COLUMBUS BAR

Lawyers QUARTERLY

FALL 2010

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LAWYERS QUARTERLY
FALL 2010

Contents

Better Lawyer

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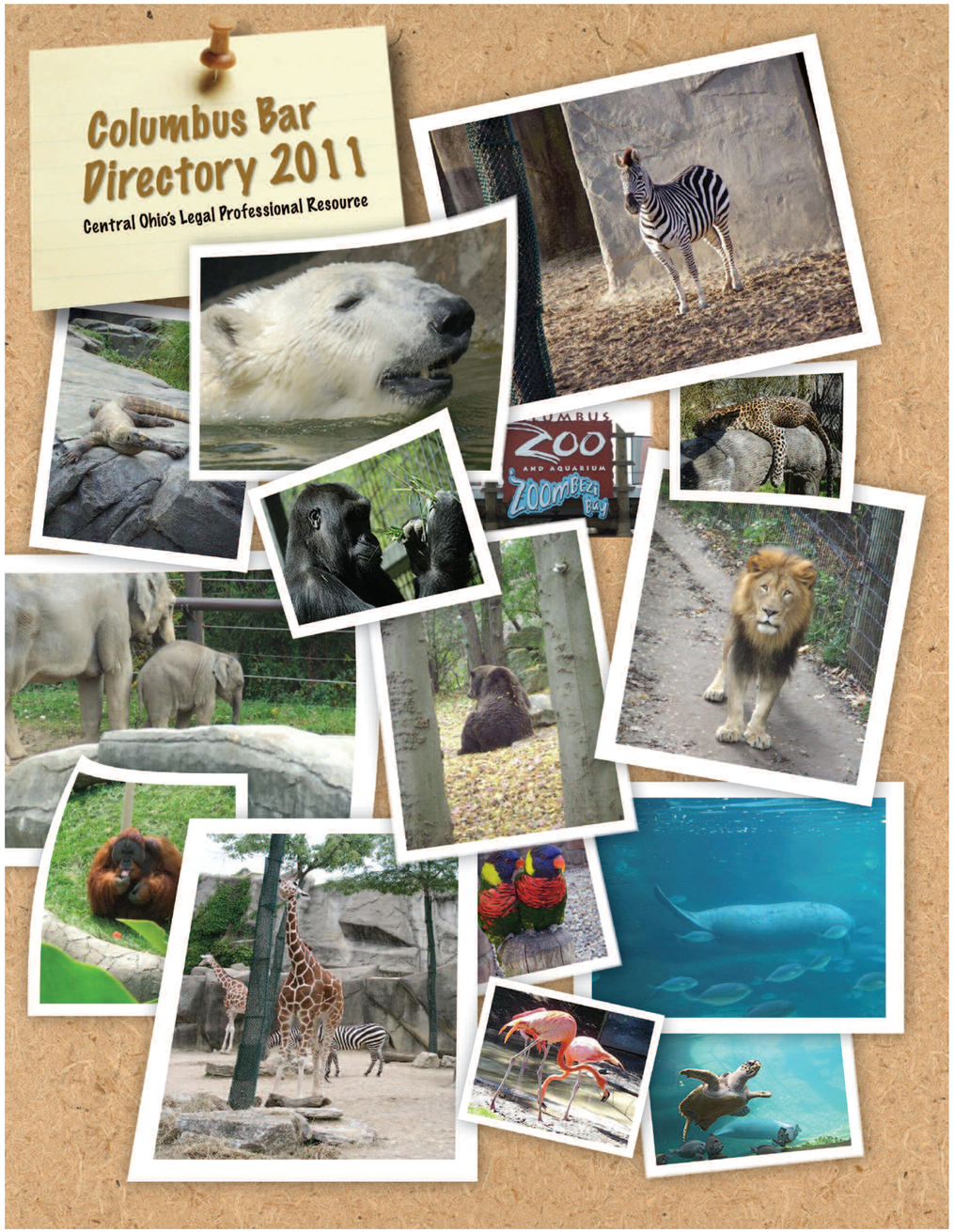

Message from the President

By The Honorable Stephen L. McIntosh

At the recent ABA conference there was a panel discussion on the topic of attorney job satisfaction. Most of the data used by the panel was from a survey conducted by the South Carolina Bar Association,[1] surveying attorneys in North Carolina, Georgia and South Carolina who were licensed to practice 15 years or less. The mission of the panel studying the issues was:

"To identify and address issues regarding retention and satisfaction of attorneys in the practice of law in order to maximize professional potential"

Of those attorneys responding, 30% indicated they would not have gone to law school if they could do it all over again. In an effort to quantify the data, the survey was divided into two broad categories, satisfiers and dissatisfiers – essentially what attorneys like or disliked about their job or the profession. The top five satisfiers were compensation, intellectual stimulation, flexibility, co-workers and client appreciation. The top five dissatisfiers were stress levels, billable hours, money, lack of respect from all, and feeling over your head.[2]

Finally, the survey provided opportunity for open ended responses to some of the top reasons for dissatisfaction. Those included incivility and unethical behavior, flexibility for mothers, billing goals – in general, too much stress for my pay and too much debt for my pay.

There were many conclusions drawn from the survey, too numerous to detail in this article. However, the challenge outline in the conclusion was on how to address the many issues raised by the respondents. The task force intends to recommend actions to address the concerns listed.

A review of the survey results and the discussion that followed did point to an issue we all need to be acutely aware of in our profession – namely, stress. Most statistics indicate that lawyers suffer depression at twice the national average. A few of the stressors that have been identified for attorneys:

Time constraints and deadlines.

The high stakes involved including loss of property, freedom and even life.

The high expectations of expertise.

The constant scrutiny and critical judgment of our work from opposing counsel or the courts.

The legal process in general, which is inherently conflict driven. An opposing counsel is always determined to prove us wrong.

The threat of malpractice, Murphy's law, and cover your backside from other lawyers and even your own clients.

A tendency to assume your clients burden.

The demise of professional cordiality and camaraderie.

The contrast between effective advocacy and personal relationships. While lawyers are trained to be aggressive, judgmental, intellectual, emotionally defended or withdrawn and while that style may have practical value, it may not be popular outside the arena of the legal case.

The professional training that requires us to notice and anticipate the negative and the downside in all situations.

The group norms or culture in the law firm, which carries certain expectations, including high billable hours.

The depletion of energy that comes from high demands, strong focus and the need to stay on task.

Frequent use of defense mechanisms — such as rigidity, compulsiveness and perfectionism.[3]

We all know the studies and the statistics. Much of this data is not news. Yet the issues and problems persist because many of us believe these stresses are part of the job and come with the territory. So we ignore them or just accept them.

The SCBA study in looking at stress easily concluded that it distinctly correlated with all the other dissatisfiers. In other words the other dissatisfiers listed were a root cause of stress. For example, billable hours were high on the list and the demographic which was surveyed had strong negative opinions about it. Comments included that billable hours act as a disincentive to finish a task in a timely manner; that opposing counsel's refusal to settle and/or negotiate was based upon his/her desire to generate more fees; and billable hours is as accurate an indication of quality and value as a scheme to price all restaurant meals by surface area on a plate.

Student loan debt was another stressor. It was best described by this comment: " I am in my 10th year of practice and am just now earning enough money to maintain a modest lifestyle…. I am 40 years old and there seems to be no end in sight for student loan debt."

The conclusions reached? We have to seriously look at the profession starting from the training received in law school (ways to alleviate the massive debt accumulated by attending law

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school) to the current structure of firms and cost of litigation and everything in between.

Some firms have already begun the process of evaluating their structure. Firms are developing profiles when looking at potential associates to determine who may best fit their culture and succeed in becoming a partner as oppose to looking at only the top one to ten percent in a class. They are considering award merit based compensation that takes into consideration not just billable hours but looks at client service and quality of work. Some firms have instituted having no billable hours but a fixed fee with incentives. Flex scheduling, reduced hours, job sharing that does not negatively impact one's ability to become partner are options many firms have instituted. These options and more are to alleviate stress, increase productivity and enhance job satisfaction.

Bar associations also see these as important issues for their members and have begun to look at how they can help address some of them. The SCBA is working with its courts to assess docketing and calendaring of cases, statewide lunch and learn programs, forums on the reality of earning capacity and loan repayment to name a few.

The Columbus Bar is continuing to look at these issues. Last year President Elizabeth Watters in her speech at the annual meeting talked about "making work lives better" and seeking the work/life balance. She used the phrase "wocation," working while on vacation to emphasize that lack of balance. The CBA will continue to be your neighborhood bar in discussing and hopefully helping you deal with the dissatisfiers in the profession. Our noon luncheon series for October and November will address some of these issues. While stress will always be a part of our profession know that the dialogue to offer constructive changes or the solution to dealing with your individual circumstance is always available.

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1. South Carolina Lawyers: The State of the Profession, A Report on the Confidential Survey Commissioned by The Professional Potential Task Force of the South Carolina Bar. By Dr. Bentley Coffey, April 30, 2009.
2. To provide some context other satisfiers included control over your schedule, type of practice, and respect in the community. Other top dissatisfiers included Court appointed cases, disillusionment, unclear expectations.
3. Dr. Standish McCleary, Phd, Stress Management and Burnout

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The Ohio Veterans Wraparound Project: *Wrapping Our Arms Around Veterans*

By Justice Evelyn Lundberg Stratton

Veterans in the Criminal Justice System

Among the 50 states, Ohio has the fifth largest veterans population -- an estimated 900,000. An increasing number of our veterans are developing serious mental illnesses, substance abuse issues (or both) and as a result may end up homeless, unemployed, and disengaged from their family, friends and communities. Many have Post-Traumatic Stress Disorder (PTSD) or the less understood Traumatic Brain Injury (TBI) from repeated concussions and other physical injuries. Because of these factors, some of our veterans will find themselves in the criminal justice system when they only wanted to come home and live the peaceful civilian life they bravely fought to maintain for us. Just as we have learned from our mental health court programs, incarcerating our veterans and throwing away the key is not the solution in dealing with this problem. Since they have given so much for our country and our safety, we need to wrap our arms around our veterans and help them in *their* time of need.

