a social networking site.

Advertising - For the attorney, content on social web sites could be considered internet advertising. As with other forms of media, all ethics advertising rules must be followed. Lawyers are permitted to communicate information about their services as long as the communication does not misrepresent a material fact and is not otherwise misleading.[1] Accordingly, lawyers should be careful not to post client testimonials or case results that are not verifiable. Lawyers must likewise ensure that their direct communication with potential clients does not amount to improper client solicitation.

Confidentiality and Unintended Clients – Keep in mind that client confidentiality rules may limit him disclosing the identity of clients without proper authorization.[2] Lawyers must likewise be careful not to post client information on public networking site areas. As a rule of thumb, focus on supplying general information and be cautious about inadvertently creating an attorney-client relationship by giving advice or answering legal questions online.

Employer Investigations – Recently, stories have been reported of individuals securing jobs, only to have the job offer rescinded once the human resource department checked the MySpace or Facebook account of the candidate or read an offensive post on a blog authored by the candidate. Often, social networking accounts contain photographs reflecting behaviors that might make an employer think twice. Posting blog commentary which may be antithetical to an employer's set of values may also threaten employment.

Improper statements, ethical violations, or compromising photographs, conduct in social networking sites may impede one's ability to obtain a law license, result in discipline or ruin an opportunity for employment. Lawyers should consider that their portrayal in online social networking sites reflects their character.

As the number of lawyers participating in online social networks continues to rise, professional responsibility risks of social networking will increasingly become apparent. As in other industries, lawyers can find tremendous benefit in using web-based social networking sites. As members of a profession, however, lawyers should ensure that their use of this medium reflects proper character and ethical conduct.

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1. Prof. Cond. Rule 7.1.
2. Prof. Cond. Rule 1.6.

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Alvin E. Mathews Jr., Bricker & Eckler, and Barbara Wayman, APR

CIVIL JURY TRIALS

FRANKLIN COUNTY COMMON PLEAS COURT

By Belinda S. Barnes and Monica L. Waller

Verdict: $595,625.00. Eminent Domain. Plaintiff filed an action to appropriate 2½ acres of Defendant's property to construct a leisure path for public purposes. The parties were not able to agree on the fair market value of the appropriated property and the amount of damages, if any, to the remaining land caused by the appropriation. Plaintiff's Expert: Robert Domini. Defendant's Expert: Richard Vannatta. Plaintiff's Appraised Amount: $9,249. Defendant's Appraised Amount: $2,938,500 for the impaired value or $661,000 for the unimpaired value. Length of Trial: 3 days. Plaintiff's Attorneys: Michael L. Close and Jennifer B. Casto. Defendant's Attorney: Richard T. Bennett. Judge: Fais. Case Caption: *Village of Canal Winchester, Ohio v. Richard L. Stebelton, et al.* Case No. 06 CV 7242 (2007).

Verdict: $22,391.81 (for Plaintiff Kim Ray) $4,000.00 (for Plaintiff Tim Ray). Auto Accident. Defendant failed to yield on a left turn and struck Plaintiffs. Plaintiff Kim Ray sustained a contusion to her knee and underwent diagnostic testing and therapy for ongoing pain. She incurred medical bills totaling $6,000.00 Plaintiff Tim Ray also sustained a contusion to his knee and abrasions to his arms. He incurred medical bills totaling $1,300.00. Lost Wages: None. Plaintiff's Expert: Jeff Gittens, M.D. Defendant's Expert: None. Settlement Demand: Unknown. Settlement Offer: $7,917.00 for both Kim and Tim Ray. Length of Trial: 2 days. Judge: Magistrate Angel. Plaintiff's Attorney: Michael Geiser. Defendant's Attorney: David Kostreava. Case Caption: *Timothy Ray, et al. v. Marjorie Lane*. Case No. 07 CV 4162 (2008).

Verdict: $6,918.24. Auto Accident. Plaintiff Robert Baker and Defendant Ashley Healy were involved in a rear-end accident. Plaintiff was awarded summary judgment on the issue of negligence and the trial proceeded on the issue of damages only. Plaintiff claimed soft tissue injuries to his neck and back and a rotator cuff tear. Defendant disputed that the rotator cuff tear was related to the accident. Medical Expenses: $26,942.00. Lost Wages: $15,422.40 plus $4,198.32. Plaintiff's Expert: Thomas E. Baker, D.O. Defendant's Expert: Joseph Schlonsky, M.D. Settlement Demand: $100,000. Settlement Offer: $7,500. Length of Trial: 2 days. Judge: Magistrate Harildstad. Plaintiff's Attorney: Melissa Chase. Defendant's Attorney: Case Caption: *Robert Baker v. Ashley Healy.* Case No. 05 CV 6096 (2007). LeAnna Smack.

Verdict: $1,500. Auto Accident. Defendant Misty Hunt was northbound on Central Avenue, driving approximately 30 mph, near the intersection of Central Avenue and Town Street in Columbus, Ohio. According to Ms. Hunt's testimony, she was approximately half-a-car length from the intersection when the traffic light signal changed from green to yellow, still northbound on Central. Ms. Hunt attempted to clear the intersection. Plaintiff Michael Crabtree was a passenger in a vehicle driven by his brother-in-law that was headed eastbound on Town St. Mr. Crabtree testified that they were stopped at the red light on Town Street, the light turned green, and they proceeded through the intersection. They were struck in the rear driver's side of the vehicle. Mr. Crabtree alleged soft tissue injuries to the neck, back, shoulder, and numbness in the leg that persisted over a period of two weeks. He stated that the neck, shoulder and leg numbness resolved itself within a couple of weeks. However, his back continued bothering him for 5-6 months. The medical bills included the emergency room only for a total of $574. Plaintiff's Expert: None. Defendant's Expert: None. Plaintiff's original settlement demand was in excess of $25,000 but was reduced to $1,500 at the time of trial. There was no settlement offer. Length of Trial: 2 days. Plaintiff's Attorney: Nick English. Defendant's Attorney: Adem Vllasi. Judge: Hogan. Case Caption: *Michael Crabtree v. Misty Hunt*. Case No. 05 CV 14427 (2007).

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Verdict: $100. Auto Accident. Plaintiff Keith Smith, a 44-year old meat cutter at a local grocery store, was riding his motorcycle at the intersection of Williams Road and Hamilton Road when he was rear-ended by Defendant Charles Jones. He anticipated the collision and braced himself and was able to stay upright on the motorcycle. However, he claimed to have experienced immediate pain in his neck, shoulder, waist and back and a headache. He was diagnosed with a cervical strain, headaches and back pain and received physical therapy. He incurred medical bills totaling $2,644 and lost wages of $645. Liability was not disputed and Plaintiff's expert acknowledged that Plaintiff suffered sprains and strains of his neck and back for which he recovered. Plaintiff's expert claimed Plaintiff continued to suffer ongoing problems as a result of the accident and could be expected to continue to suffer problems in the future. Plaintiff's Expert: Donna Parsley, M.D. Defendant's Expert: Joseph Schlonsky, M.D. Settlement Demand: Unknown. Settlement Offer: $1,013. Length of Trial: 2 days. Plaintiff's Attorney: Braden Blumenstiel. Defendant's Attorney: Rick Marsh. Judge: Pfeiffer. Case Caption: *Keith Smith v. Charles Jones.* Case No. 06 CV 12817 (2007).

Verdict Amount: Defense Verdict. Medical Malpractice/Wrongful Death. Plaintiff's decedent, 64-years-old at the time of death, had been operated on at an outlying hospital for rectal bleeding where a blind resection had been performed. The patient suffered additional bleeding within a few weeks and was transferred to Grant. Plaintiff's decedent died at Grant, allegedly due to an undiagnosed abscess and septicemia. Medical Bills: Unknown. Lost Wages: None. Plaintiff's Expert: Grant Bochiocchio, M.D. of John's Hopkins. Defendant's Expert: Janice Rafferty, M.D. of University of Cincinnati. Settlement Demand: None. Settlement Offer: None. Length of Trial: 5 days. Plaintiff's Attorney: Donald Cybulski. Defendant's Attorney: Vincent Lodico. Judge: Bessey. Case Caption: *Phyllis Keiffer v. Grant Medical Center, et al.* Case No. 05 CV 14689 (2008).

Verdict Amount: Defense Verdict. Pedestrian/Auto Accident. On August 4, 2003, Plaintiff Justin Harris, age 16, was walking northbound on the Route 40 crosswalk in Whitehall, Ohio. He had crossed the first lane of traffic when he turned back and headed towards the sidewalk, his point of origin. While returning to the sidewalk at the intersection of Maplewood Avenue and US Route 40, he was struck by a 2002 Chevrolet Trailblazer driven by Defendant Vaughn Brown, who was traveling eastbound on Route 40. Plaintiff filed a lawsuit against Vaughn Brown claiming that he was traveling at a high rate of speed and that Defendant Brown had sufficient time to avoid striking the Plaintiff who was a pedestrian in plain view and occupying the crosswalk. There was no dispute that Plaintiff sustained a compound fracture of his lower leg and his medical bills were stipulated by both parties. Plaintiff alleged he activated the pedestrian walk button and was halfway across the street when the "don't walk" light began to flash. He claimed he panicked and tried to return to the side from which he started. However, as he turned and went back he was struck by defendant's vehicle that was traveling in the left lane. Plaintiff argued that defendant was speeding and that defendant saw him and could have stopped or veered into the right lane to avoid the impact. Defendant acknowledged that he saw plaintiff well before the intersection but denied he was speeding. Defendant contended that he did not anticipate plaintiff would attempt to return to the side of the street. He testified that plaintiff was in the crosswalk after he activated the walk signal, but when plaintiff attempted to return to the sidewalk, he began dodging traffic outside the crosswalk. Medical Bills: $27,535.34. Lost Wages: None. Plaintiff's Expert: None. Defendant's Expert: None. Settlement Demand $75,000. Settlement Offer: $10,000. Length of Trial: 2 days. Plaintiff's Attorney: Eleni A. Drakatos. Defendant's Attorney: Tim Ryan. Judge: Reece. Case Caption: *Justin Harris, et al. v. Vaughn Brown, et al.* Case No. 05 CV 8395 (2007).

Verdict: Defense Verdict. Auto Accident. Plaintiff Paul Lewis was driving a semi truck south in the middle of three thru lanes of traffic on Interstate 71 South. There was a fourth lane to the west that was an on ramp and off ramp lane. According to Mr. Lewis, Defendant Gloria Hampton was traveling in front of him, put her blinker on, moved into the lane to the right and hit a car that was moving toward the middle lane. The collision sent the defendant into a spin and underneath the semi truck. The defendant suffered severe injuries and brain damage and, therefore, did not recall the accident. However, there were three witnesses to the accident. Two of the witnesses testified that an unknown white car entered the highway and clipped the back of the defendant's car, sending her into a spin. They agreed that there was nothing the defendant could have done and that she was traveling straight in her lane of travel. The third witness was offered to corroborate the plaintiff's explanation of the accident, but ultimately admitted that he did not see how the accident began. The case was bifurcated with the liability determination to be made first. Plaintiff's Expert: None. Defense Expert: None. Settlement Demand: $25,000. Settlement Offer: None. Length of Trial: 1 day. Plaintiff's Attorney: Timothy Tepe. Defendant's Attorney: LeAnna Smack. Judge: Brown. Case Caption: *Paul Lewis, et al. v. Gloria Hampton, et al.* Case No. 07 CV 3119 (2008).

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The *Art* of *The Appellate Appendix*

By The Honorable Judith L. French and Jon E. Schelb

The local rule for the Tenth District Court of Appeals, Loc. R. 7(E), requires parties to include in an addendum or appendix to their briefs materials that are "essential to the determination of the assignments of error." While that instruction seems simple enough, it can leave parties wondering what "essential" means and whether their view of what it means is the same as the court's view. While I can only speak as one member of the court, the following is my list of essentials.

WHAT TO INCLUDE:

The trial court decision and judgment entry. Make sure this includes the court's findings of fact and conclusions of law, not just the final entry, and any underlying magistrate's decision.

Evidentiary materials pertinent to summary judgment. This does not mean all of the materials submitted in support of, or in opposition to, summary judgment. Depending on the facts of the case, it could mean any or all of the following: pertinent affidavits; substantive, relevant portions (maybe a few pages) of depositions; relevant portions of hearing transcripts; underlying contracts or agreements, or relevant portions of these documents if they are lengthy. Decide what materials are truly necessary for the judges' understanding of the arguments you present in your brief and include only those materials. If the judges need other materials, the record is easily accessible.

Portions of pleadings material to sustaining motions to dismiss. This does not mean all of the pleadings filed in the case. Again, decide what is really at issue on appeal and attach only those pleadings that directly pertain to those issues. Everything else is in the record.

Relevant portions of documents construed by the trial court. If a particular document was at issue before the trial court, and is at issue on appeal, then include it. If the document is lengthy, include just the relevant portion.

Statutes, rules, and regulations. App.R. 16(E) requires parties to reproduce "provisions of constitutions, statutes, ordinances, rules, or regulations" if determination of the assignments of error requires their consideration. But the rule allows parties to reproduce "relevant parts" of those provisions "in the brief or in the addendum." So, if an appeal requires consideration of a statute, rule or regulation, and you have provided a direct quotation of the relevant portion of that statute, rule or regulation in the brief, you need not reproduce it in the appendix. As a courtesy to the court, however, if the assignments of error require consideration of a statute, rule or regulation that has been changed, is no longer published or is not currently available, you should attach a complete copy of the statute, rule or regulation on which you are relying.

Other helpful materials. If you want to draw the court's attention to a specific portion of a document, particular testimony or your version of the smoking gun, by all means, include that specific information in the appendix. When you discuss it in your brief, be sure to direct the court to the appendix for immediate review of the information.

WHAT *NOT* TO INCLUDE:

Copies of cited opinions. A recent rule change eliminated the requirement to attach unpublished opinions. You should, however, attach opinions that are truly unpublished and not readily available. These may include older Attorney General opinions and memorandum decisions.

The complaint, answer, other pleadings or motions. You need not attach these materials unless they are at issue on appeal.

The notice of appeal. Again, you need not include a copy of the notice of appeal unless it is at issue on appeal.

Materials already included in another party's appendix. If you cite to these materials in your brief, just cite to the other party's appendix.

Once you have your materials together, remember to include a table of contents and, if you have more than five documents, to tab each separate document. If the materials total more than 50 pages, the appendix must be separate from the brief, and it must be bound. (An appendix secured only by a metal clip is not "bound.")

In summary, when creating your appellate appendix, always begin with App.R. 16(E) and Loc.R.7(E), include the materials specifically required, and follow the court's instructions for filing. Beyond that, however, decide what materials are really essential to the judges' understanding of your arguments and limit the appendix to those materials. We will all be happier for it.

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The Honorable Judith L. French and Jon E. Schelb, Tenth District Court of Appeals

Court Needs Protection From Protection Requests

"Judges err on the side of caution" when considering CPO requests. But maybe it's just a neighborhood dispute and people just need to be linked with available resources."

By The Honorable David E. Cain

Foreclosure filings are not the only things soaring in the sour economy. Requests for Civil Protection Orders (CPOs) have nearly tripled over the last three years. They required more than 4,300 hearings in 2008.

The number of CPOs demanded during the first three months of 2009 is nearly equal to the total that were sought during the entire year of 2005.

"And we haven't even hit the hot season yet," Magistrate Pam Erdy remarked.

CPOs are creature of a statutory scheme (ORC 2903.21.4) that became effective on July 29, 1998. It provides that petitions may be filed in common pleas courts by petitioners who allege they are victims of stalking and need the courts' protection. The court is directed to hold an ex parte hearing as soon as possible, but no later than the court's next business day. If the petitioner claims the respondent has threatened him or her, the court may issue a variety of no contact and stay away orders. If such ex parte protection orders are granted, the court shall hold a full hearing within 10 court days at which the respondent can contest the allegations and ask that the orders be vacated. Or, the court can continue the orders for up to five years.

For a few years, requests for protection orders weren't a big problem. Duty judges handled the ex parte hearings and the courts eight magistrates took turns with the full hearings. But by 2005, the ex parte hearings increased to 442. In 2006, there were 588.

The year 2007 saw a 76% increase in requests, necessitating 1,632 ex parte hearings, 1,080 continuance hearings and 1,063 final hearings.

The court hired Erdy in May, 2007, to handle everything after the ex parte hearings as a part-time magistrate.

In an effort to fine tune the process and relieve the clerk's office, the court hired Roscoe Patterson and Brian Merriman in January, 2008, to assist petitioners in filling out forms and to perhaps divert some of them who obviously don't quality for a CPO.

In May, 2008, the judges made Erdy's position full-time as the numbers grew by another 39% over 2007. The number of hearings from ex parte to final totalled 4,352 in 2008.

Magistrate Erdy is now hearing an average of 15 cases a day – with one or more multiple-witness trials everyday. The trials last anywhere from a half hour to several days (if attorneys are involved). Last year, final hearings were scheduled a week after the ex parte hearings. Now they are barely making the statutory deadline.

The need for a quick "full" hearing is more than a statutory mandate as jobs and professional licenses, for example, of innocent respondents are jeopardized by even temporary CPOs issued ex parte.

"We'll just see more and more unless the legislature changes the language (currently a couple threats are enough) or puts a filing fee on them," Erdy declared.

The statute says "no court or units of state or local government shall charge any fee, deposit, or money in connection with the filing of a petition pursuant to this section."

Erdy believes a $10 filing fee would eliminate many of the more frivolous complaints. Others believe it would cut out indigents who really need the protection.

Also pursuant to the statute, anti-stalking CPOs go into police data bases and can have devastating effects on respondents. So, frequently, Erdy informally imposes a cooling down period for a few weeks or months and then issues a dismissal if there are no violations of the temporary orders. "A lot of times a warning letter works. Or, mediation usually works. But it takes so much time," she asserted.

The Night Prosecutors Program, operated by the Columbus City Attorney's office, is the classic forum for neighborhood disputes. But the line is usually backed up for two or three hours – sometimes as long as eight hours – because of personnel shortages due to budget cuts. So, police and municipal prosecutors are routinely sending people to the court to ask for a CPO without screening anyone out.

"We need a one-stop shop . . . an accessible, centralized, public area . . . where people can be screened and given good information," Atiba Jones, Executive Director of the Common Pleas Court, commented.

"Judges err on the side of caution" when considering CPO requests, he noted. But maybe it's just a neighborhood dispute and people just need to be linked with available resources, he added.

He said he has been meeting with other city, county and court officials to see "how we can help each other . . . how we can share resources" for CPOs and other problems as well.

All requests for CPOs against juveniles are now being directed to the Domestic Relations/Juvenile Court.

"Juvenile Court has confidentiality and resources," Erdy pointed out. Confidentiality is important, she commented, because a CPO can jeopardize a future job or scholarship while it may have involved nothing more than typical infighting at school, she said. Furthermore, the Juvenile Court can check out custody issues, appoint guardians ad litem if necessary, and ask for help from the Franklin County Children's Services.

Erdy has a secretary who runs record checks on both sides and determines whether any of them have filed before. She also has her own deputy sheriff "because they get into fights in the hallway all the time."

In any event, the legislature may need to reconsider a couple aspects. Presently, attorneys who represent petitioners who have no disqualifying criminal records can be paid out of the State's Victims of Crime Fund. "It's being drained dry," Erdy remarked.

Also, earlier this year the legislature amended the statute to allow a court to order electronic monitoring of respondents who are shown by "clear and convincing evidence" to present "a continuing danger to the person to be protected." This is an interesting provision (not yet used in Franklin County) since the proceeding is clearly civil in nature (even in name) with civil standards of proof.

Violation of a CPO will mean the respondent is much more likely to be arrested – especially if near the petitioner's home or job site – and a possible finding of contempt and/or criminal prosecution for violation of a protection order.

Foreclosures

As for foreclosures, the increases are beginning to slow down a little. In the 1990s, foreclosure actions averaged less than 2,000 a year in Franklin County. Last year, new foreclosure complaints totaled 9,265. So far this year, they are averaging about 850 a month.

About one-third of them are being referred to the Franklin County Mediation Project for possible reinstatement or modification.

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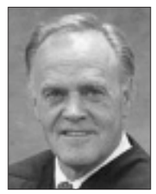

The Honorable David E. Cain, Franklin County Common Pleas Court

Getting a GRIP on Litigation HOLDS

By David F. Axelrod and John A. Walker

In Arthur Andersen v. United States, 125 S. Ct. 2129 (2005), the Supreme Court acknowledged the legitimacy of the routine destruction of unneeded records.

Destruction policies must, however, be suspended once an investigation or litigation is reasonably anticipated. This is normally accomplished through a "litigation hold," instructing employees to preserve all potentially relevant records.

Implementation involves both human and technical challenges, some of which are described below.

Human Challenges

Applying the general rule may be especially difficult where litigation is merely anticipated rather than pending. Challenges include:

- Pinpointing when litigation becomes reasonably anticipated. For instance, does a mere threat of litigation impose a company-wide duty to preserve records?
- Determining what must be preserved may require predicting causes of action, cross-claims, defenses, counterclaims, etc. Companies may have to consider suspending all routine purges until the smoke clears.
- Determining how to preserve electronic records. An instant freeze is impractical because it would require blocking user access and disabling core software. A more realistic approach is to act as quickly as possible to impose a broad freeze, which may be gradually relaxed as more becomes known.

Technical Challenges

Difficulties arise from electronic records' volume, duplicability, dynamic content,metadata and dispersion.

Volume

The rate at which electronic records are created has accelerated such that there are now vastly more electronic than paper records. The Sedona Conference estimates that:

- At least 93% of information is first generated in digital format;
- 70% of corporate records are stored that way; and
- 30% of electronic information is never printed to paper.

Email contributes substantially to this profusion. The ABA's Digital Evidence Project projected over 11 trillion email messages for 2007. Volume, duplicability and dispersion magnify the significance of electronic records in imposing litigation holds.

Duplicability

Electronic records replicate with and without human intervention through such means as automatic backup of file data. Duplication also occurs when, for example, an email message is sent to many recipients, some of whom forward it to several others, etc. Simultaneously, computer systems that transmit the messages automatically create multiple copies as the messages are sent and resent.

Duplication and dispersion increase the difficulty of capturing all relevant versions of electronic records.

Dispersion

Electronic records can reside in many places simultaneously: PCs, laptops, floppy disks, CDs, flash drives, servers, PDAs, and even iPods (which may be used to back up hard drives). This magnifies even further the difficulty of capturing all relevant versions.

Metadata

Metadata is descriptive information about documents, files and email that assists users and facilitates the storage and retrieval of electronic records. It includes such information as dates of file creation and modification, authorship, comments, editing history and file designation. For email, it includes such information as the dates that mail was sent, received, replied to and forwarded.

Not all metadata is visible to the ordinary user. Metadata can be important because it may reveal the origin and distribution of electronic records.

Dynamic Content

Electronic records often change over time. The simple act of booting up a computer can alter data. Human intervention can change electronic records in other ways, such as moving a word processing file from one location to another, which may alter the creation and modification dates associated with the file.

Authentication

In re Vinhnee, 2005 WL 3609376 (B.A.P. 9th Cir. 2005), imposed new foundational requirements for electronic records, essentially requiring a prima facie showing of measures to safeguard data integrity. See Axelrod, New Rules for Electronic Records? (Business Crimes Bulletin, June 2006). The Sedona

Conference explains:

[I]t may be more difficult to determine the provenance of electronic documents than paper documents. The ease of transmitting electronic data and the routine modification and multi user editing process may obscure the origin of a document. Electronic files are often stored in shared network folders that may have departmental or functional designations rather than author information. In addition, there is growing use of collaborative software that allows for group editing of electronic data, rendering the determination of authorship far more difficult. Finally, while electronic documents may be stored on a single drive, it is likely that such documents may also be found on high-capacity, undifferentiated backup tapes, or on network servers not under the custodianship of an individual who may have "created" the document.

Consequently, a litigation hold should include forensic measures to memorialize the creation, modification and integrity of electronic data.

David F. Axelrod, Axelrod LLC, and John A. Walker, Deloitte Financial Advisory Services

Diminution in Property Value After *Rakich*

By Scott E. Smith

The Problem

You find yourself driving along in your one-year-old dream car, just washed and waxed when some knucklehead blows a stop sign and sideswipes your precious. It costs $10,000.00 to fix your car all of which is begrudgingly paid by the insurer of the careless driver. You pry yourself from the mini subcompact rental car the insurance company provided in exchange for your repaired vehicle at the body shop. The measure of damages for the loss of use of a vehicle is the reasonable rental cost of a like kind vehicle for such reasonable period of time as is necessary to make the repairs. You know in your heart that which is substantially damaged can never be made new. Fortunately for you the law of Ohio recognizes you are entitled to be compensated for this loss.

The Solution

In *Rakich v. Anthem Blue Cross and Blue Shield*,[1] the Tenth District Court of Appeals, in a well reasoned unanimous Opinion, held personal property diminution in value caused by a third party's negligence is alive and well in Ohio.

In *Rakich*, the Court focused on the difference between fair market value (FMV) of a vehicle before an automobile collision and FMV after the vehicle is repaired. In brief, fair market value is the price a willing buyer would pay to a willing seller. In reversing the trial court's decision, the court held that when the owner proves the value of his automobile after repair is less than the pre-crash value of the vehicle, the owner is entitled to recover the "residual diminution in value" of the vehicle. However, the owner may not recover damages that exceed the FMV of the car immediately before the crash notwithstanding loss of use or out of pocket expenses.[2]

Diminished value recognizes accelerated depreciation sustained by an automobile in contrast to its natural depreciation. Natural depreciation is uniformly applicable to all vehicles characterized by change in models or body style, age, and normal wear and tear. Accordingly, natural depreciation applies to all vehicles subsequent to purchase. Accelerated depreciation is based upon facts or circumstances related to a particular event such as an automobile collision, theft, manufacturer recall, flood or fire damage. *Rakich* addresses accelerated depreciation of a vehicle caused by a third party.

Diminished value can also occur due to property and casualty insurance company repair standards arbitrarily applied and vary from company to company thus affecting the quality of vehicle repair. Insurance companies often instruct body shops to use after market parts, refuse to authorize certain repairs or place "caps" on materials used that negatively affects adequate repair. Therefore if a body shop follows insurance industry standards the integrity of a severely damaged vehicle after repair can not only lead to diminished value but also compromise vehicle safety.

Procedural History and Analysis
A Diminution in Value

On April 13, 2004 Plaintiff Rakich was driving her 2004 GMC Yukon when a young lady, insured by Nationwide Mutual Fire Company, failed to yield from a private drive, struck Rakich's Yukon and caused a "T-bone" collision. Rakich suffered bodily injury and incurred property damage to the vehicle. Suit was filed and upon Rakich's motion, the trial court found the young lady solely responsible for the collision.

The Rakich vehicle necessitated repairs totaling $8,049.00. Nationwide paid for the repairs but refused to pay for diminution in value. Rakich filed suit and alleged, among other things, property damage resulting from the diminished value of her vehicle. Nationwide's in-house counsel responded and claimed diminution in value is not a legal theory of recovery recognized in Ohio.

Subsequent to briefing, the trial court ruled the plaintiff was not entitled to present evidence of diminished property value because Rakich chose to have her car fixed and the repairs were paid for by the at fault party's insurance company. The trial court adopted a divergent damage analysis by carving out an alternative "election of remedies" option. Essentially, the trial court erred by holding that a person whose vehicle incurred damage caused by a negligent driver could either recover under a diminished value theory or a cost of repair theory, but not both. As such, the trial court ruled Rakich was prohibited from presenting evidence of diminished value to a judge or jury.

On appeal Rakich argued she was entitled to present evidence that her repaired vehicle had a lesser FMV than a substantially similar vehicle that had not been wrecked and repaired and was therefore entitled to present evidence of diminished value to the trier of fact.

The trial court misinterpreted *Hayes Freight Lines, Inc., v. Tarver*,[3] and *Allstate Ins. Co. v. Reep*[4] for the proposition diminished value of a wrecked vehicle is measured as the difference between the market value immediately before and immediately after the collision, or alternatively, measured by the cost to repair the vehicle. The Court of Appeals reversed and remanded and set sail on a thorough historical analysis of property damage recovery in Ohio.

In a tort action the measure of damages is that which will make the injured party whole, a maxim often lost for its simplicity. The Rakich court recognized diminution in value adhered to this principle in making an injured party whole citing to *Falter v. City of Toledo*, (1959) 169 Ohio St. 238, wherein the Supreme Court held, "[t]he owner of a damaged motor vehicle may recover the difference between its market value immediately before and immediately after the collision," *Rakich* at paragraph 9. Accordingly, the Court noted the FMV of a vehicle before a collision is not necessarily equal to the FMV of the same vehicle after repair.

The long established general rule for ascertaining damage to property was set forth in *Ohio Collieries Co. v. Cocke*, (1923), 107 Ohio St. 238, wherein the Ohio Supreme Court held:

If restoration can be made, the measure of damages is the reasonable cost of restoration, plus the reasonable value of the loss of the use of the property between the time of the injury and the restoration, unless such cost of restoration exceeds the difference in the market value of the property as a whole before and after the injury, in which case the difference in the market value before and after the injury becomes the measure.

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The rule was expressly adopted by the Tenth District Court of Appeals in the context of damaged motor vehicles in *Reep* at 91, wherein the Court held:

While the usual measure of damages in a case such as this would be the difference between the fair market value of the car before and after the accident, an alternative method — the cost of repair — is an acceptable measure of damages if the cost of repair does not exceed the amount of damages that would be arrived at using the primary measure of damages. In other words, the cost of repair must not exceed the diminution in market value. Nor may the cost of repair exceed the fair market value of the property before the accident.

This proposition of law requires a routine mathematical application. The critical part of the analysis overlooked by the trial court was the failure to recognize the pre-crash and post-crash FMV of a vehicle after repair is usually not equal and therefore becomes a question of fact to be resolved with the at fault party's insurance company or by the trier of fact.

This article presumes the vehicle warranty, if any, was not affected by the repairs and that proper workmanship and appropriate parts were used in repairing the vehicle. See R.C. 1345.81. B. Evidentiary Considerations

In *Reep*, the cost of repair was the only evidence offered, without objection. No evidence of diminution in value was offered. As a result, the court in *Reep* accepted as evidence the cost of repair in assessing whether the damaged party was made whole.

Thus, Ohio law has always required evidence of pre and post crash value to determine diminution in value, if not waived by both parties. Only after such a factual analysis is completed and evidence offered is it possible to determine whether the cost of repair will fully restore, exceed, or be less than the pre crash FMV.

The lynchpin of the *Rakich* holding is based upon the trial court's erroneous interpretation of *Reep*. The record in *Reep* only contained evidence regarding cost of repairs introduced, without objection, to the absence of evidence of pre-crash FMV and diminution in value. Noting this distinction, the Rakich court cited to *Auto-Owners Ins. Co. v. Santilli*, (Jan. 23, 1966), Franklin App. No. 95APG06-771, wherein the Tenth District affirmed the trial court's finding plaintiffs presented evidence of the cost of repair to the automobile but not of the vehicle's pre-crash FMV. As a result, *Santilli* recognized diminution in value but noted the record was devoid of evidence in support thereof.

The Rakich court also noted no Ohio case had held a plaintiff was limited to recovering the cost of repair to the exclusion of residual diminution in value when evidence is offered the repairs are insufficient to restore the vehicle to its pre-collision FMV. Accordingly, the Rakich court sought guidance from the Restatement of the Law, Second Torts (1979) 542, Section 928 that reads in pertinent part:

When one is entitled to a Judgment for harm to chattels is not amounting to a total destruction in value, the damages include compensation for (a) the difference between the value of the chattel before the harm and the value after the harm or, at its election or in an appropriate case, the reasonable cost of repair or restoration, with due allowance for any difference between the original value and the value after repairs.*** [.][5]

In *Rakich*, the court was careful to distinguish the plaintiff was not seeking compensation for loss of future potential resale of the vehicle. The diminution in value recovery is time specific measured by the FMW of the vehicle immediately before and after the collision.

The court also confirmed the plaintiff would not be entitled to recover both the cost of repair plus the difference between the pre-crash and post-crash value leading to double recovery. In other words, if one elects to have a damaged car repaired, the aggrieved party may not also recover the difference between the pre and post crash FMV unless the repaired vehicle's FMV is less than the pre-crash FMV.

From an evidentiary standpoint, the Rakich court found the market value of a vehicle immediately following its repair was no more speculative than the market value of a vehicle immediately before or after the collision. FMV is an automobile industry threshold by which all used vehicles are valued, bought and sold every day. Authoritative sources of a vehicle's FMV includes use of the National Automobile Dealer's Associate (NADA) Official Used Car Guide or like-kind industry standard, *Henry v. Serey*, (1989) 46 Ohio App. 3d 93.

Finally, the court headed off Nationwide's argument that recognition of a claim for residual diminution in value would promote increased litigation of property damage claims. Nationwide argued that if diminution in value was a recognized loss each party would be required to hire an expert to ascertain a vehicle's value. This argument was summarily dismissed as proof of a vehicle's FMV immediately before and after a collision has always been an evidentiary prerequisite in determining value. An expert may be helpful but is not needed for this purpose.[6]

In sum, all is not lost when your property is damaged and repaired and you are transformed into the less than proud owner of damaged goods. You are entitled to be made whole. This has always been the law of Ohio. *Rakich* did nothing more than clarify this theory of recovery.

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1. 171 Ohio App. 3d 523, 2007-Ohio-3739.
2. See *Hayes Freightlines, Inc. v. Turner* 148 O.S. 822 (1947); *Robbins* at 166-167.
3. 148 O.S. 822 (1947)
4. (1982), 7 Ohio App.3d 90
5. *Rakich* at paragraph 15 also citing to Annotation, Measure of Damages for Destruction of or Damage to Automobile Other than Commercial Vehicle (1947), 169 ALR 1100, 1112. The court acknowledged a majority of jurisdictions overwhelmingly permitted recovery of diminution in value beyond the cost of repairs
6. *Nearhouse v. Volkswagen of America, Inc.* (19887) 42 Ohio App. 3d 42; *Insley v. Mitchell* (1963) 118 Ohio App. 104; *Buck v. Auto Shop MD* 2003-Ohio-6959 citing *Starkinski v. Pace* (1987) 41 Ohio App. 3d 200, 202; *Henry v. Serey* (1989) 46 Ohio App. 3d 93 citing Evid. R. 807(17); *Hess v. Riedell-Hess* (Franklin) 2003-Ohio-3912 citing Evid. R. 901(A), (B)(1); *Combs v. Cincinnati Gas & Electric Co.* (1984) 16 Ohio App. 3d citing *Bishop v. East Ohio Gas Co.* 143 Ohio St. 541.

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Law School

A TIME TO DISCOURAGE, A TIME TO DISCLOSE

By Jason M. Dolin

More Students, more Applications.

Recent data from the Law School Admission Council shows that the number of students applying to law school for fall 2009 has increased 3.8 percent over last year and the number of law school applications filed by those applicants is up 6 percent.[1] That's good news for law schools. It's doubtful, however, that it's good news for the profession or for many of those applicants who decide to attend law school.

Given the dismal economy, substantial layoffs in the legal profession, and the very real prospect of significant firm downsizing in the future, the increase in applications defies logic. A recent survey by Kaplan Test Prep and Admissions of more than 1,000 pre-law students who sat for the February 2009 LSAT provides some disheartening answers.

In its survey Kaplan found that 40% of those taking the February LSAT were applying to law school, at least in part, to avoid looking for employment in the current economic environment. In addition, Kaplan found that 67% of the applicants listed the potential earning power of being a lawyer as affecting their decision to apply to law school.[2] Based on these survey results, a significant number of prospective law students see law school as a safe harbor during a rough economy. Others see it as a road to riches. Both may be disappointed.

If those applicants decide to attend law school they will learn, perhaps too late, law school is no safe harbor unless they define a "safe harbor" as foregoing three years of income while simultaneously accruing over $83,000 debt.[3] They will also learn that the practice of law is a predominantly middle class profession and that most lawyers do not get rich. They will learn that, according to the ABA, 48% of all private practitioners are in solo practice and that 70% of all private practitioners practice either solo or in groups of up to ten attorneys.[4] These are hardly the practice contexts in which one gets wealthy. Finally, they will learn, as have many dissatisfied and depressed lawyers before them, that for those who choose a legal career for reasons other than a true desire to serve the public, practicing law is often not a very satisfying way to make a living.

The Kaplan findings lend further support to what we, and the law schools, already know: that law school has become the graduate school of default for far too many bright college graduates who are uncertain about their career interests but can't stand the sight of blood. Once more, we see large numbers of "default applicants" deciding to attend law school without reconciling their true interests with the realities of law school and law practice.

Choosing law school is a huge personal and financial commitment. Like any other significant life decision – buying a house, getting married, starting a family – it should be an affirmative choice driven by a conscious and thoughtful decision process. In the case of choosing a legal career, it should be a conscious and thoughtful choice to serve the public. The Kaplan survey reaffirms that for far too many college graduates – particularly the default applicants – the decision to attend law school is not an affirmance but an avoidance; an avoidance of searching for employment in a difficult market, an avoidance of taking a self-inventory and making searching and sometimes difficult decisions about one's true personal and career interests.