The Ohio Veterans WrapAround Project:

The "WrapAround" approach should not be anything new to Ohio. It's what makes the over 130 specialized docket programs already in existence throughout the state work so well. These specialized docket court programs -- drug, mental health, OVI, re-entry, domestic violence, sex offender, child support enforcement courts, etc. -- introduce participants to new ways of thinking to change how they live and act in order to become productive members of their communities. It is accountability endowed with substantive treatment to enhance real change in behavior.

To try to visualize this concept, I have created a "WrapAround Circle Chart" which is a visual consisting of circles within circles of the help we can wrap around our veterans.

See image below

The first circle is the criminal justice system, representing the initial contact the veteran will have with our local law enforcement, judges, prosecutors, probation officers, and defense counsel who should, if not already, ask the question: "Do you have military experience?" (I learned that many say "no" if only asked if they are a "veteran.") This should be part of all intakes so

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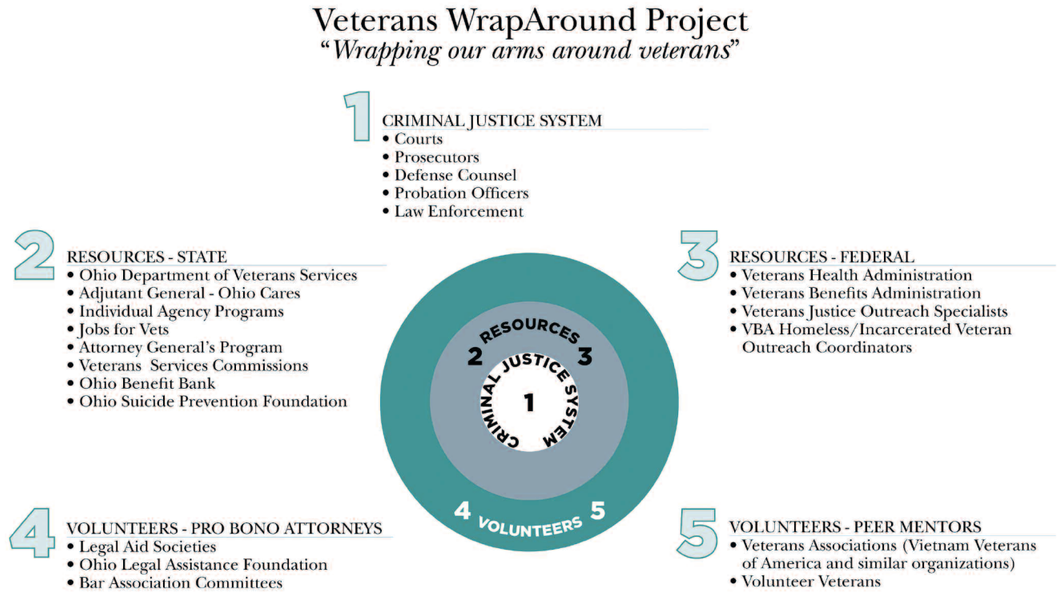

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the process of connecting the veteran to benefits and treatment can begin.

The next circle represents the resources where we can start directing our veterans. Resources can be broken down into two tiers: state and federal. We hope to work with the Ohio Department of Veterans Services to set up a one-stop website, arranged by need categories, where all federal, state, local and even non-profits and volunteer resources can be listed.

The last circle is the volunteer component of the WrapAround Project. We need more pro bono lawyer volunteers. Following the unveiling of the WrapAround Project, the Ohio Legal Assistance Foundation (OLAF) and the Ohio State Legal Services Association are working with us on a program to provide pro bono services for the civil legal needs of veterans that often follow involvement in the criminal justice system. We have some pro bono programs that focus on wills and estate planning, but need so much more legal assistance for the many other needs of veterans and their families. In addition, we have learned that many veterans are calling the Ohio Department of Veterans Services for help on legal issues. We will try to incorporate them into our efforts.

A Work in Progress:

We have much work to do in developing these programs and support systems for our veterans. But through continued leadership of our courts and lawyers working together to better serve our troops, we can give back to the men and women who serve our country and come home to civilian life, only to find that life in shambles. Many need help but won't ask for it. They should not have to ask. In many ways, our veterans have kept us safe and secure. Many have paid a heavy price for their service. Now it is our time to help them. And where can we all start making a difference? The first step is asking every client – whether criminal or civil – if they have military experience. They just may be eligible for assistance and services available to veterans.

Justice Evelyn Lundberg Stratton, The Supreme Court of Ohio

SIGN UP NOW

If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.
— Learned Hand

By Anne M. Valentine

I walk into the old, stained concrete block building (home to an average of 90 men on any given day) as I have done on many Wednesday evenings over the past 20 years. The fading sunlight filters through the smoke filled air that smells of dust and desperation and men who call the shelter home. Wendell and I exchange a warm hello and short briefing on our respective lives since we last saw one another before he shouts over the din of dozens of conversations in the large loud room "Hey. Listen up. The lawyer's here ... Sign up if you need to talk to the lawyer." Wendell has been on staff at the men's only shelter for as long as I can remember. He reminds me each night before I leave, as much as to remind himself, I think, "You and me, we're only a six-pack away from these guys." His way of saying but for the grace of God, go I. I call out the first name on the list and my work begins.

Over the next couple of hours I talk with 15 men. Jake has worked the past five days cleaning out a building on the north end for a man who came to the shelter to recruit workers for a hard, dirty job. Jake does the work. The man will not pay what is due. A few telephone calls and letters later I track the man down and Jake gets his money. Ray-Ray signs up just to talk. He signs up week after week and I have finally convinced him he need not make up a problem so we can talk. He now waits until I have called all the names on the list. The next three men want to have their criminal records expunged so they can get a job. None of them meets the strict statutory requirements. At least half of the guys have no tangible legal problem with which I can help. At least they have been heard. Someone took the time to listen.

Why do I share a glimpse of my experience as a volunteer with the homeless project with you? Because I believe that as trial lawyers we have unique skills to offer those who are most in need of legal help. Sometimes we forget that. None of the people mentioned above needed a "trial lawyer." None of them had any problems within my area of expertise. But the skills of determination, identification with the less powerful in our communities and the network we build as a trial lawyer is all that is needed to make a difference. Lawyers are in a unique, powerful position in our society. We hold a monopoly on who is actually able to access the justice system. We have a professional, and I believe, personal obligation to use that power to benefit the poor. Pro bono work is for all of us.

I know we all struggle with whether or not to accept the tough case given the frustration we endure trying to obtain a good result. Yet what I hear from you, colleagues and friends, is that you take those cases because those people are as deserving of legal help as any other and without you they will be cheated by the insurance company, the State or the system. In effect, you agree to help because not to help is to deny that person access to justice.

The poor, the homeless lack the resources to access justice. You can be the link that is needed to open the door. Trial lawyers represent the highest ideals of our profession. We are routinely on the cusp of guaranteeing justice for our clients. Pro bono work is a gift we owe. The CBA has many opportunities for lawyers to volunteer their legal talent. Many of the programs offer training and mentoring to help you deal with issues outside of "your expertise." You will be pleasantly surprised how much you have to offer.

Hear me when I tell you for the little effort I expend, the rewards are awesome. I always leave the shelter with so much more than I gave. The sense of satisfaction, good fortune and empowerment that fills me with each shift I volunteer is worth its weight in gold. Try it. You will like it.

For more information contact She'lia Bolding, Lawyers for Justice Pro Bono Coordinator at 614.340.2074

*no real names have been used

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CIVIL JURY TRIALS

FRANKLIN COUNTY COMMON PLEAS COURT

By Belinda S. Barnes and Monica L. Waller

Verdict: $150,000. Property. Plaintiff City of Gahanna tried unsuccessfully to purchase 10.592 acres located at the rear of Defendant George Weber, Jr.'s property for park land and to develop a recreational trail along Big Walnut Creek. When the parties could not agree on the terms of the conveyance, the City of Gahanna filed a petition for appropriation. Mr. Weber did not deny the necessity of the taking, therefore the only issue for the jury was the amount of compensation due for the property. Based on an appraisal, the City of Gahanna concluded that the land was worth $12,500/acre for a total of $132,400. Mr. Weber refused to sell at that price. Mr. Weber hired an appraiser who concluded that the property was worth $14,161/acre for a total of $150,000. The City of Gahanna offered to pay Mr. Weber $150,000. However, Mr. Weber refused. Mr. Weber maintained that the value of his property was $25,000/acre for a total of $264,800. Plaintiff's Expert: Charles Porter, Jr., MAI, SRA (Appraiser) Defendant's Expert: Brian Barnes, MAI. Last Settlement Demand: $264,800. Last Settlement Offer: $150,000. Length of Trial: 1 day. Plaintiff's Counsel: Brian M. Zets. Defendant's Counsel: none. Judge Sheward. Case Caption: *City of Gahanna, Ohio v. George W. Weber, Jr., et al*. Case No. 08 CVC 11645 (2009).