Practicing law in any context, even by those who intrinsically love doing it, can be difficult and often frustrating. Our profession is flooded with attorneys,[5] too many of whom are dissatisfied, depressed, and unhappy.[6] But the lawyers I've known over the years who seem most satisfied in their work and in their lives are not those who practice to get wealthy, but those who practice to help their clients get healthy. Once they encounter the realities of law practice, the default applicants are prime candidates for a world of career dissatisfaction and financial struggle.

Reality for the current crop of LSAT applicants, and particularly for the default applicants, will hit a few years from now – too late to be helpful – after they've made the life-changing financial decision to attend law school. Somewhere in the third year if not before, most students suffer an OMG moment when they begin to truly understand that their employment prospects are limited, that they are about to enter an unwelcoming job market, that their Boston Legal-fueled earnings expectations were unrealistic, and that their high five figure debt payments are about to come due. As an adjunct law professor, teaching third and fourth year evening students, I've seen this too many times to recount. By then, it's too late.

Default applicants should be discouraged from attending law school.[7] The cost of a legal education is too high, the job prospects for most law graduates too limited, and the career/life satisfaction prospects for those entering law (or any career) for the wrong reasons too low to encourage those who are not primarily motivated by service to the public to enter into such a significant life choice. Both the organized bar and the law schools have a role to play and should be active in discouraging the marginally committed, and particularly the default applicants, from attending law school. We practitioners have, too often, seen the end result. We don't need more disappointed, unhappy, underemployed attorneys.

Moreover, we are looking at a coming train wreck in legal employment. The Class of 2008 suffered significant layoffs. The evidence indicates that the placement rate for the just-graduated Class of 2009 is nothing short of dire, and predictions for placement of the Class of 2010 are no better. Landing a good legal job has never been easy, even in the best of economies. But even if we assume that legal hiring picks up in 2010, when many predict

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the recession will end, the classes that graduate in 2011 and 2012 will be competing for jobs not only against their own classmates but against the underemployed or still unemployed members of the classes of 2008 through 2010. It is hard to conceive of even the most robust recovery from the recession being able to absorb and fully employ all of the unemployed and underemployed attorneys that will then be on the market.

This is not to discourage those who are truly committed to serving the public through law. If, in the face of this, there are committed students who are willing to endure the financial and other hardships they will encounter in entering this field, we welcome them to the profession with open arms. The profession needs more dedicated and enthusiastic young attorneys.

But to those whose primary motivation in applying to law school is to find a place to hide during the recession or to get wealthy: choose another career. There are easier ways to get rich and you won't incur the crushing debt load for a career choice that you may find less than satisfying. Finally, to those aren't sure about attending law school: wait. Work for a few years and gain experience in law related or other work. If law is still your interest, reapply. The law schools will still be there and with enhanced employment experience you'll be a more attractive candidate for admission.

A Time to Disclose

Unfortunately, many students entering law school – bright as they are - are not sophisticated purchasers of a legal education. Many of the law students I encounter are the first in their families to attend law school, having had little knowledgeable guidance about the realities of legal practice at the time they applied, their most probable employment prospects, or their coming debt obligations. Many base their decision on incomplete information or carefully designed law school marketing materials. Even if applicants have doubts about their choice or are not keen on practicing law, they often assuage these concerns by buying into the law-school propagated view that a Juris Doctor is a flexible multipurpose degree that can be used in other careers.[8] How many times have we heard the hackneyed notion that going to law school "keeps your options open."[9]

By being the graduate school of default, law schools have benefited handsomely from the substantial tuition dollars paid by default applicants. The law schools have no financial incentive, and have shown no inclination, to discourage applicants. As a result, they have done little at the front end of the application process to counsel applicants to seriously explore other career options, to delay their law school decision, or to take a hard look at their most likely financial prospects once they graduate from law school.

The payment of law school tuition is one of the largest financial investments that any of us will ever make and at the time of application it may be the largest investment that prospective law students have ever made. Whatever may be said of the merits of a legal education one thing is beyond debate: for most law students it will take years of significant personal and financial sacrifice to pay off their law school loans.

As attorneys we spend a good deal of time trying to find the most cost effective solutions to our client's problems, even if pursuing other avenues would be more financially remunerative to us. At a minimum, we owe our clients the best information available about the probable cost of the engagement and the most probable range of results. The client comes first. It is part of our fiduciary responsibility. Law schools owe no less to their prospective students.

In this regard, law schools should be required to inform their applicants, prior to their decision, about their most probable post graduation employment prospects and debt obligations. Such disclosure not only comports with the values of transparency and full disclosure taught and touted in our law schools, but with the pro-consumer disclosures required of other industries that sell costly goods and services (ie: automobiles). In addition, the five Ohio public law schools have a particular disclosure obligation. Not only are they funded with public dollars, but the financial records they maintain are public records and would be required to be disclosed pursuant to a public records request under Ohio's Public Records Law (RC 149.43).

Accordingly, I urge all Ohio law schools to post on their websites, in a conspicuous, well marked, and easy to find location, uniform data (discussed below) about law student debt and post-graduation employment. If such data can't be located on the law school's actual home page, it should be on their "admissions" or "prospective students" home pages. This is the information applicants want, need, and are entitled to see in order to make an informed choice. Using this format, it would be no more than one click away from the law school's home page. You can be certain such locations will be among the most visited sites by prospective students visiting the law school's website.

I have reviewed a number of the websites of Ohio law schools and while some have provided valuable data (ie: Akron and Ohio State provide the best break down of post-graduation employment) others have provided very little. Significantly, however, most of the schools did not post median debt loads (Cleveland State was the exception). In general, there is no uniformity of format in the information provided (which would be helpful to prospective students seeking to compare this data across schools) and the quality and quantity of information varied significantly from site to site.

In this regard, I would recommend that the following information be set forth on each law school's website on a single webpage for at least the three immediately preceding graduating classes.

DEBT

- Average law school debt upon graduation

EMPLOYMENT AND SALARY

- Percentage of graduating and actual number of graduating students employed at time of graduation
- Percentage of graduating class and actual number employed 9 months after graduation
- Average starting salary of all graduates
- Median starting salary of all graduates
- Percentage of graduating class and actual number employed (at graduation and nine months out) in the following categories: private practice, government, judicial clerkship, business and industry, public interest, academic, other
- Average starting salary by category of employment
- Median starting salary by category of employment
- Actual number and percentage of graduates working in the following categories and median salary in each: solo, firms of 2-10; 11-25; 26-50; 51-100; 101-250; 251-500; 501 and up

Most, if not all, of this data is already being collected by law schools and reported annually to the National Association of Law Placement (NALP), so posting it on their websites would impose little burden or cost.

A Time for the Whole Truth

It is not by accident that since time immemorial the law has required witnesses under oath to tell the truth, the whole truth. As lawyers, and as a society, we value the whole truth, not the half truth.

The whole truth about law school and a legal education involves both sides of the post-graduation ledger: debt and income. Those contemplating attendance at law school are entitled to up front, clear, conspicuous, and complete disclosure of their most likely debt and employment prospects upon graduation. This disclosure comports with our societal values of openness and transparency and will better inform those who are committed to the idea of a legal career. Simultaneously, it will perhaps deter the default applicant who is not committed to a legal career but is looking for a place to hide.

Our profession needs enthusiastic practitioners who are happy and healthy in what they do. That's good for the practitioners and it's good for their clients. This disclosure requirement will go a long way towards helping prospective law students make a more informed, intelligent choice, for what may be one of the major decisions of their life. In that regard, it may well play a significant part in helping to reduce the too many recent law graduates who are unhappy, depressed, and dissatisfied with their career choice.

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1. See ABA Journal at http://www.abajournal.com/news/number_of_students_applying_to_law_school_jumps_3.8_per cent, last visited on May 6, 2009.

2. See ABA Journal at http://www.abajournal.com/news/40_of_law_school_applicants_riding_out_recession, last visited on May 6, 2009.

3. See, amongst others, the July 2008 article by Professors Andrew P. Morriss and William Henderson, The New Math of Legal Education, at http://www.abanet.org/yld/tyl/july08/morriss.html, and http://www.abanet.org/poladv/priorities/student_loan/prosdefrepay07.pdf.

4. See the most recent ABA Lawyer Demographics for the year 2000 at http://www.abanet.org/marketresearch/Lawyer_Demographics_2008.pdf.

5. According to the American Bar Foundation, in 1951 there was 1 lawyer for every 695 Americans. In 2000 there was one lawyer for every 264 Americans. See Clara N. Carson & Barbara A. Curran, Growth and Gender Diversit: A Statistical Profile of the Legal Profession in 2000, RESEARCH L., WINTER 2005 at 1. At that rate of growth, in the year 2050 there will be 1 lawyer for every 100 Americans.

6. The studies and anecdotal evidence on this point are legion, too numerous to list here. But see, for example, Patrick J. Schiltz, On Being a Happy, Healthy, and Ethical Member of an Unhapp, Unhealthy, and Unethical Profession, 52 VAND. L. REV. 871 (1999).

7. If not discouraged, at a minimum law schools should counsel these students to delay their decision to enter law school to give them more time and life experience to draw upon in making their career choices.

8. That may or may not be true, but the question is: At what cost? Is a multipurpose degree really worth foregoing three years of income coupled with $83,000 in debt? Moreover, if the purpose of attending law school is to obtain a multipurpose degree, rather than to learn how to be a lawyer, there are cheaper alternatives. An MBA is a multipurpose degree as is a masters in public administration. Both can help a college graduate succeed in a broad range of business, government, and other careers as can undergraduate or masters degrees in engineering, chemistry, mathematics, computer science, to name a few. If a multipurpose degree is the goal, it's overpriced at law school. These other multipurpose degrees have the added benefit of usually requiring only one or two years of graduate school – making them less expensive than a law degree - and being in fields where there might be greater employment opportunities.

9. In fact, the exact opposite may be true. By incurring high five figure debt in a difficult employment market, these debt burdened students may be limiting their career options to only those jobs or careers that can service that debt. The ABA has raised significant concern that as a result of large law student debt, many law students do not even consider legal careers in government, nonprofit, or other less remunerative areas. See Lifting the Burden: Law Student Debt as a Barrier to Public Service – The Final Report of the ABA Commission on Loan Repayment and Forgiveness, American Bar Association, 2003.

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Law schools should be required to inform their applicants, prior to their decision, about their most probable post graduation employment prospects and debt obligations.

GENERATIONAL DIVERSITY

OR

What do you do when your new employee thinks bar codes have always been on everything?

By Marty Eisenbarth

Each fall Beloit College publishes a list of things that college freshmen don't know. This year we were informed that college freshmen have always known that Google is a verb, bar codes are on everything, and that Madden is a video game, not a NFL coach. As an AARP-eligible worker, these lists always amaze me, and I look at young people in my workplace and think about how different they are from me.

Diversity efforts in law firms have focused for many years on inclusion for minorities and women. However, our diverse work force also includes people of many ages and it is helpful to understand the generational impact of their backgrounds when analyzing work product and style, training efforts and motivation.

As background, there have been many studies and articles published establishing broad generalizations defining the age groups in our work force today. The commonly accepted strata are defined as:

World War II Generation – born between 1920 and 1940
Baby Boomers – born between 1940 and 1960
Generation X – born between 1960 and 1980
Millennials – born between 1980 and 2000

The stereotypical characteristics of these groups are reflective of the circumstances of their upbringing.

The World War II Generation was broadly shaped by world events – the Great Depression and World War II. They are serious-minded and dedicated – to their jobs, to their children, to their beliefs. These are the people who came into the work force expecting to spend 30 years with the same company, to be treated with respect and ushered out at the end of their career with a gold watch and handsome, life-long pension. Many have been shocked as their corporate culture changed to emphasize the bottom line, resulting in many of them being "downsized" at what they felt should have been the peak of their careers. Instead of reaping the rewards from years of paying their dues and playing by the rules, many found themselves unemployed and forgotten in their 50s and 60s. This generation comprises a small portion of the work force, but the ones that are left frequently are in positions of power and decision making. They generally are perceived as less tech savvy than younger people and intransigent to change.

The Baby Boomers have been the most studied, most analyzed, most marketed to generation ever. They comprise the greatest portion of the workforce – as much as 45%— and they are the leaders of many organizations. They grew up in a period of social upheaval – from the Cuban missile crisis through the civil rights movements, through man landing on the moon, through the Viet Nam War and the social unrest of that era. This is a generation of great change – the family and the work force changed dramatically with the entry of the working mom into the work force. The changes these workers experienced as youths continued through their working careers with the technological advances that began in the 70s as the Boomers were entering the workplace and have accelerated through the present. Some of the Boomers have become tech savvy and have adapted to the changes; others have resisted and try to cling to the old ways. This is the "Me Generation" and many are focused on material possessions as an indicator of success, often sacrificing family life and leisure time to achieve their defined success.

The Generation X'ers entered the work force having seen their parents' frustration with the changing corporate culture. Many watched their parents deal with downsizing – seeing their parents unemployed or watching them deal with the additional demands resulting from the corporate culture of "Do more with less." They feel very little loyalty to an employer, expecting to move up the ladder quickly, expecting opportunities for growth and advancement, and further expect inclusion and teamwork. Many grew up as latch-key children and are independent and tech savvy. They demand a work-life balance and, as they are moving into positions of authority, are more likely to value diversity of experiences and life-styles than the drudgery of long hours as a definition of success.

Millenials are the newest entrants to the workplace. They are finishing their schooling and embarking on their careers – bringing with them the lessons of their youth. Remember, this is the group that has always known that Google is a verb and they are extremely technology oriented. They bring the plugged in concept with them and expect the best of technology, the newest tools and can use them effectively. Even more than the Generation X'ers, they value leisure and fun and want to, not just make sure there is time for both, but want to incorporate them into the work place. To them change is a given – they embrace it and want to push the envelope on their experiences and opportunities. They have grown up with the family focused on them, they are likely to maintain virtually constant contact with friends and family and have grown up in a cocoon of self-esteem boosting, positive reinforcement.

What does this all mean in the workplace? Each of these generations brings different expectations and styles with them. A Boomer working with a Millenial may want to throw his or her hands up in the air when the Millenial looks the Boomer in the eye and says "Sorry, I can't take on that project. I have plans for this evening." The Boomer's experience has been that the junior person uncomplainingly accepts any assignment in an effort to prove himself and take that next step toward partnership. The Millenial will factor the cost of giving up leisure/family time, decide they can't justify staying late to complete the project, and expect the decision not to impact their value in the organization. The Gen X'er supervisor may be more understanding of the Millenial's choice. But each will process the situation through the bias of their generation.

Many trainers, supervisors and mentors lead by analogy, falling back on experiences they are comfortable with to demonstrate to the trainee the value of a particular course of action. If the employee/trainee has no relationship to or understanding of a particular analogy, the trainable moment can be lost. Senior lawyers and supervisors need to be aware of the differences engendered by diverse life experiences. By the same token, Generation Xers and Millenials are well-served by understanding the biases and culture of the older people they work with, particularly if they are supervising someone senior to them. Boomers and Millenials tend to need more assurances that they are succeeding. Gen Xers, focused on family or other non-work demands, are more likely to walk away from a job if it does not meet their needs.

As with any stereotypical descriptor, these are broad generalizations. While they may be based on solid research, the most successful enterprises are ones where the employee is valued and considered as an individual. Any individual from any generation may have values at odds with the common characteristics of the group. In particular, someone who has emigrated from another country may have very different beliefs from someone who grew up in Columbus. And that Columbus native may have an upbringing that included life experiences far different from a person who was raised in a rural setting. One-on-one interactions are the best way to learn what a person needs to succeed – the best tools, the best training, the best motivation.

Those of us tenured in the workforce should realize that the new graduate coming to work in the office or cubicle next to you has grown up in a world very different from you – where the Soviet Union has never existed and therefore is about as scary as the student union and where the United States has only had three presidents. Likewise, the new graduate would do well to learn what motivates the more experienced co-workers. And, ideally, both will learn from each other, and recognize that each employee, partner, supervisor and client is a person whose values have been shaped, not only by the generational experiences, but by their individual life experiences. To paraphrase a credit card commercial – Learning about stereotypical behavior has value in a diverse workplace. Getting to know individuals and learning how to lead them to a successful career – priceless.

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ON BECOMING A PROFESSIONAL PHOENIX

By James N. Turner

It comes as no surprise that in a time of economic stress employers must cut costs to protect their solvency. Personnel costs in service industries like the legal profession can be particularly vulnerable to that reality. Involuntary separation is a real risk. How then, might a person gracefully overcome such adversity? Here are some brief observations on which to reflect.

First: put your finances in order. If you haven't already, start saving. Do not plan to depend on Unemployment Compensation. The benefits do not go far or last long. Adjust your financial plans to provide greater short-term liquidity that can be reached without incurring withdrawal penalties. If your employer allows the accumulation of leave balances that can be redeemed for cash, or if they have a deferred compensation program, give serious thought to deferring some income and definitely allow your unused leave balances to accrue, even if the pay-out will be discounted. On separation, those balances are usually paid in lump sums that can be critical to your ability to pay primary obligations like the mortgage. Spread utility or other seasonal costs out by using a monthly budget plan. If your spouse or partner is employed, check with the benefits administrator where they work to learn whether you are covered under their plan if you lose coverage under your own. Check with your employer to find out about their COBRA policy. The point is to arm your self with information before dismissal at a time when you can review the facts dispassionately and make decisions unhurried by a sense of financial panic.

Second: if lay-offs are announced and negotiating a more generous separation is not an option be sure to make a graceful exit by facilitating rather than bitterly subverting the transition. This should yield a good or at least a neutral reference from your former employer later when they are contacted by prospective employers who are making due diligence contacts with your former supervisors or human resources staff. It may even yield referrals to potential new employers, especially if your separation is due to economic conditions and is not performance based. It may be cliché, but build bridges as you depart, don't burn them. If faced with dismissal you must present and maintain a positive attitude for future networking contacts and job interviews.

Third: when laid off, take time for yourself, your family, and your friends to absorb what has happened. Allow them to rally around you and to be your resilient bastion of personal support and shared sacrifice. This is the time to think about how to turn a short-term disaster into a long-term opportunity for personal and professional redefinition and growth. Update your résumé to get reacquainted with your accomplishments, not just the periods of time you spent in various places. Since employers seek people whose career qualifications enable them to solve particular issues, be able to discuss what you have done in the context of what the prospective employer needs. To do that, you must research every employer with whom you might interview in order to learn what their issues are, concisely present your qualifications in that context, and ask intelligent questions. Consider the things that you have enjoyed the most – and the least – about your career, your strengths and weaknesses, your "dream job," where you want to live, and how to maximize your talents while minimizing your shortcomings. Once you finish that introspection, discuss it with those who know you best. Then make a strategic plan with realistic goals and objectives. Clear your vision with fresh perspective by taking some time off away from familiar surroundings before you embark on your search for a new position.

Fourth: avoid a self-pitying attitude, be patient, and keep your sense of humor. Be positive about opportunities and confident in your skills, talents, and strategic plan. This can be the tough part. Some degree of depression is unavoidable following the loss of a job to conditions beyond our control. This can be particularly true in a culture like ours in which many define themselves in terms of what they do. Loss of a job can become a loss of identity. Once your strategic plan has been made, shared with your spouse or partner and vetted with friends and mentors, then an excellent way to defeat the ennui bred by depression is to act on the plan, no matter how small each action step might be. A sense of growing accomplishment in implementing the plan will translate to greater confidence – an attitude that potential employers will find attractive.

Staying in positive relationships and making new ones is not only good for the image you have of yourself and project to others, it is critical to finding your next position. Tell your family and friends what happened and ask them for leads and help. They will provide you with loyal and objective advice and feedback. When you are networking don't be reluctant to talk about your situation – just be sure to do so with a positive approach that looks forward rather than back. Staying at home can be distracting and depressing. Seek an arrangement by which you can get out of the house on a regular basis to work on your search. Perhaps a friend has extra space at an office where you could use your laptop computer and cell phone to make and pursue contacts. By being in an environment outside the home you are less prone to being drawn away from your goals by minutiae, you can be more focused on advancing your strategic plan, and you will be in a social context that expands your network and helps buoy your spirits.

Finally: while internet access has revolutionized the process of looking for a new job, the consensus is that personal networking still yields the best job search results. Update your résumé to make it consistent with your strategic plan and focus it on the industry or practice niche that you have identified as your goal. Get involved with civic or other groups that operate within that target. Networking in those groups will be astonishingly easy since common interests have brought everyone there together in the first place. Use the internet to identify groups, associations and employers in your target. Bar Associations and other organizations, for example, have on-line search engines that you can customize to provide email notice of opportunities that are focused on the practice fields in which you are interested or the places you would like to live, or both. Using the vast resources of the internet without strategic direction will likely lead to intimidated inactivity – otherwise there is just too much information available on-line.

These thoughts and observations are based on my own experience following the involuntary loss of a position held for over 12 years. Did I follow my own advice all the time? No. I had to learn from some mistakes … but I did survive them and the ordeal with a stronger marriage and family, a greater appreciation for true friends, and a wonderful new position with a firm I have known and admired for years.

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METADATA MANIA

By Dianna M. Anelli

So what is new in the area of metadata? Can one peek into an electronic document's metadata to discover hidden treasures? Or is such voyeurism strictly forbidden? Well, the answer to that question may depend upon the jurisdiction in which the issue arises.

In 2006, the ABA released ABA Formal Ethics Op. 06-442. Generally, the ABA Standing Committee On Ethics and Professional Responsibility stated that the Model Rules of Professional Conduct permit an attorney to review and use metadata contained in email and other electronically produced documents. Since that time 10 states have written opinions on the matter, some permitting its use and others not.

For example, in September 2006, Florida rendered its ethics opinion that an attorney has a duty to take reasonable steps to eradicate metadata from a document prior to sending. On the other hand, a receiver of such a document has a duty not to try to mine the metadata. If the receiving attorney inadvertently discovers metadata, he or she has a duty to notify the sending attorney. This opinion did not discuss e-discovery, something now permitted under both the Federal Rules of Civil Procedure and the Ohio Rules of Civil Procedure.

Later that same year, Maryland released its ethics opinion stating that lawyers may review and use metadata in electronically produced documents in discovery. The sending attorney, according to the Maine opinion has a duty to remove all information subject to attorney-client confidentiality and work product. This opinion does address metadata within the scope of discovery.

The states that do not allow the mining of metadata in email and other electronically produced documents are Alabama (Op. 2007-02); Arizona (Op. 07-03); District of Columbia (Op. 341); Florida (Op. 06-2); Maine (Op. 196) and New York State/New York County Lawyer's Assn. (Op. 738) and New Hampshire (2008-2009/4).

These states reject the ABA's opinion on the basis that such documentation may contain attorney-client and/or work product information. These opinions do not address documentation that must be provided within the course of discovery, where redaction or destruction of metadata may lead to sanctions or other penalties.

Taking the opposite view and following the ABA position are Colorado (Op. 119); Maryland (Op. 2007-09); and Pennsylvania (Op. 2009-100).

These states place the initial burden of eradicating the metadata upon the sending attorney. Unless the information is inadvertently sent, mining this information is permitted. If it is clear that the metadata contains attorney-client or work product information, however, the attorney has a duty to inform the sender of the receipt of this information.

Indeed, all opinions, whether they adopt the ABA position or reject it, make clear that it is the sending attorney's duty reasonably to ensure that metadata in emails and other electronically sent documentation is eradicated prior to sending. It is what occurs after that reasonable precaution is taken and information nevertheless is transmitted that creates the division. Further departure occurs in the allowance of the affirmative step of actually mining or seeking metadata once an electronic document is received.

Ohio has yet to declare whether it will follow the ABA position on this issue or depart from it as seven other states now appear to have done. The last pronouncement of the Board of Commissioners on Grievances and Discipline regarding inadvertently discovered information is contained in Board Op. 93-011. This opinion permits Ohio attorneys to both read and disclose to his or her client confidential information inadvertently obtained through a public records search. The lawyer has a duty, however, to notify opposing counsel.

Ohio has yet to declare its position on the mining of metadata. As the Board Op. 93-011, Ohio's Rule 4.4(b) indicates only that where an attorney discovers that documentation (including email and other electronically sent items) was inadvertently sent, the lawyer has a duty to notify the sender. The comparison notes indicate that Ohio's Rule 4.4(b) is identical to Model Rule 4.4(b). Model Rule 4.4(b) was used as the basis for the ABA's opinion that metadata can be mined.

So, what happens if the sender is in Arizona, which does not permit the mining of metadata, while the recipient is in Colorado, which does allow such conduct? Is the recipient permitted to mine the metadata because his or her jurisdiction permits it?

Such questions will, no doubt, be the next round to be addressed in the ever changing landscape of attorney practice. Likely the answer to such questions will involve issues such as whether the transmission occurred in the course of litigation, the forum state in which the legal matter occurred, which state has subject matter jurisdiction of the matter and things of that nature. Even that, however, may not rule the day.

Since an attorney practicing in another jurisdiction, whether *pro hac vice*, or temporarily via another rule, is subject both to that jurisdiction's disciplinary rules as well as the disciplinary rules of the state of licensure, it will be imperative to discover the rules of both jurisdictions. The best rule of thumb then is to err on the side of caution and use the most restrictive rule.

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A Brief History of Franklin County's Courthouses

By Robert C. Van Schoyck

The new Franklin County courthouse being built on South High Street promises to be a groundbreaking piece of civic architecture, thanks in particular to its unique design and environmentally-friendly features. As construction progresses on the building, it presents an opportunity to look back on the other facilities that have hosted Franklin County's court system over the past 200-plus years. Several buildings have served in this role, from humble beginnings, to today accommodating more than one million county residents.

With no courthouse to speak of at the time of the county's 1803 founding, court was initially held in rented rooms of private homes in Franklinton, the first county seat. Founded in 1797, Franklinton was then a rough-hewn frontier settlement just west of the Scioto River, opposite present day downtown Columbus. In these early years, court sessions were major events that drew many spectators, and, with only streams and crude roads to travel by, attendance involved a major trek for those in the jurisdiction's farther reaches.

In 1807, the common pleas court contracted with Lucas Sullivant, the founder of Franklinton, to build the county's first courthouse for the sum of $6,000. Completed in 1808, the brick, square-shaped building contained a large central hall on each of its two stories and was topped by an octagonal cupola. It was located near the present day intersection of Broad Street and State Route 315.

The fate of Franklinton and its courthouse, however, suffered a blow in 1812 when the state legislature provided for the establishment of Columbus just across the Scioto River as the new seat of state government. Growth in the area quickly centered on Columbus, enough so by 1824 the county government moved there from Franklinton. The old Franklinton courthouse served for some years afterward as a school, but was razed in the 1870s to make way for a new elementary school.

The move to Columbus led the county courts to a new, albeit shared, home in the United States Courthouse, a two-story brick structure on Capitol Square facing High Street. Erected in 1820, it accommodated the relocation of Ohio's federal district court from Chillicothe to Columbus in 1821, and with recessed entryway, green dome, and stepped-gable roof, it was a distinctive feature of the young city. However, between the federal court and county government, conditions in the building were less than commodious. Additional space was created for county offices around 1828 by adding a long, one-story brick wing to the rear of the building. But, as the population of Columbus continued to grow, the need for a dedicated county courthouse became manifest.

In 1837 the county began construction on a $40,000 courthouse all its own at the southeast corner of High and Mound Streets. When it opened in 1840, the new building welcomed the courts and other county offices previously located in the U.S. Courthouse. For its part, the U.S. Courthouse continued to host the federal court until 1855, when Ohio was split into two federal court districts based in Cincinnati and Cleveland. In 1857, it was razed during the grading of Capitol Square.

The 1840 courthouse exemplified the Greek Revival style that was popular at the time, with a brick, two-story main section featuring a columned facade and a dome, and one-story wings extending to the north and south. A lawn buffered the structure from the bordering streets. It took little time, however, for the county government to outgrow this courthouse. A large annex built in the Italianate style was added to the south in 1853. By the 1870s, the push was on for a new, larger courthouse. A fire that swept through part of the building in 1879 and destroyed many documents in the recorder's office strengthened public support for a new facility. Authorities believed the fire to have been deliberately set, but in spite of a $2,000 reward offered by the county for information regarding the blaze, arson was never proven.

The 1870s and 1880s were something of a golden age for courthouse construction in Ohio, when more than a third of Ohio's counties erected such structures, usually in grandiose fashion. Driven in large part by civic pride and a developing economy, the phenomenon also owed to an 1869 legislative act that permitted counties to raise funds for courthouse construction through the issuance of bonds.

In 1884, Franklin County voters approved such a bond issue to the tune of $500,000, authorizing the replacement of the 1840 courthouse with a new structure to be built on the same site. Demolition began shortly thereafter, forcing the courts and other county offices to temporarily rent space in nearby buildings on High Street.

The cornerstone of the new building was laid during a ceremony on July 4, 1885, attracting a large crowd undeterred by rain showers. Over the next two years, an ornate Second Empire style courthouse built largely of sandstone took shape under the guidance of Columbus architect George H. Maetzel, who also designed courthouses in Allen, Madison, and Shelby Counties. On July 13, 1887, the new courthouse – significantly larger and more elaborate than its predecessor – was dedicated before droves of county residents with pomp and circumstance that culminated in an evening fireworks display and dance. Majestic as the building appeared from the outside, it was no less impressive within, given its adornment in walnut woodwork, gilding, marble, and ironwork.

Generations of local attorneys plied their trade in the 1887 courthouse that enjoyed a longer run than any other in the county's history and is regarded as one of the finest ever built in Ohio. Unfortunately, the luster faded over time. The appearance of the building was particularly diminished in the early 1950s by the removal of its clock tower and statue of Lady Justice due to crumbling pieces falling onto the sidewalk below. Around the same time, an annex was built to the south in a contrasting architectural style, and it remains today at 410 South High Street.

This building (352 South High Street) was built in 1840 and razed in 1884. (Courtesy of the Columbus Metropolitan Libraries.)

Photo taken shortly after completion of the edifice, 1896. (Courtesy of the Columbus Metropolitan Libraries.)

From earthcam, June 2009, http://www.fccourts.org/gen/WebFront.nsf//wp/Home?open

Plans for a replacement courthouse were well afoot by the 1960s, although funding issues delayed the process for some time. County commissioners eventually settled upon building the contemporary Hall of Justice at 369 South High Street, directly across the street from the 1887 courthouse. Designed by the Columbus firm (Prindle & Patrick) in a modern style typical of the era, the Hall of Justice cost around $9 million to build and was formally dedicated on September 8, 1974.

The arrival of the Hall of Justice brought the history of the 1887 courthouse to a rapid close. Once the last of the old building's occupants moved out, the county held a public auction to dispose of the remaining fixtures, although thieves had already taken much. After a group of preservationists waged an unsuccessful legal campaign to save the building, it met with the wrecking ball in October 1974, and the park now known as Dorrian Commons took its place. No county courthouse in Ohio has been torn down since.

Today, the Hall of Justice is but one part of a sprawling courthouse complex that includes the Municipal Court building at 375 South High Street and the Courthouse Building at 373 South High Street, which were completed in 1979 and 1991, respectively. It is reported that after the common pleas court moves into the new courthouse, the Hall of Justice will be renovated for use by other county offices.

The new courthouse, with its modern design and largely glass exterior, will differ from its predecessors in many respects, not least of which is aesthetics. In form and function, though, the county's courthouses have reflected well both the local community and prevailing notions of civic architecture in their respective eras. And, from the pioneer courthouse in Franklinton to today's new state-of-the-art structure, each building has served as an important landmark, both physically and symbolically, on the local landscape.

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"Sites and Scenes from your *Neighborhood Bar"*

Columbus Bar Foundation Gala

Green Initiative

Pro Bono Breakfast

Luper Neidenthal & Logan — Earth Day

Martin Luther King, Jr., Luncheon

Women Lawyers of Franklin County Annual Meeting

Courtroom Production

Closing Day Bikers

Dinsmore & Shohl at the Race for the Cure

Earth Day

Rock 'n' Bowl

Rock 'n' Bowl

New Lawyers Lunch with Judges

New Lawyers' Blue Jackets Night

Minority Clerkship Program

CBF & Bar volunteers at YWCA Family Canter for Homeless

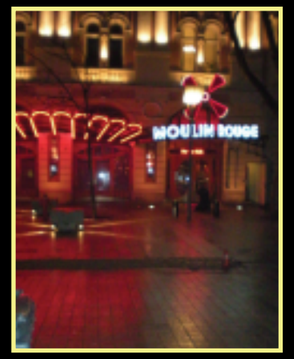
Birthplace of Coffee Houses and Goulash . . . *Heaven or Budapest?*

By A. Alysha Clous

Orsolya, graduate of the Peter Pazmany[1] Catholic University Law School

House of Parliament

Inside the House of Parliament



The answer is Budapest. American coffee houses are now filled with blurry eyed office workers and internet addicted laptop users but in the mid 1800's, Budapest coffee houses were hotbeds of artistic, revolutionary and literary minds. And, as for goulash, Mrs. Hammar's homemade goulash is incomparable, but, more on that later.

As some of you may know, Orsolya Hammar Hilt, our longtime assistant in the Columbus Bar's ethics department, is a native of Hungary. Sadly (for us) she went home for an extended visit last summer.

In a perfect storm of reasonable airfare, cooperative significant others and lenient bosses, Esther Kash (publications editor) and I flew off to Budapest in January to impose on Orsolya's hospitality. We were met at the airport by Orsolya and an ice storm. Luggage, ancient cobblestones and ice are not the best combination, but we managed to stay on our feet and, after checking into our hotel, duly set out to explore the city. With Orsolya at the helm, and an extensive public transportation system at our feet, this was easily accomplished.

THE LAY OF THE LAND

Budapest straddles the Danube River and was not unified into a single city until 1873. Now connected by a number of beautiful (and a few not-so-beautiful) bridges, Buda grew on the western side of the river and Pest on the east. Buda hosts the Castle district where Hungarian kings maintained their residence for 700 years, a hilly landscape and beautiful residential areas. Pest was built on a flat plain and contains the commercial and governmental districts, opera house, Turkish baths and much, much more.

Western Railway Station designed by Gustave Eiffel

CASTLES AND PARLIAMENT

Stepping out of the Kossuth metro station we were presented with the panoramic which is the Hungarian Parliament building. It is the largest Parliament building in Europe and occupies a long stretch of river front property. The building houses the crown jewels of St. Stephen. The crown is believed to have been presented to Stephen, the first King of Hungary, by Pope Sylvester II in the year 1000. The crown boasts a cross on top with a wacky tilt and a great twentieth century tale. As Soviets advanced into Hungary after World War II, fleeing fascists removed the crown from the country. It was housed at Ft. Knox in Kentucky until President Carter returned the crown to Hungary in 1978. (No one will set blame or time for the cross being bent.)

We spent a cold and foggy day in the Castle District on the Buda side of the river. The 700-year-old Matthias church is undergoing extensive exterior renovations, but we found the interior to be an ancient and still very active church. Orsolya assures us there are stunning views of the Danube and across the river to the Pest side, but we will just have to trust her on that since the fog was as thick as pea soup.

COURT SYSTEM

One of the highlights of our visit was the opportunity to observe a case being handled by Brigitta Matyas, Orsolya's law partner (when Orsolya is in Hungary, she's a lawyer too). Brigitta is a plaintiff's personal injury lawyer with a focus on medical malpractice. One of their cases was set for an appellate hearing. In this case, a severely diabetic client had been informed by her physician after her first child that any additional pregnancies could result in vision loss. Almost immediately after having her "tubes tied," she became pregnant and suffered a loss of vision. The trial court found for the doctor and Brigitta appealed the case.

Three judges heard the appeal, but, otherwise, the process was quite different from our appellate system. Two doctors appointed by the Court testified under the direct examination of the appellate panel chair. The attorneys were allowed to question the physicians only after the chair completed her examination. At the end of testimony, the chair dictated a summary of the testimony to a court typist. The testimony was not recorded or transcribed. The attorneys were allowed to request additions or corrections to the summary. At the end of the hearing, the matter was continued because the judges requested additional medical information from the plaintiff.

You wouldn't think it would be exciting to listen to a hearing when the only words you know in the language are "thank you" and "bottoms up," but, it was very interesting to observe the actions and interactions of the parties. Although the hearing was not a trial *de novo*, the judges were, obviously, much more involved in the questioning and testimony then any of our judges would be, especially an appellate judge.

COFFEE AND CAKES

Esther and I experimented with a coffee-and-cake only diet while we were in Budapest. Although maybe not the best long term dietary plan, it was enjoyable while it lasted. I can only speculate that there is a small army of pastry chefs in Budapest, working through the night to provide the city with the inexhaustible variety of cakes. We had a waiter at all of the coffee houses we visited (none of this going up to the counter and running out the door) and I did not see a single to-go cup or travel mug during our visit. The only remotely similar experience I've had in Columbus was once at Pistacio Vera's when Anne (the extremely nice the co-owner) brought a piece of cake to my table because my two-year-old daughter was having a meltdown (which the cake instantly resolved). Imagine that . . . only better . . . at every corner . . . of every street.