Verdict: $10,623.23. (Tripled to $31,869.69) Consumer Protection. Plaintiff Keelie Green bought a used 2000 Volkswagen Beetle from Defendant Germain Ford of Columbus on June 6, 2004. She financed the vehicle through Defendant National City Bank. Plaintiff alleged that the dealer at Germain Ford told her that the vehicle was previously owned by a pregnant woman who needed a larger car. Plaintiff later discovered that the vehicle had been involved in a serious accident and sustained significant damage resulting in numerous mechanical failures. She brought the vehicle in for repair in August of 2004 and it was not able to be repaired. Plaintiff's Expert: Troy Cultice (Automobile Service Writer). Defendant's Expert: None. Settlement negotiations were not reported. Length of Trial: 6 days. Plaintiff's Counsel: Ronald Burdge of Dayton. Defendant's Counsel: Michelle R. Dudley. Judge Travis. Case Caption: *Keelie Green v. Germain Ford of Columbus, LLC, et al*. Case No. 05 CVC 5234 (2008).

Defense Verdict. Medical Malpractice. Plaintiff Linda Weinstock (a 58-year-old high school teacher) became a patient of Sharon McQuillan, M.D., a family practitioner, on April 9, 2001. During the initial visit, Ms. Weinstock complained of symptoms of hypothyroidism including, fatigue, bloating, weight gain, depression and elevated blood pressure. Dr. McQuillan performed blood studies and found that the Plaintiff's thyroid values were within normal limits although the T3 level was at the low/normal range. Based on these symptoms and test results, Dr. McQuillan prescribed Armour Thyroid on April 23, 2001. At the next visit, Plaintiff reported improvement in her symptoms. In August 2001, Dr. McQuillan sold her practice to co-defendant Imtiaz Kazi, M.D. with whom Plaintiff continued to treat. Dr. Kazi refilled Plaintiff's Armour Thyroid prescription in December 2001. In February 2002, Plaintiff began complaining of loss of muscle strength and difficulty with vision. Dr. Kazi reduced the prescription of Armour Thyroid. In July 2002, Plaintiff's blood studies were repeated and found to be abnormal. Dr. Kazi diagnosed her with iatrogenic hyperthyroidism. Plaintiff was ultimately diagnosed with Grave's disease, an autoimmune disorder to which Plaintiff was genetically predisposed and for which one of the main features is hyperthyroidism. Plaintiff underwent a procedure whereby her thyroid was radioactively deactivated. Plaintiff contended that she suffered from osteoporosis, depression, excessive weight loss, vision problems, mood swings, hair loss, dry skin and lack of stamina—all symptoms of Graves disease. Plaintiff claimed that Dr. McQuillan negligently and unnecessarily prescribed Armour Thyroid to her, that the Armour Thyroid caused iodine induced hyperthyroidism, that the onset of hyperthyroidism created stress which in turn triggered the onset of Graves disease. Plaintiff further alleged that Dr. McQuillan misrepresented her board-certification. Defendants claimed that the prescription of Armour Thyroid was not a breach of the standard of care and that Plaintiff's Graves disease was not caused by the medication. Defendants denied that Dr. McQuillan misrepresented her status regarding board certification. Medical Bills: $40,000-$45,000 in past medical specials, $23,067.58 alleged in future medical specials. Lost Wages: $33,000. Plaintiff's Expert: Richard Guttler, M.D. (endocrinologist) Defendant McQuillan's Experts: William A. Malarky, M.D. (endocrinology), Neal Rouzier, M.D. (emergency medicine), Kenneth Cahill, M.D. (ophthalmology); Last Settlement Demand: $1,000,000. Last Settlement Offer: $42,500 (from Defendant McQuillan), $12,500 (from Defendant Kazi). Length of Trial: 9 days. Plaintiff's Counsel: Leigh Ann Simms. Defendant's Counsel: Greg Rankin (Dr. McQuillan), Fred Fifner (Dr. Kazi). Judge Hogan. Case Caption: *Weinstock v. McQuillan, et al*., Case No. 04 CVH 12376 (2009). (Note-- After the verdict, Plaintiff moved for a mistrial, a new trial and for judgment notwithstanding the verdict. In Plaintiff's motions for a mistrial and a new trial Plaintiff's counsel claimed that she suffered a stroke on the second day of trial and that her medical condition impaired her ability to properly represent Plaintiff. Defendant McQuillan filed a motion for sanctions seeking fees and expenses due to Plaintiff's counsel's failure to appear on the second day of trial due to the alleged stroke. All motions were denied. Plaintiff appealed the denial of the motions for a mistrial and/or a new trial. Defendant moved to dismiss the appeal as frivolous and moved for attorney's fees. The Court of Appeals upheld the trial court's decision, finding that Plaintiff's evidence did not support the allegation that her counsel suffered a stroke during trial. The Trial Court also denied Defendant's motions. Case No. 09 AP-539 (2009).)

Defense Verdict. Slip and Fall. On March 31, 2006, Plaintiff Florence G. Cabakoff was a patron at Defendant Turning Heads Hair Designs, Inc. when her foot got caught in a power cord when she attempted to rise from the salon chair and fell. She suffered a fractured left femur which was surgically repaired with the use of plates and screws. Plaintiff admitted that the cord was visible as she was sitting in the chair and that she saw it before she fell. However, she maintained that the cord created a dangerous condition that was not "open and obvious" because she did not see the cord as she fell. Plaintiff also argued that the stylist moved the cord and the chair after Plaintiff saw the cord and before she fell. As a result of these attendant circumstances, Plaintiff argued that the "open and obvious doctrine" did not apply. Defendants claimed that the cord was open and obvious and not the cause of Plaintiff's fall. Defendants claimed Plaintiff fell because of swelling and stiffness that was caused by a health condition unrelated to the power cord. Defendants were granted summary judgment and Plaintiff appealed. The Court of Appeals reversed the summary judgment decision and remanded the case for trial. The jury found that the hazard was open and obvious and rendered a verdict in favor of Defendants. Medical Bills: $135,418.31. Lost Wages: None. Plaintiff's Expert: Laura Pfeiffer, M.D. Defendant's Expert: none; Last Settlement Demand: $100,000. Last Settlement Offer: none. Length of Trial: 3 days. Plaintiff's Counsel: Stan Dritz and Chadd McKitrick. Defendant's Counsel: Kevin Bush. Judge Reece. Case Caption: *Florence G. Cabakoff v. Turning Heads Hair Designs, Inc., et al.*, Case No. 07 CVC 7030 (2009).

Defense Verdict. Breach of Contract/Construction. Plaintiff condominium owners claimed that the defendant general contractor did not construct their condominium in a good and workmanlike manner. Plaintiffs' condominium was one unit of a 32 unit mid-rise condominium building. Plaintiffs' alleged that the tile floors were not level, that they could hear hammer sounds when the toilets were flushed, that the windows failed to open properly, that the HVAC did not sufficiently heat and cool the condominium, that carpet was not installed correctly, that exhaust fans were too noisy, and that the balcony did not drain properly. Defendant denied the allegations and argued the condominium unit was constructed in accordance with the contract and specifications. Plaintiff claimed damages in excess of $115,000. The jury found for the Defendant as to all claims. Plaintiffs' Experts: Donald Schofield (architect) and Michael Collins, P.E. Defendant's Experts: Michael Keister and Ralph Kramer, P.E. Last Settlement Demand: None. Last Settlement Offer: $15,000. Length of Trial: 5 days. Plaintiffs' Counsel: Ray J. King. Defendant's Counsel: Kerry T. Boyle. Judge Frye. Case Caption: *A. Patrick Tonti, et al. v. East Bank Condominiums, LLC, et al.* 2008 CV 5256 (2009).

Defense Verdict. Auto Accident. Plaintiff Tabitha Felder claimed that on February 22, 2006 she was traveling southbound on Joyce Road when Defendant Sam Jones drove his tow truck into the side of her vehicle from the private parking lot of a salvage yard. Mr. Jones claimed that his truck was parked off the drivable portion of Joyce Road when Ms. Felder sideswiped him. No citations were issued. Ms. Felder had three passengers in her vehicle-- Plaintiff Doris Williams, Ms. Williams' daughter, Tamitha Williams and Plaintiff Tamika Wyche. Plaintiff Tabitha Felder alleged that she suffered a neck strain and chest wall contusion as a result of the accident. She did not claim that her injuries were permanent. Mr. Jones alleged that Ms Felder did not sustain injuries which required medical treatment and that her condition was the result of a pre-existing stress disorder. Plaintiff Doris Williams claimed to have suffered a chest contusion, abdominal contusion and neck strain. She claimed that her injuries were permanent. Mr. Jones claimed that Ms. Williams had pre-existing neck pain and that she was on her way to the hospital for another serious medical condition when the accident occurred. Plaintiff Tamika Wyche (14-years-old at the time of the accident) claimed to have sustained neck pain and a concussion. Medical Bills: Plaintiff Williams alleged $17,820.00 in medical specials, $1,141.20 of which was written off; Plaintiff Felder claimed $4,196.25 in medical specials, $752.38 of which was written off; Plaintiff Wyche claimed $3,430.80 in medical specials, $128.43 of which was written off. Lost Wages: None. Plaintiff's Expert: Edwin Season, M.D. Defendant's Expert: none; Last Settlement Demand: unknown. Last Settlement Offer: $500 for each Plaintiff. Length of Trial: 2 days. Plaintiff's Counsel: Ralph Buss of Painesville. Defendant's Counsel: Kim Schellhaus. Judge Reece. Case Caption: *Tabitha Felder, et al. v. Samuel Jones, et al.*, Case No. 06 CVC 5264 (2008).