MRS. HAMMAR'S GOULASH

We were lucky enough to have Orsolya's mother make us goulash one day during our visit. I do not have the recipe (hint-hint, Orsolya) but it was wonderful and a little surprising. It was a soup (not a stew) and homemade dumplings were involved. Mr. Hammar even shared his extra-spicy paprika paste and homemade wine, which made a great meal even better.

If you missed Budapest on your grand tour because of a little thing like communism or just ran out of steam by the time you got to Vienna, I can only suggest that you find an opportunity to visit. The city has much to offer.

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1. Peter Pazmany (1570-1607), Hungarian cardinal (Jesuit) and statesman, philosopher and theologian

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House Bill 7

SUMMARY OF ADOPTION AND CHILD WELFARE PROVISIONS

By Thomas N. Taneff

The passage of House Bill 7 (127) effectuates many positive changes in Ohio adoption laws and will encourage adoptions in Ohio of children in need of permanent homes. With approximately 2,800 children waiting for adoptive families out of the more than 22,000 children in Ohio living in either foster care or some type of out-of-home placement, it is necessary to make the adoption process more accessible.[1]

House Bill 7 provides additional financial support to the birth mother consenting to the adoption of her child. In addition to the payments of allowable expenses related to the adoption or placement of a child such as medical or legal expenses, prospective adoptive parents may now pay up to $3,000 of the living expenses incurred by the birth mother for the duration of her pregnancy and for 60 days after the child is born. The payment of these living expenses must flow through the attorney or agency arranging the adoption, but will ultimately provide much needed financial support for birth mother.

The bill also contains a requirement that the director of Job and Family Services must promulgate rules that will ensure that adoption and foster care home study procedures and content are in alignment. This will help promote efficiency and consistency for the adoption and foster care systems, which should help make the adoption process go more smoothly.

The length of time in which a child must live with a foster parent before the foster parent may submit an adoption application has been decreased from 12 months to 6 months. Also, a juvenile court no longer needs to consent to adoptions before a probate court can grant adoption petitions that include legal guardians or custodians. As a result of these changes, children will have the opportunity to be adopted at a much faster rate and the number of children awaiting permanent homes will likely decrease.

Where a parent has not been in contact with the child for one year and failed to provide for the child, consent by the parent is no longer forfeited; rather, under the new law, the court must find by clear and convincing evidence that the parent did not try to establish contact with the child or provide any support. In addition, the clerk of courts must send a notice to the parent stating the legal ramifications of the adoption and informing the parent of his or her right to contest the child's adoption. While the use of the "clear and convincing" standard as opposed to the automatic forfeiture of rights may be seen as a means to impede rather than expedite the adoption process, its usage will provide the birth parent(s) with the ability to contest the adoption before their parental rights are terminated and in doing so may reduce the possibility of lengthy appeals.

Another change provides for the finalization of an interlocutory order not less than six months and not over one year from the date the adoptee is placed in the adoptive home instead of anywhere between six months and one year from the date the order is issued. This provision will decrease the time the court has available for observation, investigation, and review of home study reports while also decreasing the amount of time the adoptive parents must wait before the adoption is final. Current law which allows the court to vacate an interlocutory order sooner for good cause relating to adoptions involving foster parents or relatives remains unchanged in the bill.

A juvenile court must now consider the ability of the adoptive parents to meet the needs of the other children living in their home.

The bill also adopts a new definition of "non-identifying information" by listing types of information that may be requested in relation to the adoptive parent. Prior to the passage of House Bill 7, Ohio law only addressed the type of information considered as "non-identifying" as that which pertained to the birth parent. Under the bill, the adoptive parent's age at the time of adoption, an adoptive sibling's age at the time of adoption, the heritage, ethnic background, religion, educational level, and occupation of the adoptive parent, and general information known about the well-being of the adoptee both prior and after adoption is considered to be information that does not identify the parties involved and therefore subject to inquiry. The bill does authorize an agency, attorney, person, or other governmental authority to reclassify any non-identifying information related to an adoptive family as identifying information on a case-by-case basis and to deny the request made for that information. In addition, House Bill 7 preserves the ability of a birth parent of an adopted person, a birth sibling over 18 years, or a birth family member of a deceased birth parent to submit a written request for non-identifying information as well as retains the definition of what constitutes such information, but stipulates that the birth parent must wait until the adopted child is 18 years of age before the information can be requested.

Changes in Child Welfare Laws

Under House Bill 7, a juvenile court may extend a temporary custody order for an additional time beyond that by which a PCSA or a PCPA may extend a temporary custody order by motion. The bill permits a juvenile court to extend a temporary custody order in increments of six months each, but under no circumstance may it extend the order for more than one year. In addition, the bill prohibits the court from extending the temporary custody order beyond two years from either the date when the complaint was filed or when the child was put in shelter care, whichever comes first and irrespective of any previous extensions. This provision allows a juvenile court more latitude in its disposition of the child, while safeguarding against the placement of a child in temporary custody for an inordinate period of time.

The new law mandates that a juvenile court must, under specific circumstances, place a child in PCSA (public child service agency) or PCPA (private child placing agency) custody. The child is required to be placed with either agency if all of the following apply: 1) the court determines by clear and convincing evidence that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent; 2) the child has been in an agency's custody for two years or longer, and no longer qualifies for temporary custody; 3) the child does not meet the requirements for a planned permanent living arrangement pursuant to current law; and 4) prior to the dispositional hearing, no relative or other interested person has filed, or has been identified in, a motion for legal custody of the child.

The law provides specifications concerning when it is necessary for the child to stay in residential or institutional care. If the child is unable to function in a family-like setting due to physical or mental disability and must therefore remain in residential or institutional care, the law specifies that the child must remain in such care for "now and the foreseeable future" beyond the date of the child's dispositional hearing.

Finally, the new law provides an additional standard for the involuntary termination of the parental rights of a parent who has already had his or her parental rights terminated in regards to a sibling of the child in question. Under House Bill 7, the parent must prove by clear and convincing evidence that in spite of the previous termination, the parent can provide a secure, permanent placement and adequate care for the health, welfare, and safety of the child. While this provision allows the parent the ability to preserve his parental rights for the child regardless of the loss of parental rights in respect to another child, it also protects the child who is the current subject of a Termination of Parental Rights proceeding by requiring the parent to meet a stricter burden of proof.

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1. Ohio Department of Job and Family Services, Adoption Fact Sheet (2008) http://jfs.ohio.gov/factsheets/Adoption.pdf.

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Thomas N. Taneff

A Primer on Ohio's New Commercial Dockets

By Timothy B. McGranor

In his April 2007, State of the Judiciary Address, Chief Justice Thomas J. Moyer announced the creation of the Supreme Court Task Force on Commercial Dockets. This Task Force was co-chaired by Judge John P. Bessey and Patrick F. Fischer of Keating, Muething & Klekamp. The task force's work culminated in the adoption by the Supreme Court of Temporary Rules of Superintendence 1.01 through 1.11 on May 6, 2008, effective July 1, 2008. These Temporary Rules created, on a pilot-project basis, new commercial dockets in Cuyahoga, Franklin, Hamilton, and Lucas Counties, to remain in effect until July 1, 2012, unless otherwise extended by the Supreme Court. The new commercial docket became effective in Franklin County for all cases filed on or after January 5, 2009.[1]

The goals of the project are two-fold: efficiency and predictability. Cases on the commercial docket will be decided more quickly than cases that remain on the standard docket because of specific timing rules. Consistency and predictability of decision will come from having the same limited number of judges deciding commercial issues. With these improvements, the hope is that Ohio will become more hospitable toward business, strengthening the state's economy.

What Cases Are Within the Jurisdiction of the Commercial Docket?

The commercial dockets will hear virtually all cases where the gravamen of the action is a dispute between business entities or involves the governance or ownership of a business entity. The term "business entity" is used broadly and means any "profit or nonprofit corporation, partnership, limited liability company, limited liability partnership, professional association, business trust, joint venture, unincorporated association, or sole proprietorship."[2]

The following cases will be transferred to the commercial docket: disputes involving the formation, governance, dissolution, or liquidation of any business entity; disputes among owners (or other principals) of a business entity concerning their rights and obligations; disputes concerning trade secret, non-disclosure, non-compete, or employment agreements between a business entity and an owner of the business entity; cases involving the "rights, obligations, liability, or indemnity" of a business entity's officers, directors, or owners; and contract disputes and business-tort disputes between business entities.[3]

Cases expressly excluded from the commercial docket include: personal-injury and wrongful-death claims; consumer claims against business entities; employment disputes, such as OSHA, wage-and-hour, and workers' and unemployment-compensation claims not involving an owner of the business entity; environmental claims; cases involving labor organizations or governmental entities; claims of discrimination; administrative appeals; individual residential disputes such as foreclosure and landlord-tenant disputes; cases that cannot be filed in the general division of the common pleas court, such as domestic relations, juvenile, and probate cases and cases that must be filed in the municipal court; and criminal cases.[4]

How Are Cases Assigned to the Commercial Docket?

When a commercial case is filed, it is subject to the same random-assignment system that governs all other cases.[5] But if the "gravamen of the case" falls within the specified jurisdiction of the commercial docket,[6] the plaintiff's attorney must file with the complaint a motion to transfer the case to the commercial docket. If the plaintiff's attorney fails to file a transfer motion, the defendant's attorney must file a motion to transfer the case to the commercial docket at the earlier of either the attorney's initial appearance or the first responsive pleading.[7] If neither party files the required motion to transfer, the assigned judge must sua sponte request a transfer.[8] These requirements are mandatory; there is no option to remain with the initially assigned judge.

The assigned judge must rule on the motion to transfer within two days of filing.[9] Any appeal of this decision must be made within three days of the ruling and is heard by the administrative judge.[10] The administrative judge must rule on the appeal within two days. When the request for transfer was made by the court sua sponte, the commercial docket judge must decide the request within two days.[11]

For each commercial docket case that is transferred to the commercial docket, a non-commercial docket case will be transferred to a non-commercial docket judge through the random-assignment process.[12] Thus, the commercial docket judges will maintain the same number of cases as other judges on the court. Commercial docket judges will also continue to handle criminal cases and administrative appeals.

Timing Requirements

The commercial dockets are governed by strict timing rules. Commercial docket judges are required to decide motions within 60 days of filing.[13] Following submission of the case to the court for decision after trial, the commercial docket judge is required to issue a decision within 90 days.[14] If the court fails to rule within the time allotted, the attorney is required to provide written notice to the court that the deadline has passed.[15] The commercial docket also has a nonbinding goal of bringing each case to final decision within 18 months of filing, except for complex cases.[16] The court is required to notify the Supreme Court if a case has not been disposed of in that time.[17]

Body of Law

The second goal of the pilot project is to create a predictable and consistent body of business law in Ohio. This will be achieved in two ways. First, the same limited number of judges will be hearing all commercial docket cases in their jurisdictions. In Franklin County, those judges are the John P. Bessey and Richard A. Frye. Second, all opinions and dispositive orders by commercial docket judges will be posted on the Supreme Court's website and made available for review by both the bar and other commercial docket judges.[18] The hope is that a body of law will quickly develop that will enable parties to better predict potential outcomes and plan their business accordingly.

Special Masters

Commercial docket judges have been given the power to appoint special masters with the consent of the parties.[19] The special master will discharge those duties consented to by the parties and will perform pretrial or post-trial duties that cannot be "effectively and timely" addressed by the judge.[20] In exceptional cases or cases involving accounting or complex damages, the special master may hold hearings and issue findings or recommendations to the judge.[21] The specific duties must be specified in the order appointing the special master.[22] The order appointing the special master must also specify whether and to what extent the special master may communicate with the judge and the parties ex parte[23] and how the special master will be compensated.[24]

For More Information

The Supreme Court of Ohio website contains some additional information relating to the commercial docket pilot project; it lists the courts and judges that are part of the project, contains a copy of the Temporary Rules, and provides sample forms for use in transferring the case to the commercial docket.
www.sconet.state.oh.us/boards/commDockets/default.asp

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1. Franklin County Local Rule 94.01.
2. Temp. Sup. R. 1.01.
3. Temp. Sup. R. 1.03(A)(1)–(5).
4. Temp. Sup. R. 1.03(B)(1)–(15).
5. Temp. Sup. R. 1.04(A).
6. Temp. Sup. R. 1.04(B)(1).
7. Temp. Sup. R. 1.04(B)(2).
8. Temp. Sup. R. 1.04(B)(3).
9. Temp. Sup. R. 1.04(C)(1).
10. *Id.*
11. Temp. Sup. R. 1.04(C)(2).
12. Temp. Sup. R. 1.04(E); Sup. R. 36(C)(1).
13. Temp. Sup. R. 1.07(A)(1).
14. Temp. Sup. R. 1.07(B)(1).
15. Temp. Sup. R. 1.07(A)(2), (B)(2).
16. Temp. Sup. R. 1.08(A).
17. Temp. Sup. R. 1.08(B).
18. Temp. Sup. R. 1.09.
19. Temp. Sup. R. 1.05(A)(1).
20. *Id.*
21. Temp. Sup. R. 1.05(A)(1)(b).
22. Temp. Sup. R. 1.05(B)(2).
23. Temp. Sup. R. 1.05(B)(2)(b).
24. Temp. Sup. R. 1.05(B)(2)(c).

Timothy B. McGranor,
Vorys Sater Seymour and Pease

Consistency and predictability of decision will come from having the same limited number of judges deciding commercial issues. With these improvements, the hope is that Ohio will become more hospitable toward business, strengthening the state's economy.

Deepening Insolvency is only damages *deep*

By Peter Kimani

"A corporation is not a biological entity for which it can be presumed that any act which extends its existence is beneficial to it."[1]

With the current economic downturn, it is anticipated that there will be an uptick in cases alleging deepening insolvency as a cause of action or a measure of damages or both. As creditors seek to recover from companies in bankruptcy, this theory will experience a new lease of life and more courts throughout the United States will be called upon to decide on its validity.

The theory of deepening insolvency is not universally recognized. There are hardly any state cases that involve deepening insolvency as either a cause of action or as a theory that supports recovery of damages by the aggrieved party. Most deepening insolvency cases originate from federal bankruptcy courts. Although older court decisions recognized deepening insolvency as a cause of action, more recent rulings appear to allow it only as a theory for recovery of damages

The phrase "deepening insolvency" was first introduced in *Schacht v. Brown*,[2] in which the Illinois insurance commissioner alleged that the directors and officers of an insurance company fraudulently concealed its insolvency, thereby allowing continued writing of insurance and further dissipation of assets. In *Kittay v Atlantic Bank* of New York,[3] yet another court went a step further and defined deepening insolvency as "…the fraudulent prolongation of a corporation's life beyond insolvency, resulting in damage to the corporation caused by increased debt."

The most influential case appears to be the *The Official Committee of Unsecured Creditors v. R.F. Lafferty & Co*[4] (Lafferty) decision. This ruling is referenced by nearly all other courts dealing with deepening insolvency. The court in *Lafferty* ruled that the theory of deepening insolvency is essentially sound and "…may give rise to a cognizable injury…" under Pennsylvania law. The court observed that that even when insolvent, corporate property still has value. It further noted that fraudulent increase in debt can damage that value in a number of ways, such as forcing the afflicted company into bankruptcy; placing limitations on corporate operations, undermining the company's corporate relationships, and/or dissipating its assets.

Recent cases have departed from the direct application of Lafferty's guidelines on deepening insolvency. In *Trenwick America Litigation Trust v Ernst & Young, LLP*,[5] (Trenwick), the Delaware bankruptcy court dismissed deepening insolvency as a valid cause of action but came short of resolving whether it was an appropriate theory of damages. In *In re Parmalat Securities Litigation*[6] the court established a test that distinguished "delayed liquidation" from "delayed reorganization," and stated that damages cannot arise for the former but are theoretically possible in cases involving "delayed reorganizations." In *Miller v. McCown* (In re Brown Schools)[7] the Delaware court concurred with *Trenwick* and upheld the ruling that deepening insolvency was not a valid cause of action, but observed that the theory may be used to measure damages in an action for breach of the fiduciary duty of loyalty.

Deepening insolvency rests on the premise that a corporation is injured when its life is artificially and wrongfully extended past its current state of insolvency.[8] However, the point at which a company crosses the solvency threshold is not unambiguous, in fact some courts have accepted a "zone" of insolvency. To complicate matters further, courts have commonly accepted three types of insolvency:

Balance sheet insolvency, which occurs when a company's debts exceed the fair market value of the sum of its assets.

Cash flow insolvency, which arises when a company does not have enough cash on hand to cover its debts as they become due.

Low capital insolvency, which occurs when a company's capital is too small to protect it from business downturns and fluctuations.[9]

Most deepening insolvency claims are deliberated during hearings for motions to dismiss or summary judgment hearings. As such, there is no real guidance regarding the calculation of damages. Typical damages are calculated as the decline in company value (equity) as a result of wrongdoing. In deepening insolvency cases, however, pre-damage equity is less than zero. This brings about a peculiar question to the court: should the measure of damage in deepening insolvency be arrived at by calculating the difference between pre-damage negative equity and post-damage "more negative" equity? Two damage theories have been presented for companies within the "zone" of insolvency:

Dissipation of assets or increased debt load. Here, the underlying principle is that reduced assets and additional debt decrease the final distribution to unsecured creditors.

Impact on business operations and relationships. The underlying premise is that wrongful or tortuous conduct diminishes the company's chance to restructure as well as its overall value.[10]

In some cases, plaintiffs have argued that the measure of recoverable damages consists of the entire amount of the unpaid debt incurred by the company during the period of its alleged insolvency. However, opponents of the "increased debt" theory argue that debt is balance sheet neutral, additional debt while increasing a company's liabilities also increases its assets. They also argue that unless the borrowed funds are looted, additional debt cannot "deepen" insolvency, certainly not balance sheet insolvency.

Another method computes damages in deepening insolvency as the quantified impact on operations and relationships of the business that necessarily arise from the wrongdoing of the defendants. This is a much more subjective and complex measure of damages, because the plaintiff has to prove that there was value in the insolvent company, and demonstrate that the defendants' actions negatively impacted the said value in a manner that would otherwise have been impossible but for their actions.

Most deepening insolvency claims are initiated by creditors' committees of troubled companies. Typical plaintiffs in these cases are bankruptcy trustees and unsecured creditors. They generally allege that certain actions by the defendants resulted in loss from either additional liability or further erosion of assets of the insolvent company.

Given that deepening insolvency in its most basic form arises from conduct that is alleged to either fraudulently or negligently prolong the life of a company, it follows that parties who are believed to have fiduciary obligations or perceived fiduciary duties of care are likely to end up as defendants in these cases. At the top of this list of potential defendants are company directors and officers. Others are professionals paid to advise the company, including auditors, investment brokers and attorneys and secured lenders who extend new financing during insolvency while simultaneously acquiring additional security for their loans.

It is anticipated that given the current economic climate deepening insolvency will be developed further as a legal concept as more and more courts are called upon to address the issue.

1. *Bloor v. Danske (In re Investors Funding Corp.,* 523 F. Supp. 533 (S.D.N.Y. 1980) at 541.
2. *Schacht v Brown,711 F.2d 1343 (7th Cir. 1983)*
3. *Kittay v Atlantic Bank of New York (In re Global Service Group LLC).*
4. *Official Committee of Unsecured Creditors v R.F. Lafferty & Co., 267 F.3d 340 (3rd Cir. 2001)*
5. *Trenwick America Litigation Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 205 (Del.Ch. 2006)*
6. *Bondi v. Bank of Am. Corp. (In re Parmalat Sec. Litig.), 383 F. Supp. 2d 587, 601 (S.D.N.Y. 2004)*
7. *Miller v. McCown De Leeuw & Co., Inc., (In re Brown Schools) 386 B.R. 37 (Bankr. D. Del. 2008)*
8. Phil C. Appenzeller, Ross H Parker, *Deepening Insolvency Part I A Challenging New Theory or Just the Search for a Deep Pocket?* March 2005
9. Holem Roberts & Owen, LLP, *Avoiding the Undertow of Deepening Insolvency.* August 12, 2005, p. 2
10. Phil C. Appenzeller, Jr., Esq., Ross H. Parker, Esq., *Deepening Insolvency Part I, A Challenging New Theory or Just the Search for a Deeper Pocket*, TMA 2005 Spring Conference, March 9-12 2005, Part IV.

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401K SURVIVAL TOOL KIT

How to Help Participants Tap Retirement Accounts for Needed Cash – But Only As a Last Resort

By Bert Nester

It started as an urgent call after 5:00 on a Friday afternoon from the office manager of one of our law firm clients. *Betsy, a paralegal at their firm, needed to pull $16,000 from her 401(k) – and she would need the cash by Monday evening. In Betsy's words, "It's kind of like a checking account isn't it?" Due to the current fragile economy, we are fielding quite a few of these calls – not just concerning the newer staffers – but a number of business owners as well. (* Not her real name.)

Pulling cash from your retirement account is not a good thing, although it may be the best alternative, and in some cases there are no other choices. This is a quick primer on the many ways your retirement plan could allow participants to tap their accounts for needed cash.

Participant loans: This is the quickest and easiest way to pull cash from a retirement account. Most 401(k) and other 401(a) plans allow for loans. Loans are prohibited for SIMPLEs and SEPs. If you aren't sure if your plan allows for loans, ask your Plan Administrator.

Although loans are subject to strict dollar limits (50% of the vested account balance, capped at $50,000), there is no need for the participant to have attained any certain age or to have any certain reason for the loan. Thus, relatively speaking, loans are fast and loose, but not free! Loans must be repaid with interest using a one to five-year amortization schedule, or longer if the loan is to finance the purchase of a principal residence.

Betsy wants to withdraw $16,000, and her vested account balance is a little over $22,000. She could take an $11,000 loan, but that still leaves her $5,000 short. Let's look at her other possibilities.

Hardship distributions: Most plans allow the withdrawal of funds held in 401(k) contribution accounts but only if the participant has exhausted all other options (including loans) and the financial hardship qualifies as one of the IRS's six "safe harbor" reasons: (1) expenses for medical care for the employee, spouse or the employee's dependents; (2) costs directly related to the purchase of a principal residence (excluding mortgage payments); (3) payment of tuition, room and board, etc. for the next 12 months of post-secondary education for the employee, spouse, children or dependants; (4) payments to prevent eviction or foreclosure of the principal residence; (5) payments for burial or funeral expenses; and (6) expenses due to damages to the principal residence.

Provided her need is due to one of these reasons, Betsy could withdraw up to the total of her 401(k) contributions (reduced by any prior hardship distribution or other withdrawals).

As it turns out, the $16,000 Betsy needs is for the purchase of a principal residence – for her daughter, not for Betsy. Therefore, Betsy's need does not qualify for a hardship distribution from her 401(k) account.

In-service distributions: Most plans allow the withdrawal of accounts only in the event of death, attainment of normal retirement age or termination of employment.

Plans could, however, permit on-going employees (who haven't terminated employment) to receive in-service distributions from discretionary matching or profit sharing accounts. These types of distributions could be for any number of reasons. The plan could provide, for example, that anyone who has attained age 40 could withdraw their matching and profit sharing accounts when fully-vested.

For 401(k) contribution accounts, however, in-service distributions are strictly prohibited prior to age 59-1/2 unless the participant's need is due to one of the six hardship reasons.

Betsy, age 46, has $12,000+ in her 401(k) and $10,000+ in her profit sharing account. She cannot take any of her 401(k) account as a hardship distribution or as an in-service distribution. To withdraw a total of $16,000, she could take an $11,000 loan, with that amount coming from her 401(k) account, and a $5,000 in-service distribution from the profit sharing account. The timing and sequence is critical however. First, she would take the $11,000 loan, since she can only borrow up to 50% of her vested account balance, which is based on the value of her account at the time the loan is issued. After receiving the $11,000 loan, Betsy could take the $5,000 in-service distribution. This leaves $6,000+ in her combined 401(k)/ profit sharing accounts, which is OK because the loan did not exceed 50% of her total vested account at the time the loan was made. What happens after she receives the loan makes no difference.

Remember these pointers:

Participant loans can be up to 50% of the vested account balance capped at $50,000 and are repaid with interest generally over five years. These withdrawals are not subject to income tax.

Hardship distributions from 401(k) contribution accounts can only be for one of the IRS's six reasons and is limited to the amount of the participant's total 401(k) contributions. These distributions are not repaid to the plan and are subject to income tax and possibly a 10% excise tax.

In-service distributions can be for (virtually) any reason and at any age and up to the full amount of the discretionary profit sharing and matching contribution accounts. These withdrawals are not repaid to the plan and are subject to income tax and possibly a 10% excise tax.

Your company decides to what extent any of these provisions will be written into your plan. Some companies broadly allow all of these types of withdrawals; others do not. Due to their financial significance, it's best to have these policy decisions calmly made before 5:00 on a Friday afternoon.

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ON BEING A PRIVATE ATTORNEY GENERAL

By Edward Forman

A fifty-five year old man has spent his entire working life at a mid-sized corporation. He earns a comfortable salary, with health benefits which cover both his wife and his second child, who is still in college. It is the Spring of 2009, and layoffs are coming. He is selected, largely because his manager wants to make sure he keeps the "new blood" in the company.

This guy, ladies and gentlemen, is in serious trouble. His chances of finding comparable employment are virtually non-existent, and his skill set does not translate to self employment. I could give you some other specifics about his mortgage being underwater and the sorry state of his 401(k), but it doesn't really matter; without his monthly paycheck it's only a matter of time.

While the legal field has been hard hit from the recent financial downturn (or today's preferred euphemism), employment litigation has remained steady or has even increased. I was asked to contribute an article about the opportunities the practice of employment law presents in a down economy, both to new attorneys and those who are looking to expand their practice.

My advice to those considering the field of plaintiff's employment law is that you should think long and hard about yourself. If you view it as a business opportunity, chances are that you will be disappointed. To work effectively in this area requires an honest commitment to the advancement of the interests of the labor force, as well as those of you clients. You will realize these interests are one and the same.

As a profession, the legal field's response the state of the work force, and the sudden poverty it has created, has been simply dismal. Rather than recognize the concerns of the labor force, there has been an assault on the concept of employment itself as the employment defense bar pushes to label employees as "independent contractors." This has long been a concern in the renovation/light construction field, as employers claim the individuals working for them five days a week are independent contractors in order to avoid workers compensation and unemployment premiums, employer share payroll taxes, and requirements for minimum wage and overtime pay. It goes far beyond that now. The delivery guy who shows up in uniform to deliver packages to your office every day at the same time? Independent delivery contractor. The cable guy who works 60 hours a week doing line repairs at the whim of dispatch? Small business owner.

Expecting people to obtain individual benefits is simply unrealistic – partly because they will not be able to take advantage of group rates, and partly because they will choose to take a chance that they and their family will not need medical treatment. This places increased reliance on an already beleaguered public benefits system, as well as emergency rooms, not to mention the tremendously unfair competition faced by businesses who do not try to bend the rules.

Unquestionably, in the short term many employers might wish to avoid the burden of having employees. However, having made the social safety net dependent upon employment, we cannot in good conscience put our energies to undermining the concept of employment. In the long run, however, it is an irresponsible strategy for both business and the legal profession.

In this area of law, your client base is generally the recently unemployed. Your clients will be individuals who have recently lost their jobs and are now staring poverty dead in the face. You may say that this person could have prepared better for such change in circumstances, which is doubtless true. Such a statement, though, is an exercise in irrelevancy. Be it right or wrong, the vast majority of individuals are utterly unprepared to lose even a portion of their monthly income.

You will find yourself acting as a pseudo-social worker to the literally hundreds of people who call your office who have no legal case, but are nevertheless in desperate need of help. Make sure they have applied for unemployment, tell them how to get their children covered by Medicaid, point them to entities that can help them avoid foreclosure. You will not be paid for this – get used to it.

You will never encounter a perfect client. Oddly, you may find that your least presentable clients have the best cases. A person who comes to you with a preposterous discrimination case may have a bulletproof FMLA case. Keep your eyes open.

You will deal with clients, especially sexual harassment clients, who have been horribly damaged by their ordeal and are in need of your support. Recently, an employment defense attorney wrote in his blog that "[t]here is something viscerally appealing about cross examining a sexual harassment plaintiff concerning her home videos" (to those of you who sat with me in the back row in law school, visceral is defined by Merriam Webster as "dealing with crude or elemental emotions").

You will encounter a judiciary which is at times hostile to employment law claims. In *Boerst v. General Mills Operations, Inc.*, 25 Fed. Appx. 403 (2002), an ADA case, the Sixth Circuit found that a medical condition limiting an individual to two to four hours of sleep per night, "while inconvenient," did not substantially limit the major life activity of sleeping. In *Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St. 3d 351 (2008), the Ohio Supreme Court reversed course and held that employers may legally terminate employees for taking Workers' Compensation leave, cutting hundreds of filed cases off at the knees.

You will learn to work with the poor and the underprivileged. You will grow to recognize and loathe the condescension in others which springs from a feeling that there is something morally wrong with being poor. You will learn that in the real world, people fudge their resumes, fail to disclose DUI convictions, and sign for employee handbooks they did not actually receive. They did not begin their life preordained to the *cursus honorum*. They will also sit on your juries.

You will learn that you are not just an employment lawyer, you are a civil rights lawyer. You are a private attorney general who enforces the laws against discrimination and illegal employment practices. You will catch those who steal from their employees by illegally denying them overtime pay. You will be the workers' hammer.

Most important, you will learn that you need help. In no area of practice is the phrase "bad facts make bad law" more appropriate. You will encounter a bewildering array of laws, as well as a confounding and inconsistent array of statutes of limitations. Please contact the Ohio Employment Lawyers Association for assistance. We can be found at www.oelasmart.net

Edward Forman, Marshall and Morrow

Broken Dreams and Nightmares

County Agency Child Support in Disrupted Adoptions

By Susan Garner Eisenman and Erik L. Smith

Daisy, a recent adolescent adoptee, developed a sexual crush on her adoptive sister, leading her to leave suggestive notes in her sister's underwear drawer and to make other overt sexual overtones. Counseling could not resolve the problem. The pre-adolescent adoptive sister, who had been in the home since infancy, was extremely stressed. The family pet, that showed fear toward the adoptee, experienced unexplained fatal injuries.

T.S., an adoptee who survived the Ethiopian civil war despite enduring torture and sexual slavery, developed dissociative personality disorder. One of her alter egos repeatedly tried to harm the other children in the home and choked the adoptive mom into unconsciousness on several occasions. Although medical tests indicated T. S. had been thirteen at the time of the adoption, the adoptive family had been told she was six.

Donna, a 14-year-old adolescent, was treated for reactive attachment disorder when she was adopted at age six. But eight years later when the parents were working and the family was living in Beijing, Donna became a runaway and a prostitute. The family was expelled just before the 2008 Olympics. Upon return to the United States, Donna continued to run away and to refuse counseling. For Donna's own safety, the adoptive parents felt she needed a secure residential placement.

In each of those cases, the child was placed out of the home in county custody for the protection of the child and other adoptive family members. National child welfare policy makes an adoptive home the preferred place for a child unable to be cared for by the original family, yet some children have personal issues beyond the capacity of most families to cope.

In Ohio, when a child has been committed to county custody,[1] the juvenile court must order the parent, guardian, or person charged with the child's support to pay child support.[2] These support orders can be extraordinary if the child is in need of psychiatric or inpatient care. The results can be financially devastating to an adoptive family who has already suffered great emotional loss when the placement failed. But R.C. 2151.361 makes an exception for adopted children. The exception's relatively recent enactment (2002) and infrequent occurrence, combined with child support amounts governed by separate statutes,[3] can cause courts and parties to overlook the exception.[4]

The public policy behind the exception

The adopted child exception encourages adoptions of children with behavioral problems, while leaving adoptive parents responsible for child support when justified.[5] Thus, a juvenile court may deny an agency's child support motion for fear of discouraging future adoptions of special needs children without abusing its discretion.[6] But a juvenile court abuses its discretion by not considering all of the factors under R.C. 2151.361(B) before ordering the adoptive parent to pay support.[7]

In using that discretion, the court must consider all pertinent issues, including the parents' ability to pay support, the chances for reunification, whether a support order will encourage or undermine reunification, whether the problem underlying the custody agreement existed before the adoption and when the parents were informed of the problem, whether the parents contributed to the child's problem, and whether the parents are part of the solution to the child's problem.[8] In April 2009, the Ohio Legislature mandated that the court also consider the needs of other children in the home.[9] The juvenile court may consider and weigh non-statutory factors.[10] Still, the court has full discretion on whether to order child support from the adoptive parents after considering all of the factors.[11] That section applies to both domestic and international adoptions.[12]

R.C. 2151.361 is a mandatory, threshold matter

The court must consider the factors under 2151.361(B) before determining an obligation amount under the child support guidelines.[13] The determination cannot be waived by the adoptive parent. The consideration must be made prior to consideration of the amount of support. But the court should be able to use a factor under R.C. 2151.361 to support a deviation after deciding, under R.C. 2151.361, to order child support. (Any relevant factor can support a deviation from the support guidelines.)[14]

Other Legislative Initiatives

Utah and Minnesota have enacted similar statutes affording adoptive families special consideration when children return to county custody. House Bill 7 (signed by Governor Strickland in April) requires the court to consider the needs of the other siblings in the home in deciding whether to order child support from the adoptive parents.

Adopting a child is the ultimate act of voluntarism. Families who adopt do so in the hope that the adoption will be forever. However when problems arise, a respite or permanent alternative placement may be necessary. Assessing extraordinary child support for conditions which pre-existed the adoption is unjust and discourages adoptions. It turns a broken dream into a nightmare.

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1. R.C. Chapter 2151 or 2152.
2. R.C. 2151.36.
3. R.C. Chapters 3119 to 3125.
4. See, *In re T.S.*, 2007-Ohio-5900 (12th Dist.).
5. See, Id., ¶¶23-25.
6. Id.
7. *In re T.S.*, 2007-Ohio-5900 (12th Dist.).
8. R.C. 2151.361(B)(1-7).
9. Sub. H.B. 7, 127th General Assembly.
10. *Wood Cty. Dept. of Job & Family Serv. v. Pete F.*, 2005-Ohio-6006 (6th Dist.).
11. Id., ¶25.
12. See, *In re T.S.*, 2007-Ohio-5900 (12th Dist.).
13. Id., ¶¶14, 19.
14. R.C. 3123(P).

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Conflicts & Compliance

"DO NO HARM"

Physician Non-Compete Agreements and Public Policy

By D. Wesley Newhouse and Amy E. Kuhlman

Non-compete provisions are common features in employment agreements for physicians. Typically, they recite that all the patients of a practice group belong to the group, and that the physician employed by the group cannot serve them or contact them for a year after they leave the group. Some agreements also require that the physician not practice medicine generally, or a certain specialty of medicine, within a certain geographic area. These are typical features of non-compete agreements, found in agreements from the salesmen of widgets to the developers of high tech electronic gadgets.

Doctors, however, don't sell widgets or invent new electronic games. They treat illness and comfort suffering. Doctors, or at least the good ones, develop unique personal relationships with their patients. Relationships of trust and reliance.

And so it is strange that physicians, who are the owners of practice groups, use so prolifically the device of a non-compete clause in an employment agreement to restrict employee physicians from serving patients and the community. Given how often the owners of physician practice groups include these clauses in their contracts, it seems unlikely that physicians as a group will adopt a prohibition on non-compete clauses any time soon.

Yet, it would seem that public policy should favor, at the least, closer scrutiny of such clauses when in physician employment agreements, as opposed to agreements to employ the sellers of punch presses.[1]

Courts have balanced the potential harm to the employer versus the harm to the physician and his patients. The primary remedy for violation of a non-compete is injunctive relief. The employer seeks first a temporary restraining order, then a preliminary injunction to prevent the physician from serving the employer's patients, or from setting up a practice in a given geographic area. These are equitable remedies. The rules require that the court balance the interests of the affected parties. It is inevitable that the physician who seeks to avoid the non-compete will argue that public policy favors allowing access to medical care generally, and to allowing specific patients to have the physician of their choice.

The current state of the law requires that courts engage in what is surely a difficult, and often a subjective, balancing of the equities. The outcomes can vary, depending on the disposition of the judge and the circumstances of the case. Take the example of a family practice physician. There are hundreds, maybe thousands of these physicians in any major metropolitan area, and restricting a patient from seeing one such doctor over another one in the same practice group may not be so burdensome as to violate public policy.[2] Certainly, those insurers who make lists of approved providers and who refuse to pay for services of physicians outside of their "networks" have contributed to the perception that one doctor is as good as another, and we should simply take what we get and be satisfied.

But there are important exceptions. Those exceptions might, eventually, define the rule. Elderly residents of nursing homes have nearly an absolute right to the physician of their choice pursuant to state regulations governing the licensing of nursing homes.[3] One court found this right so compelling that it ruled that an elderly and infirm patient should have the right to see her chosen physician on the nursing home's premises even when there was a significant dispute regarding the physician's compliance with the nursing home's standards.[4] The right of the patient to see the physician of her choice prevailed over that of the nursing home that sought to enforce its standards. One would expect that the right of the patient would also trump that of a practice group seeking to prevent access to the physician to protect its financial well-being.