Defense Verdict. Auto Accident. On January 4, 2004 Defendant Carla Braxton was northbound on Interstate 270 during heavy rain when she lost control of her vehicle and spun across several lanes of travel. Plaintiff Donna Claimpit, then 37-years-old was also headed northbound on Interstate 270 and claimed that Ms. Braxton struck her vehicle and caused it to strike the median wall. Ms. Braxton denied any contact between the two vehicles. Plaintiff claimed soft tissue injuries to her back, neck and post concussion syndrome. Plaintiff treated with her family doctor and physical therapy. Defendant present evidence at trial that no accident occurred and if there was an accident, the force of impact could not have caused injuries claimed. Medical Bills: $16,399.80 (reduced to $9,905.41 with write-offs). Lost Wages: None. Plaintiff's Expert: Stephen Stack, M.D. Defendant's Expert: Gerald Steiman, M.D. (neurology) and James Spieth (accident reconstruction); Last Settlement Demand: $25,000. Last Settlement Offer: none. Length of Trial: 1 day. Plaintiff's Counsel: Pete Rodocker. Defendant's Counsel: Edwin Hollern. Magistrate Ed Skeens. Case Caption: *Donna J. Clampit v. Carla E. Braxton, et al.*, Case No. 08 CV 7040 (2009).

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Filing an Administrative Appeal
Easing the Process

By Thea L. Allendorf

Revised Code 119.12 provides a roadmap for filing an appeal from an administrative decision. Recent Supreme Court of Ohio precedent made navigating that roadmap a bit tricky for the unwary appellant. The General Assembly, however, has amended R.C. 119.12 to smooth the path for appellants.

R.C. 119.12 allows any party adversely affected by an adjudicatory administrative order to appeal that order to a court of common pleas. When a statute confers a right to appeal, the appeal can be perfected only in the mode prescribed by that statute. Ramsdell v. Ohio Civil Rights Comm. (1990), 56 Ohio St.3d 24, 27. Thus, if an appellant deviates from the filing requirements set out in R.C. 119.12, the court of common pleas never acquires jurisdiction over the administrative appeal. Missing a turn on the R.C. 119.12 roadmap results in the dismissal of an appellant's appeal for lack of jurisdiction.

Thankfully, then, the roadmap appeared to be fairly straightforward:

> Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of the party's appeal. A copy of the notice of appeal shall also be filed by the appellant with the court.

Simple, right? Well, not after the Supreme Court decided Hughes v. Ohio Dept. of Commerce, 114 Ohio St.3d 47, 2007-Ohio-2877, and MedCorp, Inc. v. Ohio Dept. of Job and Family Servs., 121 Ohio St.3d 622, 2009-Ohio-2058.

In Hughes, the Supreme Court held that R.C. 119.12 required appellants to file their original notice of appeal with the agency and a copy of the notice with the court of common pleas. If an appellant mistakenly filed a photocopy with the agency and the original with the court, dismissal for lack of jurisdiction was warranted. Justice Pfeifer dissented from this decision, writing that it elevated procedure over substance. Regardless of whether the notice of appeal filed with the agency was an original or copy, it accomplished the purpose of the R.C. 119.12 filing requirement -- to notify the agency of an appeal.

Two years after Hughes, the Supreme Court decided MedCorp, holding that an appellant had to identify specific legal or factual errors in his notice of appeal to satisfy R.C. 119.12. Up until MedCorp, the vast majority of notices of appeal simply stated that the agency's order was not in accordance with law and was not supported by reliable, probative, and substantial evidence. These "grounds of the party's appeal" mirror the standard that courts of common pleas use to review agencies' orders. MedCorp required more than a recitation of the standard, but the decision provided little guidance as to exactly how much more.

The dissenting justices criticized the MedCorp decision for adding a degree of specificity to R.C. 119.12 that the plain language of the statute did not include. Moreover, Justice O'Donnell decried the complication that MedCorp introduced into the filing process, and he urged the General Assembly to clarify its intent. The General Assembly answered Justice O'Donnell's call.

On June 2, 2010, the 128th General Assembly enacted Sub. H.B. No. 215. Effective September 13, 2010, amended R.C. 119.12 reads:

> Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and stating that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal shall also be filed by the appellant with the court. In filing a notice of appeal with the agency or court, the notice that is filed may be either the original notice or a copy of the original notice.

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and stating that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law.

No longer must an appellant delineate specific legal or factual errors in his notice of appeal; nor must an appellant differentiate between the original and the copies of his notice of appeal when filing that notice with the agency and the court.

The General Assembly also provided a safe harbor for certain appellants who belatedly discovered that their notices of appeal ran afoul of Hughes or MedCorp. Amended R.C. 119.12 states:

> The amendments made to this paragraph by Sub. H.B. 215 of the 128th general assembly are procedural, and this paragraph as amended by those amendments shall be applied retrospectively to all appeals pursuant to this paragraph filed before the effective date of those amendments but not earlier than May 7, 2009, which was the date the supreme court of Ohio released its opinion and judgment in Medcorp, Inc. v. Ohio Dep't of Job and Family Servs. (2009), 121 Ohio St.3d 622.

This provision attempts to render appeals filed after May 7, 2009 impervious to motions to dismiss based on the appellant's failure to comply with Hughes or MedCorp.

Moreover, although these amendments override Hughes and MedCorp, they may create new technicalities to trip up appellants. Amended R.C. 119.12 requires a notice of appeal to state that the agency's order is not supported by reliable, probative, and substantial evidence and that the order is not in accordance with law. During a recent oral argument before the Tenth District Court of Appeals, an attorney with the Ohio Attorney General's office asserted that, under amended R.C. 119.12, the court of common pleas lacked jurisdiction over an appeal when the notice of appeal only stated one of these grounds. Thus, the battle of form versus substance continues.

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Thea L. Allendorf,
Tenth District Court of Appeals

APPELLATE ADVOCACY AT TRIAL

By Glen R. Pritchard

When litigation justifies the involvement of two lawyers, the "lead trial attorney" often enlists a "second chair" to help. The role of the second chair, usually a less experienced attorney, is to assist the trial attorney with whatever is needed to prepare and try the case. The second chair's duties might include any aspect of trial practice, including research, brief writing, and examination of less crucial witnesses. In many cases, the second chair simply does what the lead lawyer does not have time to do.

Let us consider a more formal division of labor between two lawyers on the same trial team. One that envisions success not only at trial, but on appeal as well. A division of labor between the trial attorney and the appellate advocate.

The role of the appellate advocate on the trial team should be of particular interest to the plaintiff's attorney. A recent study of state court appeals showed that plaintiff's win reversal on appeal only 21.5 percent of the time, drastically less than their defense colleagues who win reversal at a rate of 41.5 percent.[1] The reasons for this disparity are not altogether clear. But litigation is a process, and trial is not the end of it.

Let us pause to recognize that the skills needed to win at trial are different than those needed to succeed in the court of appeals. The trial attorney focuses, as he or she must, on the development of facts necessary to prove or disprove each element of the cause of action alleged in the complaint and the presentation of those facts to a jury. The trial attorney deposes witnesses, culls documents, and cultivates the expert opinions needed to build a persuasive factual presentation that will compel a favorable result by the finder of fact.

In the court of appeals, on the other hand, the facts are fixed in the trial record, and the legal issues take center stage. The shift in focus from the facts at trial to the law on appeal entails that the trial lawyer and the appellate advocate rely on different skills. Appellate litigation . . . calls for special skills that are substantially different from those of the trial litigator and, in fact, have no duplicate in any area of law practice. The skill that is perhaps the most important and unique to the appellate litigator is that of developing and working with the record on appeal. Everything that happens in the appellate court is premised on what happened in the trial court, and what happened in the trial court is determined by what is shown in the record. It is crucial, consequently, that the litigator know how to ensure that essential items become part of the record in the trial court, and are included in the appeal record. It is also important that the appellate litigator know how to review a record to determine the issues that can be raised on appeal and that he be able to distinguish between the issues that can be raised and those that should be raised. Once the issues are selected, the attorney must be able to develop them into meaningful arguments, always tying those arguments to the facts as shown by the record.[2]

Given the difference between trial and appellate advocacy, adding an appellate advocate to the trial team to handle specific aspects of the trial, as outlined below, may be more effective than two trial lawyers sharing responsibility for all aspect of the trial.

The Roll of the Appellate Advocate Before Trial

The motion for summary judgment stage of the litigation is often an opportune time to involve an appellate advocate in a case. Preparing a motion for summary judgment, or defending against an opposing one, will give the appellate advocate the opportunity to become familiar with the legal issues as they apply to the facts of the case. This effort will not be wasted as the issues presented on summary judgment will likely reappear at trial and again on appeal.

In the days immediately before trial, the trial attorney will want to coordinate witness examination, prepare exhibits, and implement a consistent trial theme. As the trial date approaches, however, a number of distractions will inevitably arise. The appellate advocate can help.

The appellate advocate should be responsible for challenges to the admissibility of expert testimony which is now common, especially in federal court, under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[3] Pursuant to Daubert, the federal trial judge acts as "gatekeeper" in determining not only whether an expert is qualified, but also whether the expert's methodology is sufficiently reliable to allow the expert's opinions to be considered by the jury. The appellate advocate will have a thorough understanding of the applicable Daubert reliability standards and the tools used by judges to determine whether those standards have been met.[4] The decision to admit or exclude expert testimony will frequently be the subject of appellate review. The appellate advocate should be prepared to challenge the admissibility of expert testimony offered by the opposing party as well as respond to the opposing party's Daubert challenges.

Likewise, the appellate advocate should prepare motions in limine seeking exclusion of damaging evidence and respond to motions in limine filed by the opposing party.

If proposed jury instructions must be filed before trial begins, appellate counsel can draft instructions that are both advantageous and legally defensible on appeal.