Another exception is when a physician offers a rare service of extraordinary value. Specialists whose services are in high demand may escape the restrictions of a non-compete, based on the public policy that a community would not have access to such services if the contract were enforced.[5]

Another exception may come from the lack of physicians available to serve certain communities. Put the family practice physician we considered before in a remote village that is the county seat of a sparsely populated rural community in southeastern Ohio. Suppose there are three doctors in the county, and one of the doctors is semi-retired. The other two practice together, and the younger of the two is employed by the more senior doctor under a non-compete agreement. While a judge in an urban common pleas court might balance the equities in favor of the employer, a judge in a rural county would likely see the situation very differently.[6]

What is distressing is the lack of standards to judge these situations. There is no code provision, ethical standard for physicians,[7] or compelling and conclusive precedent from our Supreme Court. We must argue the equities with each new situation, and take our chances on the viewpoints of the judges we draw. Ohio's physicians and their patients deserve more certainty than this.

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1. "this measure of disfavor [of restrictive covenants] is especially acute concerning restrictive covenants among physicians, which affect the public interest to a much greater degree." *Busch v. Premier Integrated Medical Assoc.,Ltd.*, Montgomery App. No. 19364, 2003-Ohio-4709, para. 24, quoting and citing *Ohio Urology, Inc., v. Poll* (1991), 72 Ohio App. 3d 446, 452-453, 594 N.E.2d 1027.
2. *Wall v. Firelands Radiology, Inc.* (1995), 106 Ohio App. 3d 313, 666 N.E.2d 235; *General Medicine, P.C. v. Manolache*, Cuyahoga App. No. 88809, 2007-Ohio-4169, unreported.
3. OAC 3701-17-09 (D)
4. *Bittner v. Ohio Presbyterian Retirement Services, Inc.*, (Franklin County C.P., 1/25/2005), No. CVH01-722, unreported.
5. See *Ohio Urology, Inc. v. Poll., infra,; Lewis v. Surgery & Gynecology, Inc.*, (March 12, 1991), Franklin App. No. 90AP-300, unreported; *Williams v. Hobbs* (1983), 9 Ohio App. 3d 331, 460 N.E.2d 287; *Darrow v. Kolczun* (March 6, 1991), Lorain App. No. C.A. 90CA004759, unreported.
6. See *Ohio Urology, supra*; *Clark v. Mt. Carmel Health* (1997), 124 Ohio App. 3d 308; 706 N.E.2d 336; and *Harris v. University Hospitals of Cleveland*, Cuyahoga App. Nos. 76724 and 76785, 2002-Ohio-983, unreported.
7. Claiming no moral superiority, we do note that lawyers are barred by their code of conduct from signing non-compete agreements because of the public policy favoring access to legal services. See *Ohio Rules of Professional Conduct*, Rule 5.6.

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Conflicts & Compliance

Are *you* in compliance with the Medicare Secondary Payer Act?

By Derek J. Walden & Zachary B. Pyers

Think your settlement is safe?

Over the past 20 years, and almost completely unbeknownst to many in the legal community, Medicare has held a right of recovery for conditional payments made to Medicare beneficiaries which should have been made by a primary payment source. Because Medicare's enforcement of their right to recovery has been infrequent and unpredictable, many attorneys are not properly taking Medicare's interest into account when settling cases involving Medicare beneficiaries. And while it is true that Medicare's enforcement may be lax, failing to properly protect your settlement may be a dangerous gamble to undertake. As recently as March of 2009, Medicare asserted its recovery rights and won summary judgment against a West Virginia attorney who failed to pay a Medicare lien. This recent case, in addition to new legislation taking effect this month, should serve as a wake-up call for all attorneys whose practice serves Medicare beneficiaries.

Now enter - the Medicare Secondary Payer Act and the changes

Passed in the early 1980's and amended multiple times since, the Medicare Secondary Payer Act governs situations where another entity is required to pay for covered services before Medicare does, thus making Medicare the "secondary payer." These "primary payer" entities are most frequently workers' compensation plans, group health plans, and liability insurance coverage. In practical effect, this legislation essentially gave Medicare "super liens" on any amounts conditionally paid to Medicare beneficiaries, allowing Medicare to later seek recovery of the conditionally made payments.

Back in 1977, when the government realized the size and scope of policing various secondary payer situations, Congress created the Health Care Financing Administration, now called the Centers for Medicare and Medicaid Services ("CMS").[1] In 2001, CMS first implemented a new technique to help enforce the mandates of the MSPA called a Medicare Set-aside Agreement or MSA. In short, a MSA is a written proposal which sets aside a portion of settlement funds and specifically earmarks those funds for future medical expenses which would normally be covered by Medicare. In addition to allocating settlement funds, the secondary purpose of a MSA (perhaps most important to a practicing attorney) is to insulate an attorney from future lien-recovery litigation, essentially allowing the settling attorneys to say, "I took Medicare's interest into account with my client's settlement and here's the MSA to prove it." To date, CMS only requires MSA submission or approval for settlements of workers' compensation claimants who are, or may soon become, Medicare beneficiaries.[2] But that limitation to workers' compensation may soon change.

This year (July 2009) new regulations take effect which create a mandatory reporting requirement for insurance companies involved in settlements with Medicare beneficiaries. This new legislation is the Medicare, Medicaid and State Children's Health Insurance Program Extension Act of 2007 (MMSCHIP).[3] Without getting into the nuanced details of the MMSCHIP, the practicing attorney should be aware of this legislation for one reason – Medicare will be paying more attention to personal injury settlements. Prior to this required reporting, Medicare's position was entirely reactive, only collecting on their conditional payments after a settlement was signed on the dotted line. However, this new legislation will allow Medicare to operate a comprehensive database and shorten the time elapsed between settlement approval and Medicare asserting a claim of settlement funds. This increased vigilance will almost certainly lead to increased enforcement of Medicare's MSPA rights. Additionally, many believe that this new legislation foreshadows the CMS intent to expand the applicability of MSA regulations requiring submission and approval of a settlement prior to disbursement of funds, beyond workers' compensation settlements and into the field of personal injury settlements. The "who, what, when and where" of these possible regulatory changes remain completely unknown.

Even while new legislative developments are on the horizon, recent case law continues to uphold the MSPA enforcement mechanism available to Medicare. As set forth in the MSPA, when a conditional payment is made, Medicare has a direct right of recovery against any entity responsible for making the payment for the entire amount conditionally paid.[4] While somewhat similar cases have occurred throughout the 20-year history of the MSPA, a recent decision highlights that Medicare remains willing to enforce its reimbursement rights through litigation.

A sign-post of more to come?

The recent case of *US v. Harris*, Northern District of West Virginia case no. 5:08-cv-102, has led to much discussion concerning attorney liability for failure to comply with the MSPA. Paul Harris, an attorney in Wheeling, represented the Ritcheas (as plaintiffs) in a products liability suit against a local ladder retailer. Mr. Richea had fallen off of a ladder and incurred medical expenses of $22,549.67, all of which was paid by Medicare. The Richea's products liability action against the ladder retailer settled in July of 2005 for $25,000. Notably, the settlement amount was paid by an individual company (most likely a parent company of the ladder retailer) and not paid by an insurance company.

Upon completion of the settlement, Harris forwarded to CMS a copy of the settlement agreement, including his attorney's fees and costs. After subtracting CMS's portion of the attorney's fees and costs, CMS calculated its interest in the settlement proceeds was $10,253.59. When CMS notified Harris of its interests in December of 2005, it also notified him there was a 120-day appeal period to contest the amount of the CMS lien. Neither Harris nor his client ever filed an administrative appeal within the statutory appeal period.

In May of 2006, Harris attempted to dispute the collection amount by filing suit in West Virginia state court on behalf of Mrs. Ritchea against the CMS contractor who was attempting to collect on the $10,253.59. The United States removed that action to federal court and ultimately, "pursuant to discussions between counsel," Mrs. Ritchea's state court suit was voluntarily dismissed in September of 2006.[5] The rationale behind the Harris's voluntarily dismissal remains unknown. However, the lien amount was never paid, because in May, 2008, the United States sued Harris individually for collection of the entire $10,253.59 lien amount.

Although Harris vehemently defended himself, the Northern District of West Virginia granted the United States summary judgment. The Court held that Harris had waived any argument concerning (a) whether or not CMS had a right to recover and (b) the amount of CMS recovery, all because he had failed to file an administrative appeal within the 120 days. The Court again affirmed the basic recover scheme contained within the MSPA – Medicare may bring an action against any entity responsible for making the primary payment (i.e. the ladder retailers parent company),[6] against any entity that has received payment from a primary plan (i.e. Mr. and Mrs. Ritchea), or against any entity that has received proceeds from a primary payment (i.e. Harris).[7] Thus, if an attorney takes his fee out of a primary payer's settlement, as Harris did, Medicare may have a right of action against that attorney.

What does all this mean for the practicing attorney? Compliance and vigilance are imperative.

All attorneys need to be aware that Medicare's interest must be taken into account when dealing with a settlement involving a current or potential Medicare beneficiary. Although it may come as news to some, the habit of evaluating Medicare's interest should be incorporated into the attorney's regular practice. Whether Medicare's interests are for past lien amounts previously paid or whether Medicare's interest is for future medical expenses projected through a MSA, each client's particular situation will dictate. Staying compliant with the MSPA generally breaks down into three steps.

Step One: Is the injured party now, or soon to be, a Medicare beneficiary? If the injured party is currently a Medicare beneficiary, then further analysis will be required. The gray area only comes when the injured party may soon become a Medicare beneficiary. Taking cues from CMS's current MSA requirements for workers' compensation, further MSA analysis is required for individuals who have already applied for social security disability insurance benefits or will become eligible to receive Medicare benefits within the next 30 months, i.e. the injured party is 62 ½ years of age.[8]

Step Two: Have I taken Medicare's interest into account? Medicare's interest for previously paid medical services can be determined by contacting Medicare asking for an analysis of the expenses paid. Medicare's interest in future medical expenses raises a slightly more complicated issue. Most experts believe that best way to take Medicare's future interest into account is by undertaking a Medicare set-aside analysis and completing a MSA. Once completed, this analysis will provide the settling parties with an estimate of the amount which should be set-aside for future medical expenses covered by Medicare.

Step Three: Have I placed Medicare on notice of this settlement? CMS's website notes that an attorney taking a case involving a Medicare beneficiary should notify the Coordination of Benefits Contractor working with CMS.[9] In an abundance of caution, it may also be advisable to forward to CMS a copy of your MSA or MSA analysis. Although Medicare will likely not review or grant approval of the MSA, your actions would certainly show how you attempted to place CMS on notice of your settlement and how that settlement attempted to ear-mark funds for future Medicare covered expenses. Keep in mind, as illustrated by the Harris case, notice to the government alone may not be enough – timely appeals of Medicare or CMS calculations may also become necessary.

In addition to remaining compliant, attorneys should endeavor to stay abreast of the changing legislation. As previously discussed, the MMSCHIP indicates that Medicare and CMS will be paying more attention to personal injury settlements. It would not be surprising for CMS to mandate new rules for personal injury settlements which require an attorney to submit a MSA for filing and approval with CMS. Most believe that, as was done in workers' compensation, CMS will issue a policy memorandum which will set the reporting thresholds for MSAs in personal injury settlements. However, no one knows when, or if, these changes will occur. Vigilance is the only way to ensure compliance should new regulations develop.

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1. *Why is CMS in Baltimore*, (https://www.cms.hhs.gov/History/Downloads/CMSInBaltimore.pdf)
2. Parashar B. Patel, *Medicare Secondary Payer Statute: Medicare Set-Aside Arrangements, Centers for Medicare and Medicaid Services Memorandum*, July 23, 2001, Question 1(C), (https://www.cms.hhs.gov/WorkersCompAgencyServices/Downloads/72301Memo.pdf)
3. 42 U.S.C. 1395y(b)(7)&(b)(8), (https://www.cms.gov/MandatoryInsRep/Downloads/StatutoryLanguage.pdf)
4. See 42 U.S.C. § 1395Y(b)(2)(B)(ii); see also *Cox v. Shalala*, 112 F.3d 151, 154 (4th Circ. 1997).
5. *Notice of Voluntary Dismissal*, Doc. #15, Case #5:06-cv-71; See also "discussion between counsel" language in *Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment*, Doc. #14, Case #5:08-cv-102.
6. See 42 U.S.C. § 1395Y(b)(2)(B)(iii).
7. 42 C.F.R. § 411.24(g); see also *United States v. Weinberg*, 2002 WL 32356399 (E.D. Pa. 2002) (granting United States partial summary judgment under MSPA and holding that United States is entitled to recover MSPA debt from beneficiary's attorney); *United States v. Sosnowski*, 822 F. Supp. 570 (W.D. Wis. 1993) (granting, in part, the United States' motion for judgment on the pleadings under MSPA and holding that the United States is entitled to recover MSPA debt from beneficiary and his attorney).
8. *Workers Compensation Medicare Set-aside Arrangements (WCMSAs),* CMS Review Threshold, (http://www.cms.hhs.gov/WorkersCompAgencyServices/04_wcsetaside.asp)
9. *Medicare Secondary Payer and You*, (http://www.cms.hhs.gov/MEDICARESECONDPAYERANDYOU/

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Fiduciary Duty of Real Estate Agents

"It is an express fiduciary duty of an agent to advise his or her clients to obtain expert advice related to material matters when necessary or appropriate. Many of the complaints the Division receives against agents could have been avoided had the agents recommended their clients seek counsel."

By James A. Zitesman

Fiduciary duty. What do these words really mean to real estate agents? To answer the question let's start with Black's Law Dictionary, 5th Edition, page 563: "Fiduciary: ...a person holding the character of a trustee...in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. A person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking." Simply stated, fiduciary duty means to do what is in the client's best interest, first and foremost.

Section 4735.62 of the Ohio Revised Code defines the fiduciary duties for a real estate licensee. It begins with, "In representing any client in an agency or subagency relationship, the licensee shall be a fiduciary of the client and shall use the licensee's best efforts to further the interest of the client including, but not limited to, doing all of the following:..." and then it lists out nine specific areas. Subsection (G) states, "Advising the client to obtain expert advice related to material matters when necessary or appropriate;" As Division Counsel for the Ohio Division of Real Estate, Holly Johnston-Cook has stated, "It is an express fiduciary duty of an agent to advise his or her clients to obtain expert advice related to material matters when necessary or appropriate. Many of the complaints the Division receives against agents could have been avoided had the agents recommended their clients seek counsel."

While one may think about a home inspector for a home inspection what about the recommendation to hire an attorney? Is a contract or a request to remedy a material matter which would require the expert advice of a real estate attorney? I suggest that it most definitely is and that further reading of the Ohio Revised Code and relevant case law supports that conclusion.

Section 4735.18 of the Ohio Revised Code is a long list of actions that can result in disciplinary action, including Subsection (32) "Performing any service for another constituting the practice of law, as determined by any court of law...."

Sections 4735.63 and 4735.65 are the provisions of the Ohio Revised Code detailing the duties owed by a real estate agent or broker to sellers and buyers respectively. Each Section ends with, "(C) Nothing in this section shall be construed as permitting a licensee to perform any act or service that constitutes the practice of law."

So what is the practice of law and what is a real estate agent permitted to do? In 1941, the Ohio Supreme Court decided the case of Gustafson v. V.C. Taylor & Sons, Inc., 138 Ohio St. 392. "This court finds itself in agreement with the reasoning and conclusion of the lower courts to the effect that the supplying of simple, factual material such as the date, the price, the name of the purchaser, the location of the property, the date of giving possession and the duration of the offer requires ordinary intelligence rather than the skill peculiar to one trained and experienced in the law."

In 2003, the Ohio Supreme Court found the preparation of deeds without the supervision of an attorney as unauthorized practice of law. As stated in Toledo Bar Assn. v. Chelsea Title Agency of Dayton, Inc., 100 Ohio St.3d 356, "The unauthorized practice of law is the rendering of legal services for another by any person not admitted to practice in Ohio * * *." Gov.Bar R. VII(2)(A). " `[T]he practice of law embraces the preparation of legal documents on another's behalf, including deeds which convey real property.' "

In 2005, the case of Miami Cty. Bar Assn. v. Wyandt & Silvers, Inc., 107 Ohio St.3d 259 was decided by the Ohio Supreme Court where it was found that a CPA firm was practicing law when it advised clients about entity formation. "[T]he practice of law is not limited to appearances in court, but also includes giving legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are preserved."

The Canons of Ethics for the Real Estate Industry are published on the Ohio Division of Real Estate's website. Section II, Article 8. "The licensee should recommend that title be examined and legal counsel be obtained." (Emphasis added)

What all of this is saying is that it is perfectly acceptable for a real estate agent to fill in the blanks on a pre-printed purchase contract, but beyond that, such as adding additional terms and conditions, the fiduciary duty requires the recommendation of hiring an expert in such matters, such as an attorney. Of course, by having the client hire an attorney to draft the contract and other related documents such as requests to remedy, the real estate agent is not only fulfilling the fiduciary duty but also removing themselves from making costly mistakes.

The recent case of Clark v. Humes, 2008-Ohio-640 is a perfect example of why it would be a good idea to have an attorney draft documents in a real estate transaction. This case, decided by the 10th District Court of Appeals in Franklin County, centered on an inspection and the documents relating to the agreement on the remedies for unsatisfactory conditions. The case is silent as to whether the parties were represented by real estate agents or attorneys in the negotiations, but it is clear that they were using the Columbus Board of Realtors - Columbus Bar Association Residential Real Estate Purchase Contract.

After the inspection, the buyer submitted a request to remedy. It stated, "4) Beam in crawl space under sunroom to be replaced because of decay. Add additional support under beam. Determine if the cause of moisture is current; if current, repair condition. Method of repair to be decided upon by a licensed, structural engineer. Engineer fee is to be paid for by the seller."

The sellers hired Craig Carson of Craine Engineering. His report stated, "The damaged sill plate should be replaced along the rear of the crawl space. The wood girder should be repaired where damaged. (REAR) Damaged insulation should be removed and replaced. Additional damage discovered during the process and with further investigation should be repaired. Sources of the problem (i.e. grading & drainage) should be addressed. Ventilation should be improved."

The sellers, Humes, got an estimate for repair of the sill plate of approximately $800. The Court stated in paragraph 4 of the decision, "Having investigated the problem, the Humes drafted an "Addendum to Real Estate Purchase Contract" to address the Clarks' concerns. This offer, which the Humes made on April 29, 2004, stated: 4. In reference to issue #4, Sellers have consulted with a structural engineer and will have issue remedied pursuant to the recommendations of that engineer. The Clarks accepted the Humes' proposed remedy for the sunroom problem and when doing so, wrote next to the relevant provision, "[b]uyers agree to recommendation from Craig Carson Craine Engineering dated 4-29-04.""

The repairs were not completed, or even started, prior to closing. The parties agreed to escrow $3,000 with the title agency. Paragraph 8 of the decision, "Ultimately, the Clarks spent $21,482 to remedy the problems with the sunroom. The work included replacing the decayed and rotted sub-floor and support beam; repairing leaking windows; replacing the aluminum siding and decking that was removed to do the necessary repairs; and re-grading the backyard so that water would not drain into the sunroom again. Although the Humes released the $3,000 contained in the escrow account to pay for the repairs, they refused to pay the remaining $18,482 in costs."

The Court awarded the maximum it was permitted, (Municipal Court has a maximum of $15,000). The Humes appealed asserting that they were limited to the $3,000 in escrow. The Court of Appeals determined that it was the Contract and the Addendum that controlled, not the amount in escrow. The well established rule of contract interpretation was reiterated by the Court in paragraph 12. "The construction of contracts is a matter of law. Alexander v. Buckeye Pipe Line Co. (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. When construing a contract, a court's principle objective is to ascertain and give effect to the intent of the parties. Hamilton Ins. Serv., Inc. v. Nationwide Ins. Co. (1999), 86 Ohio St.3d 270, 273. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." Kelly v. Med. Life Ins. Co. (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. In determining the parties' intent, a court must read the contract as a whole and give effect, if possible, to every provision contained in the contract. Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth. (1997), 78 Ohio St.3d 353, 361-362."

In the case of Clark v. Humes, the Court read the plain language of the documents and applied it. While it is not known from the decision what, if any, role real estate agents had in the drafting of the documents, the question is why should it even be a question? When it comes to drafting these documents, it is in the best interests of the clients to have attorneys involved. Furthermore, it is required by the Ohio Revised Code.

Bob Miller of RE/MAX Premier Choice of Dublin, Ohio and past-President of the Columbus Board of Realtors says one of the reasons he recommends an attorney is, "So that an objective attorney can 'double check' the contract language and make absolutely sure, once again, that the contract is written to the Buyer's satisfaction."

Louise Potter of Prudential Calhoon Company Realtors of Hilliard, Ohio says, "Anything can, and will, happen during a real estate transaction. Having a real estate attorney involved from contract on is the best way to ensure your clients are well protected and fully represented on their side of the deal. A good agent knows it is always best to bring in the experts."

Protecting clients by bringing in real estate attorneys, doing what truly is in the clients' best interests, and thereby fulfilling the statutory fiduciary duty also protects the real estate agent as well. If the clients are represented by an attorney, the real estate agent does not risk practicing law.

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GO THE DISTANCE

The mysterious voice in "Field of Dreams" told John Kinsella to "go the distance." I learned the meaning of that in the summer of 1998.

By Richard T. Taps

The mysterious voice in "Field of Dreams" told John Kinsella to "go the distance." I learned the meaning of that in the summer of 1998. As I drove to my office on West Main Street, I thought about a client named Joyce and that we had a real estate closing that morning. Joyce, who was 79, was buying a condo on the west side. The closing was going to be at a title agency on the west side, and I was going to take Joyce to the closing from my office.

Joyce lived in an apartment on the north side of Columbus. She didn't drive so she was going to have to take the No.2 bus on High Street to West Main and walk from there to my office. As I drove to the office, I thought about swinging by Joyce's place and taking her to my office so she wouldn't have to take the bus. But I reconsidered. "Joyce is self-sufficient. She can make it to my office on her own." And she did.

We met briefly to review some issues and go over the closing statement. I asked her, "Do you have the certified check for the amount shown on the closing statement?" She said she did. She left my office to go to the bathroom and didn't return for a long time. When she finally came back, she was very embarrassed and explained that because she wanted to make sure she didn't lose the check, she put it in her bra before leaving her apartment. If her purse was lost or stolen on the bus, she would still have the check. She said that she had stripped down in the bathroom and went through her entire wardrobe. Well, somehow the check had wiggled out of her bra and was gone.

We called COTA. They searched for the check. They didn't find it. We drove to her apartment and retraced her steps to the bus stop. No check.

Fortunately, Joyce still had enough other funds at her bank to get a certified check. She was able to close. The check she lost was never negotiated so eventually she got her money back.

Not long after that sunny day in June, another client, Jean, had an appointment at my office. Jean drove but never to downtown. She said she would take the bus. She didn't want me to pick her up. She often took the bus downtown to go to the music store.

Shortly before the meeting time, she called me from a payphone on West Town Street near the current COSI location. She had gotten off the bus on South High Street but couldn't find Main Street. She was about a half mile from my office, and I explained to her how to walk to my office and hung up the phone. Thinking about Joyce, I thought, "What have you done?" I jumped in my car and found Jean wandering around on Town Street.

We met in my office to plan for her husband who had been admitted to a nursing home. Jean and I became close friends. She became my piano teacher.

The moral of this story is to go the extra mile for your clients. In Joyce's case it would have saved me many miles and Joyce much frustration and embarrassment. In Jean's case, it was my first step to Carnegie Hall. Jean has, however, advised me not to quit my day job.

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Richard T. Taps

Legal Skills Sharpened By Family

By Aaron L. Granger

Throughout my legal career I have been fortunate to work with dynamic mentors who taught me valuable lessons in professionalism, responsiveness to clients, and how to blend critical thought with creativity to solve problems. What most people don't realize is that my family has also played a significant roll in my development as an attorney.

Helping my sister out of a fitness membership contract when she defaulted on her new year's resolution; making sure my brother's landscaper finished the job he was paid to do; or getting my aunt's neighbor to bring in her howling dog after 11 p.m. are not exactly the types of experiences I'm referring too. Those legal detours, although mildly entertaining, have very little application to the real work I do everyday. The truth is, I learned how to be a better lawyer from my wife and children.

For example, I learned how to conduct a discovery deposition from my daughter. She is at an age where her curiosity and thrust for understanding is endless. Her initial question is innocent in appearance and friendly in tone, but it's a set up for the mind numbing series of follow-up questions designed to test my memory, competency, and stamina. Irrespective of my answer she will ask "Why?" The first "why" is followed by another and another as she drills down to the only possible logical conclusion. Instead of accepting the obvious and moving on my daughter, to be absolutely certain, asks again, "Why?" Forcing me into a locked position leaving no wiggle room.

My son on the other hand has helped me tremendously in conducting voir dire. Although he was talkative when he was younger, he has now lost all ability to communicate in more than three word phrases. His vocabulary has diminished to the point where his standard responses are "I don't know," "I don't care," "Yes," "No," and "Whatever." The nightly dinner table discussion may as well be a dentist's office with a full schedule of extractions. I have to be creative to get him to actually say something meaningful rather than simply watch him robotically shake his head up and down or left and right.

One of the hardest things to master is the art of cross examination. I have read articles and attended seminars on the topic but I have learned the most from my wife. You may be wondering how she, a non-lawyer, became so proficient at cross examination. The details are not important but le's just say she's had a lot of practice. The first key is that she already knows the answer before she asks the question. She also does a good job of getting early concessions that seem harmless but help to control the flow of the questioning. Just like a masterful chess player, she anticipates all of the possible responses and maps out a strategy in response that always ends with checkmate!

Although I will be eternally grateful for the colleagues at my firm and the wonderful mentors I have had along the way, I owe a big "Thank You" to my wife and kids for making me the attorney I am today.

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Aaron Granger,
Schottenstein Zox & Dunn

NEWS FROM NAMELESS

By Lloyd E. Fisher Jr.

Dear Cousin Bud:

The depressing recession has finally hit Nameless. We kept hearing about the bank and financial institution problems, the layoffs, cut-backs and bankruptcies all over the country. I even read about the big-city law firms laying off lawyers and support staff. Apparently some firms have deferred hiring law students and one international firm even offered paid sabbaticals to some of the associates. I've been wondering if your office has been affected.

For a long time Nameless was spared but the last few weeks have been bad. Betty over at Betty's Burger Bar and Bingo Parlor says folks are eating at home more and even the "U Pick 3 for $5" specials haven't drawn a crowd. Gibby's Gas N' Go has been running ads for auto repair and maintenance but he sees his customers buying do-it-yourself supplies at Nameless Nifty Market & Hardware.

At first, I didn't think our little law office would be hit too hard but now I'm beginning to see signs of a slow-down. In fact, I've got a problem about which I need your advice. I've kept you informed about Aunt Mable's boy, Junior, the LaSalle Internet Law School graduate who has been learning the ropes here for several years now. He's made good progress but he does get some high-minded ideas from the American Bar Association publications he reads. He's been making remarks about "marketing" the firm and how we should use more technology. After I told him we would need to tighten our belts to ride out the economic downturn, I noticed he was reading "The Wall Street Journal" and some business articles in the "New York Times." Apparently, all this information led him to some individual action that may get us into trouble.

You know Ethel Danzer who for years has been our secretary, paralegal and office angel. Last week she came in my office, shut the door and said: "We've got a problem." She said that she had sent a billing reminder to Hettie Snyder for the balance due on an auto accident insurance dispute that Junior had handled for her. Hettie had called Ethel and indignantly told her that she wasn't required to make a current payment because of the firm's "Hard Times Help" policy.

It seems that Junior was reading about the auto companies' sales pitch that says if a car buyer loses a job or has other money problems, payments can be suspended or the car can be returned without harm to the buyer's credit rating. He apparently told Hettie that if she had money problems, payments on her legal bill would be deferred for six months. Hettie told Ethel that her hours at the bowling alley at Pete's Pin Emporium have been cut way back and she's eligible for Junior's plan.

When I heard Hettie's story, I was dumbfounded. Junior had never talked to me about running a personal recovery program or a stimulus package. When I confronted him in his office, the news got worse. He said he was just doing his bit to keep the firm afloat and was proud of the idea of the "Hard Times Help." I finally asked for a list of clients that he had "put on the plan." Here are the most troubling ones: 1. Junior has escrowed the unsigned Will of an out-of-work horse trainer until his first win on the county fair circuit. 2. Fewell Bunch, Judge Zane Bender's bailiff, says that a plaintiff in one of Junior's fender bender cases tried to get a refund of the court filing fees as a part of Junior's stimulus package. 3. There's a pending adoption case that I don't even want to consider what might be returned by the unemployed adoptive mother.

Bud, I'm trying to get this straightened out before the Disciplinary Counsel's office hears about it, but I may need your help. Talk to you soon.

Your cousin

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

A FEW BOOKS FOR THIS SUMMER

By Janyce C. Katz

The song "Summertime" from the opera Porgy and Bess has a phrase about "the livin' is easy" in the summer. For me, that easy living includes time to read.

I am discussing a few books I found to be thought-provoking and worth reading when that most precious commodity, free time, is available.

Democracy in Session: A History of the Ohio General Assembly (Ohio University Press, May 2009) by David M. Gold, is a general history of the General Assembly, a book badly needed and finally delivered. The preface of the book sets its tone as informative, filled with funny anecdotes and well-written.

In that first section, by comparing the legislatures of 1804, 1904 and 2004, Gold gives a snapshot of the changing functions of our General Assembly, the places in which it met, and the changing roles of the legislators. For example, in 1804, the General Assembly spent time dissolving marriages and returning women to the "single woman" status.

Gold is careful to specify that his book is about the General Assembly as an institution as framed by its rules, the Ohio Constitution, the building in which it has been housed, the customs that evolved through the years, rather than a history of the issues and policies debated by its members.

Gold divided the history into two major sections. The first section discusses the early years and the second part the twentieth century, during which both the governor and administrative agencies became more powerful.

The book is further divided into chapters in which certain customs or functions are traced. Woven into each chapter are morsels about the buildings nearby, such as the Neil House, until about twenty-five years ago, an important hotel/meeting spot in Columbus and the general history of the era.

Of particular interest to me was the chapter on 19th century campaigns. Candidates campaigning for office could be proverbially lost in the woods on issues, but also really lost in a forest. Of course, in addition to hand shaking and baby kissing, a candidate could find himself milking the cow of a potential voter.

Reading about the decision to make Columbus the capital of Ohio and then the construction of the State House are a good reminder that there has always been bickering between different interest groups and maybe a little graft involved in the decision making.

Gold gives readers bits and pieces of interesting stories as he builds his history. He does it well and he footnotes thoroughly. A historian-turned-lobbyist friend of mine looked at the book and said "wow" and is now engrossed in the 600 plus page book.

The book is not an easy read for someone with little historical knowledge. It assumes basic knowledge and the bits and pieces of tales could be confusing. It left me wanting more – perhaps an expansion of this book into a multi volume set.

In contrast, *No Winners Here Tonight: Race, Politics, and Geography in one of the Country's Busiest Death Penalty States* (Ohio University Press, February 209) by Andrew Welsh-Huggins is a book that tells a tale about one difficult subject, the death penalty in Ohio.

The book is much easier to read than Gold's massive history. Welsh-Huggins has a journalist's clear style and the advantage of expanding and detailing only one topic.

However, even with its easy-to-read gripping style, the subject matter is difficult. This history traces the death penalty from the manner in which it was carried out the early years of Ohio until the present time.

Early executions were public. Not only the condemned felons but sometimes a hapless bystander could be killed by the rush of a crowd headed to enjoy the hanging.

In the early years, more visitors were permitted to visit the condemned felon. But, always, the felon's last day became somewhat of a paradox, a mixture of celebrity and its benefits of special food or cigars and pity.

The manner in which the execution has been carried out was also traced – from hangings, to the most recent protocol released in 2007, to condemned prisoners who had filed an open records request and who then gave it to a newspaper. (It's all over when the warden buttons his buttons….)

The book focuses on the history of the death penalty but raises questions – such as why would Hamilton County have more executions than any other county in Ohio if the law is applied the same to all people and why do more death penalty cases involve the murder of a white person by a black person?

A recent poll suggested that seventy percent of Ohioans strongly support the death penalty. It would be interesting to frame that survey around some of the questions raised by Welsh-Huggins in his thought-provoking book.

If you are running away from such heavy topics, there is also the recently-published book by Columbus resident and former frequent visitor to the Statehouse, Alan S. Katchen.

Abel Kiviat, National Champion: Twentieth-Century Tract & Field and the Melting Pot (Syracuse University Press, May 2009, tells a story about a man who loved to run - not for office, but around a track. The law comes into play as Kivat was accused of demanding $40 or $75 dollars for running in a relay and putting the demand in a written document Ah yes, and Justice Weeks held the essential part of a session to decide this issue – without the defense present. Track the rest of the tale yourself.

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By Janyce C. Katz,
Assistant Attorney General,
Executive Agencies

FINI

Closing Argument OR *Razon Amiento Final*

So I was never "a day late and a dollar short."
More accurately, I was a year early ... but still a dollar short.
None of these brilliant schemes enabled me to retire in the
lifestyle to which I'd like to become accustomed.

By Joel H. Mirman

When I was eight years old and helping out in my dad's grocery store, I concluded that milk cartons needed translucent slits in their side so that the level of remaining milk could be seen. My father humored me and sent a prototype to the packaging company. Thanks, but no thanks, was the response. Now my container of liquid Tide has a translucent slit. When I was a new lawyer, I persuaded my bosses to invest in this new technology called videotape so we could provide video depositions on reel to reel tape to lawyers who had never heard of videotape. Legal Video Corporation was born and died in short order. Now video is ubiquitous. In 1990, my friend Phyllis Ives and I started a company that "rented" lawyers and paralegals by the day, week or month. People thought we were crazy. Now the concept is so much a part of the legal landscape as not to draw a comment, let alone a skeptical remark. So I was never "a day late and a dollar short." More accurately, I was a year early...but still a dollar short. None of these brilliant schemes enabled me to retire in the lifestyle to which I'd like to become accustomed.

And now I'm at it again. But this time I may have it right. I'm still practicing law at Adams Babner & Gitlitz, but now I'm telecommuting as much as possible from my place in the sun in Mexico. I've got a computer, a printer, a scanner and a fax. I've got Skype and this clever little piece of hardware called Magicjack that thinks my phone is in Columbus, even though I'm in Mexico, and I'm disgustingly accessible. You can even see my smiling face on Skype ... and believe me, in January I'm smiling much more in 85 degree weather than when I'm facing those wonderful gray, damp and cold days in Columbus.

You may question how seriously I can be taking my practice if I'm doing it from Mexico. When people used to ask the same question about temporary lawyers, my response would be this: "Would you rather have a lawyer put in an 80 hour week, knowing that when she finished the project she would roll right into another killer project, or a lawyer who knew that when the first project was over, there would be time to "restore her tissues." To those who doubt my approach, I ask the same question: "Would you rather have me work on your problem after a relaxing, head-clearing walk on the beach or after slipping on ice in the parking lot on a typical Columbus winter day?"

I'm not alone in my approach. I recently spoke with RoseAnn Rotandaro, one of the founders of Virtual Law Partners LLP (www.virtuallawpartners.com). VLP is a virtual law firm with no bricks and mortar office. Started in 2007, the firm is growing rapidly and now has approximately 40 lawyers, none of whom "go to the office," yet all have active, sophisticated practices. Their pedigrees come from schools such as Harvard, Georgetown, Stanford and the University of Virginia, and they have worked for some of the nation's largest firms and corporations. But VLP has turned the law firm economic paradigm on its head. Instead of the old notion of one-third to compensation, one-third to overhead and one-third to profit, VLP lawyers retain 85% of their fees. If that's not enough to keep them away from the "office," I don't know what is.

So come visit me in cyberspace. It's a sure bet I'll be smiling.

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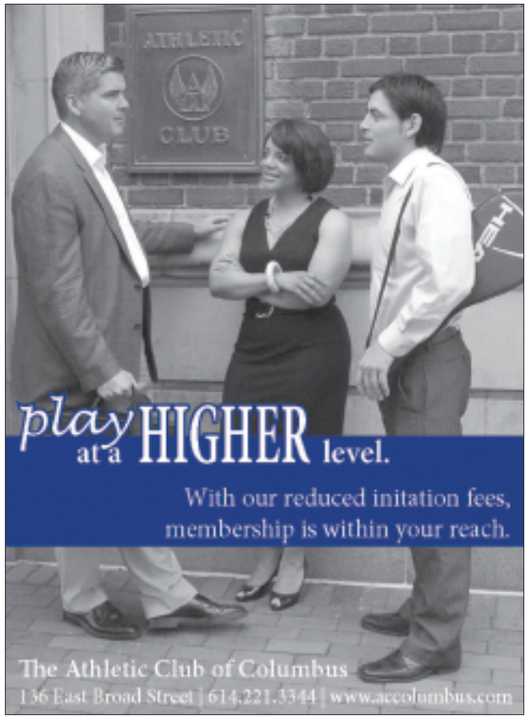
Joel H. Mirman,
Gosh Enterprises, Inc.

Classified Marketplace



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