Appellate counsel should anticipate legal arguments the opposing party will raise at trial. The opposing party must make choices about what evidence to use, what arguments to make, what document to introduce, and what objections to raise. To the extent possible, the litigation team must be prepared to respond to anything. Appellate counsel should prepare short bench memoranda to help the judge rule favorably on evidentiary and procedural issues that could arise depending upon how the opposing party chooses to try its case. Appellate counsel should also be prepared to argue those points at trial when the time comes.

Of course, the extent to which the trial attorney will stay involved with these pre-trial tasks is a matter of preference. But, involving an appellate advocate will allow the trial attorney to spend more time preparing a compelling factual presentation than would otherwise be available.

The Role of the Appellate Advocate During Trial

Objections and Protecting the Record

While the trial attorney is embroiled in the heat of trial, appellate counsel is in a better position to monitor the record as it is being created. Appellate counsel will remain mindful that:

Objections must be properly raised to avoid waiver on appeal;[5]

Excluded evidence must be proffered into the record;[6]

Answers to ambiguous questions, unclear answers to unambiguous questions, and non-verbal gestures must be clarified for the record;

Proposed jury instructions must be filed, and an objection must be made to the trial court's refusal to give a proper instruction, or to the giving of an improper instruction, before the jury retires to deliberate;[7]

The decision in *Van Scyoc v. Huba*[8] illustrates how a misstep in creating the record can result in a problem on appeal. The appellant in Van Scyoc assigned as error the trial court's failure to give a proposed jury instruction. Appellant's counsel filed the instruction and explained to the Court, on the record, why the instruction should be given. Counsel did not, however, formally object after the Court refused to give the instruction. Not wanting to elevate procedure over substance, the Van Scyoc court held that a formal objection before the jury retired for deliberations, pursuant to Civ. R. 51(A), was not necessary when "a party makes a position sufficiently clear such that the court has an opportunity to correct a mistake or defect in the instruction."[9]

One might then conclude that Appellant's counsel dodged the bullet and successfully preserved for appeal the issue of whether the trial court erred in failing to give the requested instruction. Wrong! As it turns out, after the jury retired to begin its deliberations, the trial court asked both counsel whether they wanted any additions, corrections or alterations to the jury charge, and whether they wanted to renew any objections. The Van Scyoc court concluded that, although Appellant's conduct in requesting the instruction was equivalent to an objection for the trial court's refusal to give it, the appellant effectively withdrew the objection by failing to renew it when given the opportunity to do so.

At trial, the appellate advocate will constantly monitor the proceedings from the perspective of how the record is going to look. This perspective may avoid waiving error which could limit the options available on appeal.

Research and Writing

The unexpected happens at trial. The opposing party will raise new arguments. The judge will want the parties to brief legal issues. At night, while the trial attorney is preparing for the next day's witnesses, the appellate advocate can attend to these research and writing duties.

Jury instructions and Interrogatories

After the evidence is submitted, the trial lawyer wants to hone the best possible closing argument. Very often, the trial lawyer instead finds herself engaged in a protracted conference with the court and opposing counsel to finalize the jury charge. Having drafted the proposed jury instructions, the appellate advocate will be in the best position to handle this conference, freeing the trial lawyer to focus on closing argument.

The appellate advocate must also craft jury interrogatories with care to preserve issues on appeal. If a jury returns a general verdict and its mental processes are not tested by special interrogatories to indicate which issue was determinative, the appellate court will presume that all issues were resolved in favor of the prevailing party. And, if any of the issues presented were free from error, error in presenting another issue will be disregarded.[10] The appellate advocate will create jury interrogatories designed to prevent such pitfalls.

The Role of the Appellate Advocate Post-Trial

Motions for new trial and for judgment notwithstanding the verdict are standard practice following a trial court judgment, if for no other reason than they extend the time for filing an appeal.[11] The issues raised by these motions will likely echo many of the issues raised on appeal. If the appellate advocate has been on the trial team from the start, he or she will be in an excellent position to seamlessly take the lead in filing, or defending against, post-trial motions as well as the appeal that follows. Even if appellate counsel was not actively involved at trial, the post-trial motions still provide the best platform for the appellate advocate to lead the case into the appellate court.

Final Thoughts

An appellate advocate can bring objectivity to an appeal in a way that the lawyer who tried the case cannot. Having concluded that the appeal before him was "dead on arrival", one appellate judge explained this advantage:

We . . . observe that trial attorneys who prosecute their own appeals, such as appellant, may have "tunnel vision." Having tried the case themselves, they become convinced of the merits of their cause. They may lose objectivity and would be well served by consulting and taking the advice of disinterested members of the bar, schooled in appellate practice. We suspect that had appellant done so they would have advised him not to pursue this appeal.

Ultimately, however, an appeal is won or lost based on the record created at trial. Involving the appellate advocate at trial, while the record is being created, can therefore help.

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1. Theodore Eisenberg & Michael Heise, Plantiphobia in State Courts? An Empirical Study of State Court Trials on Appeal, 38 J. Leg. Stud. 121 (Jan. 2009), available at http://scholarship.law. cornell.edu/lsrp_papers/79.
2. Appellate Litigation Skills Training: The Role of the Law, 54 U. Cin. L. Rev. 129 (1985), 138-9.
3. 509 U.S. 579, 113 S.Ct. 2786.
4. For example, the Federal Judicial Center has produced the 638 page Reference Manual of Scientific Evidence, Second Edition (2000) to assist the federal bench in evaluating scientific methodology for purposes of determining admissibility of expert opinions. It is available at http://www.fjc.gov.
5. State v. Colon, 119 Ohio St. 3d 204, 2008-Ohio-3749.
6. Ohio Ev. R. 103(A)(1).
7. Ohio Civ. R. 51(A).
8. Van Scyoc v. Huba, 9th Dist. No. 22637, 2005-Ohio-6322.
9. Van Scyoc, at ¶16, citing Callahan v. Akron Gen. Med. Ctr., 9th Dist. No. 22387, 2005-Ohio-5103.
10. Centrello v. Basky (1955), 164 Ohio St. 41, 128 N.E. 2d 80
11. App. R. 4(B)(2).

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Appealing

EQUAL ACCESS V. FREE ASSOCIATION?

Public Universities, Student Organizations, and the First Amendment after *Christian Legal Society v. Martinez*

By Larry S. Hayman

Think back, if you can, to your law school orientation. Certainly, between ice cream socials and presentations on how to brief a case or generate an outline, you perused the many student organizations that were available to you for membership and participation over the next three years. I know that I did.

Now, imagine finding a group that you were interested in joining; one bearing the name of your new law school and funded with your tuition dollars. But now imagine being rejected from that group, and told that you are not eligible for membership based on some pre-determined personal characteristic over which you have no control (take your pick - eye color, skin color, sexual orientation, etc.). Such was the setting for a case that recently made its way all the way to the United States Supreme Court this past term.

In Christian Legal Society v. Martinez, the Christian Legal Society at the University of California-Hastings College of the Law sought the right to exclude those students who "engage in unrepentant homosexual conduct," from its membership rolls. It was the group's First Amendment right, it argued, to associate itself with whomever it wanted. Such exclusion did not jibe well, however, with the law school's policy requiring all officially recognized student organizations to accept all students, regardless of their status or beliefs.

Such official recognition brought with it several benefits from the school, including the use of school funds, facilities, channels of communication, as well as the right to use the school's name and logo. CLS thus sought exemption from the law school's policy, in order to retain the benefits of official recognition without having to abide by the nondiscrimination policy. That request for exemption was denied by the law school. The law school did offer the group use of university facilities, but not the school's funds nor the use of the school's name or logo. Thereafter, CLS filed suit in U.S. district court alleging a denial of its First and Fourteenth Amendment rights. The group lost at both the district court and at the court of appeals, and appealed the case all the way to the United States Supreme Court.

In a 5-4 decision, Justice Ginsburg, writing for the majority, held that the law school's policy did not violate constitutional restraints. To reach that conclusion, the majority analyzed the case under the Court's less-restrictive, "limited public forum" analysis (the analysis urged by the law school), as opposed to the more exacting "freedom of expression" analysis urged by CLS. Employing this analysis, the Court only needed to determine whether the restriction on access to the public forum was 1) reasonable and 2) viewpoint neutral.

Taking into account the judgment of the law school's administration that the equal access policy was necessary, as well as the fact that the policy promoted diversity, tolerance, and cooperation, and was consistent with state law, the Court deemed the law school's policy reasonable. Further, because the policy applied to all student groups, it was viewpoint neutral. Thus, the law school's policy survived constitutional muster, much to the chagrin of the dissenters, who believed the majority opinion allowed principles of political correctness to trump those of freedom of expression.

The full impact of this decision remains to be seen. Certainly, its implications will unfold over time, perhaps both inside and outside the realm of educational law. To be sure, public universities may now require even-handed enforcement of their non-discrimination policies. Prior to this decision, on account of legal challenges brought by CLS, some schools across the country relented and revised nondiscrimination policies to exempt religious groups from uniform nondiscrimination policies of this nature. The Ohio State University, for example, was sued in federal court in 2004 after it threatened to withdraw recognition of its CLS chapter for failure to abide by the University's nondiscrimination policy. In response to that suit, the University amended its policy to allow religious student groups to "adopt a nondiscrimination statement that is consistent" with their sincerely held religious beliefs rather than abide by the University's broader nondiscrimination policy. That revision, and many like it in public universities in the United States, will almost certainly be revisited in light of the Court's holding.

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Promotion and Tenure and the Fair Pay Act of 2009

By Christopher E. Hogan

A year and a half after being the first bill signed into law by President Obama, the Lilly Ledbetter Fair Pay Act of 2009 (FPA)[1] continues to create uncertainty for educational institutions, as they grapple with whether promotion and tenure decisions, which may or may not be accompanied by a pay increase, fall within the ambit of the FPA. The uncertainty is due in no small part to the seeming incongruence between the FPA's language and the circumstances surrounding its genesis, with courts privileging one over the other in reaching differing results. The stakes are high: colleges and universities often make promotion and tenure decisions en masse. And to the extent those decisions are found to be covered by the FPA, they leave a legacy of trailing Title VII liability that endures long after the promotion or tenure decision itself ceases to be actionable. Conversely, to the extent such decisions lie beyond the reach of the FPA, Title VII's relatively short charge filing period applies. The ultimate answer may also cause courts to redraw the boundaries of state anti-discrimination laws, which are often interpreted so as to harmonize with Title VII.

The Ledbetter Decision

Before instituting a private civil action under Title VII, however, an aggrieved employee must have timely filed with the EEOC a charge of discrimination and have received a "right to sue" letter. In states such as Ohio that have "work-sharing" agreements with the EEOC, a charge must be filed within 300 days of the alleged unlawful employment practice. At issue in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,[2] was whether for the purposes of Title VII's charge filing period, a discriminatory pay

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decision was a "continuing violation" or a "discrete act" of discrimination. Concluding it was the latter, the court's holding meant that Title VII's charge filing period began to run when the discriminatory decision was made, not when its effects were felt.

Under the court's ruling, then, an employee who did not challenge a discriminatory pay decision under Title VII within the applicable limitations period was forever barred from challenging the decision under Title VII. This was so even if the discriminatory pay decision caused the employee to receive depressed pay for the duration of his or her employment with the employer. And so it was with Ms. Ledbetter, who was left without a remedy under Title VII, because the discriminatory compensation scheme that caused her to earn far less than her male counterparts had been implemented years before she had filed a charge of discrimination.

Congress Acts

In the wake of the Ledbetter decision Congress acted to supersede the ruling by enacting the FPA. Virtually all agree that the central, if not the only, purpose of the FPA was to return the state of the law to that which existed the day before the Ledbetter decision was handed down. This view is bolstered by the FPA's findings and legislative history. However, the FPA's text arguably goes much further, extending the FPA's reach not only to a "discriminatory compensation decision" but also to what the FPA refers to as an "other practice."

To be sure, the FPA's legislative history provides reason to believe that its "other practice" language was inserted to address the particular facts in *Ledbetter* where Ms. Ledbetter's pay disparity appeared to have been indirectly caused, at least in part, by a series of discriminatory performance appraisals. The same legislative history also suggests that Congress did not intend to overturn other Supreme Court precedents delineating between discrete acts of discrimination and continuing violations. Yet the FPA's legislative history also shows that at least one amendment designed to remove the "other practice" language on the ground that the language extended the FPA beyond congressional intent was rejected. Then there's the FPA's "other practice" language itself which suggests that it applies to all practices affecting compensation.

Enter the uncertain status of promotion and tenure decisions. Is a promotion or tenure decision an "other practice" that can be challenged years later?

Text vs. Context

So far the judicial answer appears to turn upon whether the FPA is viewed as having the limited legislative purpose of undoing *Ledbetter* or whether its text requires a broader application. The contextual approach prevailed in *Barnabas v. Board of Trustees of University of the District of Columbia.*[3] Relying on circuit precedent that the FPA was enacted for the limited purpose of undoing *Ledbetter,* the court concluded that a decision to deny the plaintiff a promotion to the rank of full professor was a discrete act of discrimination rather than a compensation decision covered by the FPA. The textual approach prevailed in *Gentry v Jackson State University.*[4] In that case, the court had little difficulty concluding that a denial of tenure that also resulted in a corresponding loss of a raise was an "other practice" affecting compensation. The court reasoned that while it was clear that a denial of tenure was a discrete act of discrimination, the corresponding loss of a raise transformed the decision into a "compensation practice." Unfortunately, the court was apparently unaware of the Supreme Court's holding in *Delaware State College v. Ricks.*[5] There the court held that the charge filing period under Title VII began to run in a denial of tenure case when the decision was made and communicated to the aggrieved faculty member. Nor did the court in *Gentry* grapple with *National R.R. Passenger Corp. v. Morgan*[6] wherein the court identified a "failure to promote" as discrete act. Thus, *Gentry* requires one to adopt a significant set of assumptions.

Whither the FPA

Fueling the outrage felt by many in the wake of the *Ledbetter* decision was the perception that the ruling would let employers escape Title VII liability for covert systematic pay discrimination, given the difficulty of discovering whether one was working within a discriminatory pay system. The risk of such a poignant injustice is far less likely in the promotion and tenure context, where such decisions are announced and often accompanied by a set of procedural protections that would be foreign to Ms. Ledbetter. It's perhaps these differences and the reluctance to brush aside Supreme Court precedent that may ultimately steer courts toward a contextual construction of the FPA.

1. Pub.L No.111-2, sec. 6, 123 Stat. 5 (2009).
2. 550 U.S. 618 (2007).
3. ---F.Supp.2d---, 2010 WL 692785 (D.D.C.).
4. 610 F.Supp.2d 564 (S.D. Miss. 2009).
5. 449 U.S. 250 (1980).
6. 536 U.S. 101 (2002).

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CURRENT CONFLICTS UNDER RULE 1.7

By Dianna M. Anelli

Generally, an attorney's duties of honesty, diligence and undivided loyalty prevent him or her from representing clients with conflicting interests. The Restatement of the Law 3d, The Law Governing Lawyers (1998) sets forth the basic prohibition at § 121: "Unless all affected clients and other necessary persons consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent a client if the representation would involve a conflict of interest."

So what is a conflict of interest? An attorney representing one client is precluded from representing another client on a matter that is adverse to the first client. Additionally, if, during the course of representation, an attorney's representation of one client results in an adverse affect on another client, the attorney is precluded from continuing the representation. Rule 1.7(a).[1] This is true, even where the two representations are unrelated. Bureau of National Affairs, Inc., Lawyer's Manual on Professional Conduct (2008) § 51:505. This latter statement is not to be confused with conflicts analysis involving former clients under Rule 1.9 wherein the substantial relationship test of *Kala v. Aluminum Smelting & Refining co., Inc.* (1998), 81 Ohio St.3d 1 applies.

Conflicts analysis regarding current clients does not apply the substantial relationship test. Rather, Rule 1.7, Comment [2][2] provides the correct analysis to be used. The first thing the attorney must do is to clearly identify the client. Although this may seem axiomatic, it is, perhaps, the biggest obstacle to an attorney realizing that he or she has a conflict requiring implementation of the steps in Rule 1.7, Comment [2]. In many instances, attorneys develop attorney-client relationships with clients without really realizing it. For example in *Carnegie Companies Inc. v. Summit Properties, Inc.* (2009), 183 Ohio App.3d 770, an attorney-client relationship was formed when Carnegie Companies, Inc. ("Carnegie") consulted with a lawyer from Ulmer & Berne, L.L.P. relative to some environmental work. Within days of Carnegie's consultation with Ulmer & Berne, Summit Properties, Inc. ("Summit") consulted with an attorney from Ulmer & Berne's Columbus office relative to the sale of its property to Carnegie. When Carnegie rescinded the sales contract, Ulmer & Berne sued Carnegie. In that instance, although Ulmer & Berne's representation of Carnegie appeared to be over prior to the filing of the law suit, the court, nevertheless, determined that both Carnegie and Summit were current clients. Id. at 783. That Ulmer & Berne never terminated its representation of Carnegie prior to undertaking the Summit representation and the law firm's failure to limit the scope of its representation of Carnegie were two factors upon which the court relied. Id. The distinction between current and past client is important as Ulmer & Berne would have been permitted to continue its representation of Summit had Carnegie been determined to be a former client. Rule 1.9 and the substantial relationship test of Kala, supra, permit such representation when the matters are not substantially related.

Step (2) in Comment [2]'s analysis is that the attorney must then determine whether a conflict exists. Comment [37][3] to Rule 1.7 makes clear that the type of conflict prohibited is one where the clients' interests are adverse. In the Carnegie case, a clear conflict existed as Ulmer & Berne ultimately sued its own current client.

Step (3) to Comment [2] is to determine whether any conflict is non-waivable pursuant to Rule 1.7(c). In Ohio, absent consent, a lawyer may not represent one client in a proceeding against another client even where the matters are wholly unrelated. Id. at 789 citing *Avon Lake Mun. Util. Dept. v. Pfizenmayer*, 2008-Ohio-344 at ¶ 15. Put another way, with consent, an attorney may represent one client in a proceeding against another client where the matters are wholly unrelated.

Rule 1.7, Comment [2], factor (4) next states that, where the conflict is not prohibited under Rule 1.7(c), the attorney must determine whether the lawyer can competently and diligently represent all clients affected by the conflict of interest. In Carnegie, the court looked to the three part test of Rule 1.7(b) and ruled that this could not occur. Id.

Rule 1.7, Comment [2], factor (5) last indicates that if the attorney is able to represent both clients' interests under factor (4), he or she is to consult with the clients and obtain the informed consent of each of them confirmed in writing. In Carnegie, no such consent was ever sought or obtained.

It is important under the new Rules for lawyers to be mindful of conflicts. Importantly, not every conflict requires disqualification and not every conflict results in a Rules violation. Nevertheless, the analysis set forth in Comment [2] to Rule 1.7 is a very important step for an attorney to take when deciding upon whether to represent current clients with interests that conflict. The ability under the Rules to limit the scope of client representation and a termination letter at the conclusion of representation go a long way toward protecting the lawyer in such situations.

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1. Rule 1.7 states:
(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:
(1) the representation of that client will be directly adverse to another current client;
(2) there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

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(b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:
(1) the lawyer will be able to provide competent and diligent representation to each affected client;
(2) each affected client gives informed consent, confirmed in writing;
(3) the representation is not precluded by division (c) of this rule.
(c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:
(1) the representation is prohibited by law;
(2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

2. [2] In order to analyze and resolve a conflict of interest problem under this rule, a lawyer must: (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation is barred by either criteria of division (c); (4) evaluate, under division (b)(1), whether the lawyer can competently and diligently represent all clients affected by the conflict of interest; and (5) if representation is otherwise permissible, consult with the clients affected by the conflict and obtain the informed consent of each of them, confirmed in writing. [analogous to Model Rule Comment 2]

3. [37] Division (c)(2) bars representation, in the same proceeding, of clients who are directly adverse because of the institutional interest in vigorous development of each client's position. A lawyer may not represent both a claimant and the party against whom the claim is asserted whether in proceedings before a tribunal or in negotiations or mediation of a claim pending before a tribunal. [derived from Model Rule Comment 17] (Emphasis added).

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Diversity in the Legal Profession
The Ongoing Road to Change

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For as long as I can remember, my father talked about the law with an unyielding degree of enthusiasm and reverence. Although he never told me that I had to become a lawyer, by the time I started high school I could not imagine doing anything else. Despite his love for the law, my father is not an attorney. He left law school after just one year to accept a non-legal job offer, and when he later pursued an advanced degree, it was in business and not law.

When my father was a law student forty years ago, legal opportunities for minorities in most settings were scarce, and in others, nonexistent. In fact, when he began studying law it was only a few years after the American Bar Association had done away with its policy of racial identification, which acted as a virtual bar to membership for blacks. I cannot help but think that my father, who has always been a practical man with the principal goal of providing for his family, realized that his options in the profession he loved would have been too severely limited by the color of his skin.

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There can be no doubt that the legal profession has changed fundamentally. The ABA, which in more recent years has led the charge for a more diverse profession, is nothing like the racially segregated legal association of my father's time. Furthermore, collaboration among law schools, bar associations, governmental agencies, law firms, corporations and the judiciary and a shared commitment to creating a profession that reflects the diversity of our nation has opened the door to those opportunities that were scarce or nonexistent for my father.

To appreciate how perspectives on diversity have changed, one does not have to look any further than Columbus.. Specifically, the Columbus Bar Association's Minority Clerkship Program is a great example of how collaboration around diversity can increase capacity and create change. The MCP was established in 1987, as a collaboration of the Columbus Bar, the Moritz College of Law, and the Capital University Law School. The program's immediate goal is to provide legal experience and education for African American, Asian, Hispanic and Native American law students through summer placement at local law firms, government and corporate offices. Doing just that, the program has had over 600 minority participants since its inception. While diversity goals and financial considerations are sometimes treated as mutually exclusive, the number of employers participating in the MCP experienced minimal decline in recent years. A secondary goal of the MCP is to increase and integrate attorneys of color into the Columbus legal community.

Significantly, three of the four current Columbus Bar board members of color are graduates of the MCP.

Programs like the MCP and others within this community have helped to transform the legal landscape and should be celebrated. At the same time, there is still work to be done, locally and nationally. Indeed, racial and ethnic minorities still make up less than 15% of the practicing attorneys in this country. As Justice O'Connor reminded us in the Grutter case, society draws its leaders from the ranks of the legal profession. It is therefore particularly troubling that diversity in the legal profession lags behind nearly all other professions of similar esteem and influence.

The lack of racial diversity among attorneys serving within governmental agencies, particularly at higher levels, and serving on our nation's courts threatens both the quality and legitimacy of decision-making. Similarly, minority representation within the private sector is equally important and it is law firms that suffer most acutely from a lack of diversity. According to the 2009-2010 National Association of Legal Professionals Directory of Legal Employers just over 6% of partners at law firms nationwide are minorities, only 1.88% of partners are minority women, and many offices report no minority partners at all. Locally, an abysmal 3.4% of partners in Columbus are minorities and only .51% are minority women. As the ABA explains, "taking effective steps to prevent the systematic and shameful attrition of attorneys from underrepresented groups…will improve the workplace for everyone and curb an expensive loss…."

When we talk about increasing diversity in the profession and continuing to advance forward, there is no one easy solution. It is going to take programs like the MCP, "pipeline programs", more diverse faculty at law schools, better mentoring, accountability by clients, challenging unconscious bias and cultural opposition to diversity, the creation of a "critical mass" and more inclusive environments, quantitative and qualitative assessments and work by affinity groups, bar associations and each individual attorney. To do otherwise, or to do nothing, would abdicate our responsibility as a profession. Despite the challenges that exist, I, like my father, love the spirit of the law and of the profession. And I am proud that the profession I know looks very different from the one my father admired, but never entered.

1. A special thank you to Annette Hudson-Clay, CBA Director of Diversity, for providing MCP information and data.
2. Grutter v. Bollinger, 539 U.S. 306 (2003).
3. ABA Presidential Commission on Diversity (2009-2010), Diversity in the Legal Profession, The Next Steps, at http://new.abanet.org/centers/diversity/PublicDocuments/Diversity_Summary_Report.pdf
4. Pipeline programs are programs designed to introduce students in college, high school or even earlier to careers in the law and to provide support to these students. A critical mass often refers to a sufficient number of minorities in an environment to prevent feelings of isolation and to limit the impact of natural attrition.

Lisa Kathumbi

When we talk about increasing diversity in the profession and continuing to advance forward, there is no one easy solution. It is going to take programs like the MCP, "pipeline programs", more diverse faculty at law schools, better mentoring, accountability by clients, challenging unconscious bias and cultural opposition to diversity, the creation of a "critical mass" and more inclusive environments, quantitative and qualitative assessments and work by affinity groups, bar associations and each individual attorney.

LIMITS OF ADVOCACY

By Mark G. Kafantaris, Kafantaris Law Offices

The young lawyer was at his office late in the evening when he received the phone call. He recognized the caller as the man he was representing in connection with a disturbance on the union picket line during a long and bitter strike.

"We're gonna blow it up tonight," the man said on the phone. The lawyer knew the client and some of his hothead friends well enough to believe there might be some truth to this. To be sure, there were already allegations that some of the workers on strike had shot at the homes of the "scab" replacement workers. He tried to stay calm. "What are you blowing up now," he asked "The water tower," the man answered, confirming his worst fears. "What would you do that for," the lawyer responded. "People could get hurt." "Ain't nobody gonna get hurt," he answered. "The tower is some ways from the plant." With that, he hung up.

The strike had gone on for months and hundreds of workers were without pay. They were desperate and capable of anything. The young lawyer sat down, still holding the phone in his hand trying to figure out what to do. He thought about calling the police. After all, this would prevent a crime from being committed and there was almost certain potential for serious physical injury to others. He called instead a seasoned labor lawyer he had worked with before. With great agitation, he related his client's call and expected ultimately that the advice would be to call the police. But the seasoned lawyer advised against it.

The young lawyer did not know what to do, and he did nothing but worry all night about the water tower and any potential ensuing harm. By the break of dawn, he turned on the news for any coverage of an explosion. Nothing. He flipped frantically through the channels over and over again throughout the morning day. Again, nothing.

Finally he went to the office. Haggard and exhausted, he cranked out a motion to withdraw from his client's case. "Philosophical differences," he wrote in the motion, and even returned the fee with the copy sent to the client.

This example illustrates that there are not always easy answers in the situations we face. Our oath of office, ethical duties and loyalty to our clients can regularly clash.

We could easily lose sight of our limited role as advocates and get caught up in the evolving events of the case. Advocacy has limits. In our zeal to prevail, we should remember that we are merely the advocates, and, that the case, with all of its consequences, belongs to the client. After we represent him or her to the best of our ability and we have exhausted the avenues for relief, our job is done. Our clients may not always be happy with the results, but we can take some comfort in knowing that we were diligent in our efforts.

It seems that a good effort is, in fact, all that clients expect from us to begin with and that they have planned ahead for ensuing consequences -- even though they may not openly admit as much to us.

Such may have been the case when a young lawyer was representing a man indicted for receiving stolen property and rape. Things did not look promising during the trial and the lawyer tried to prepare his client for the prospect that he might be going to prison. To each such warning, the client would say, "I am not going to prison." The young lawyer took these responses as mistaken assessments of the state's case, or worse, the blind faith of his client in the lawyer's advocacy skills. The trial went on through the evening and the jury took the case at 10 p.m. that night, at which point the judge immediately sent them home. They came back the next morning and, though the defendant was not present, began deliberating. A half our later, the Sheriff came in and told the lawyer "you can forget about this case, your client hung himself."

He conferred with the prosecutor and the judge, but it was not clear what they should do with the jury that was deliberating the dead man's case. They decided to let them reach a verdict. Around noon, they rang the bell and announced that they had found the defendant guilty of receiving stolen property, but not guilty for rape -- the offense for which he was worrying about going to prison.

For many nights thereafter, the young lawyer tortured himself as to what he could have done to prevent this. Was he too harsh with his client? Overwhelmed with the business of the trial, did he miss the cues on his client's state of mind? He will never know. He did learn, however, that there are limits to advocacy and the results sometimes may have little to do with winning or losing.

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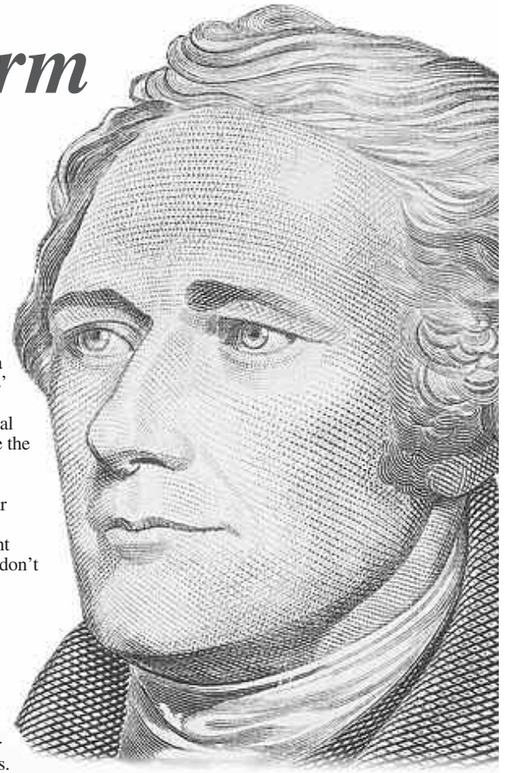
On Financial Reform Via Espresso



By Kenneth L. Finley

The following excerpt is a glance into a collegial debate of what two of our founding fathers, Thomas Jefferson and Alexander Hamilton, might say about the new financial reform bill signed into law by President Obama on July 21, 2010. The conversation takes place in a café in modern time. I chose this topic and context because of my love for political science, and I picked Jefferson and Hamilton because of their fundamental differences in political theory.

"Did you receive my package last week, James?" Thomas Jefferson bellowed out leaning on his hand-crafted cane that was carved out of tulip poplar from his Monticello estate.

"How will I ever finish reading over this new exhaustive financial Bill if you keep sending me your favorite books of the month?" James Madison glanced back as he departed from Starbrews Café on his walker after their usual Saturday morning get together.

Jefferson grinned, "Well, my good friend, I suppose that is the benefit of amusing yourself after being out of office all of these years."

Just as Madison disappeared out of the door, Alexander Hamilton raced inside ordering an extra large caramel latte while fidgeting with a Blackberry in one hand, newspapers clenched in the other, and smiling ear to ear. Jefferson immediately recognized Hamilton's voice as Hamilton jovially engaged in small talk with the brewers. Hamilton looked over and caught Jefferson's eyes. "What a delight to see you here Thomas! I suspect you have heard the news this past week about the finance reform Bill."

"Indeed. I do not doubt that you are pleased with its passage," Jefferson responded as he sipped his espresso.

Hamilton grabbed his enormous drink and strutted over to Jefferson's table, smiled brightly as he sat down, and said, "This Bill is going to safeguard against companies' risky practices, provide consumer protection, and ensure our country's economic stability. Surely I would have thought you should be in favor of policies that would achieve these goals."

Jefferson leaned off his cane and back into his chair, gave Hamilton a bewildered look and said, "Do you mean to suggest that the Bill, as it is written, best achieves these goals?"

Hamilton leaned forward on the table. "Alright, consider this: Executives keep padding their wallets! Shareholder's will now have a 'say on pay' regarding their executives' compensation. And if an executive makes a mistake regarding any financial statements, shareholders will also have the power to recoup some of those big bonuses."

"Alexander, do you recall the year 2002?"

Hamilton squinted deep in thought and then responded with a chuckle, "I don't follow you."

"Try Sarbanes-Oxley."

Hamilton nodded his head, as he seemed to have forgotten all about it.

Jefferson added, "Were parts of that Bill intended to deter fraudulent practices and inaccurate reporting?"

"I suppose Sarbanes holds executives individually responsible for accurate and complete financial reports. Hmmm … now that I think about it, I believe there is also a section in Sarbanes that requires CEOs and CFOs to give back their bonuses or compensation for such transgressions, including profits from securities sold during the preceding year."

"Do you suppose, then, this new Bill further deters CEOs and CFOs from lax reporting by requiring them to pay back bonuses and the like to their companies?"

"I guess not," Hamilton said. "I must admit that a prudent business person has enough incentive under the previous laws to conduct a thorough review when it comes to reporting. Maybe they were just looking to increase their liability to be commensurate with their compensation. You know, sort of like a balance sheet!" Hamilton laughed.

Jefferson politely smiled. "And what about the rule that the Board of Directors, who are much more familiar with a company and its relation to its respective industry, should have the authority to establish fair and reasonable compensation for officers?"

"Wouldn't it make sense for shareholders to say 'hey, you're paying yourself way too much?' That is a waste of corporate assets," Hamilton fired back.

Jefferson took a sip of his espresso, grinned and said, "Perhaps that is one way to look at it. But wouldn't you say that a company's success in the market, including the ability to attract and keep shareholders, is or should be determined by competition? And aren't there enough internal safeguards such as Board removal of Officers and Board turnover?"

Hamilton sidestepped the questions. "Well at least this Bill hits Credit Rating Agencies where it hurts. How can you not blame …" Hamilton was interrupted by his blaring phone, the noise of which rose above the chatter in the entire café. He was embarrassed. "I'm sorry, it's my reminder that our softball team, The Feds, have a game tonight. We're really hoping we can crush Team Fortune 500 tomorrow!"

Jefferson looked puzzled. "Credit Rating Agencies give ratings, correct? Ratings neither replace an investor's due diligence nor operate as recommendations to buy or sell. With all due respect to these helpful and successful agencies, they are only handing out grades based on a conglomeration of information, not advising investors, who are the individuals ultimately making the decisions."

Hamilton gulped down the rest of his latte. "But you and I both know how much an investor is likely to rely on such ratings. The Bill allows for a private right of action if an agency knowingly or recklessly fails to conduct a reasonable investigation of the facts or fails to get an analysis from an independent source."

"To what degree does that hold an agency liable? Other than agencies familiar with such work, who would know what facts or sources are relevant?"

Hamilton was proud to know the answer. "Information outside of the organization being rated must be at least deemed credible by the agency."

"I think that just begs the question, Alexander," Jefferson said. "Nonetheless, inaccurate ratings should eventually become evident and self-curing with inflated ratings affecting the credibility of an agency. This especially should be true given the recent mass downgrading. These potential lawsuits may have opened the floodgates for litigation."

Hamilton reasoned, "Look, overall, the "tough to get too big" provisions make this Bill worth its passage. The Bill allows us to mitigate risks if a bank holding company has consolidated assets over $50 billion or a nonbank company poses a threat to our financial stability. The Board of Governors just needs a 2/3 vote to seriously limit a company's strategies and operations, including requiring it to cease one of its business activities."

"What are the practical consequences of that? The 'funeral plan,' which requires big companies to prepare ahead of time for a breakup or liquidation, is a great concept. But a serious restriction on a company's ability to grow or a mandate to divest some of its holdings seems like a stark contrast to laissez-faire capitalism. I do not understand why the Board of Governors should have so much power; Congress will not even be responsible for the decision."

Jefferson finished his espresso and slowly got up on his cane. He patted Hamilton on his back on his way out and said, "Dear Alexander, this old debate of ours about our banking system will never yield. But you already know very well my opinion about the expansion of federal financial programs."

Hamilton smiled.

Just as Jefferson put his hand out to open the door, Goldman Sachs CEO Lloyd Blankfein surprisingly opened it for him while he exited too. The bells on the door chimed as Jefferson and Blankfein walked out.

"Lloyd, it's good to see you. How have you been lately?"

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Kenneth L. Finley

LEADERSHIP SKILLS – NATURE OR NURTURE

By Marty Eisenbarth, Bricker & Eckler

Several years ago I heard a presentation by a person heading up a leadership institute. She was encouraging law firms to identify and select a few new lawyers to enroll in the institute so they could develop and be groomed for leadership roles. At the time I wondered about the non-selected associates -- whether there were natural leaders among them and what would happen to their leadership skills if they were not selected, groomed and mentored through this or other programs as compared to the ones who were enrolled in the institute.

Over the years I have revisited that question as I have observed associates not deemed worthy of partnership in one firm move to another where they not only earned partnership status, but developed into skilled and capable managers and leaders. Or partners who were not part of the management structure in one firm, go off on their own and establish and lead a successful law firm enterprise.

What makes a leader? First and foremost, it takes energy. Leaders don't just do their jobs – they excel at what they do and serve as role models for others. They maximize their knowledge base – not just in their area of expertise, but in other fields of law, and in technology, trends, finance, communication and economics. A leader understands the nature and the history of the workforce and the clients. Certainly they can surround themselves with experts, but they have to have some basic knowledge of what the experts know so they can evaluate advice and suggestions. At the same time, to maintain sanity, there has to be balance between work, family and leisure, making sure there's enough of themselves to go around. It's not for the faint-of-heart or the plodder. Being a leader takes drive, motivation and, especially, energy.

Leadership also requires communication skills. If the person with the best vision and best strategy for success can't communicate, they can't lead. Leaders need to be able to inspire others and they can't do that if they are unable to express their plans for the future and their ideas on how to achieve success. The best communicators are also the best listeners. They entertain ideas from a broad spectrum of people and are able to accurately and succinctly evaluate all the input to reach a decision they can describe and defend, not just to their peers, but to people across and at all levels of the organization.

Leaders must be able to make decisions. How many times have you watched a problem discussed to death with no action taken; or watched a problem, ignored, fester. Leaders face a problem, analyze the situation, listen to the discussions and develop a goal and an action plan. They will also have a Plan B and be flexible enough to re-evaluate decisions when circumstances or situations change. They must be organized in their planning and thinking.

And last but by no means least, a leader must have integrity. They must lead by example, communicate honestly and make decisions fairly. As we have seen too often lately, leaders caught in lies or with hidden agendas or selfish motives ultimately fail. The easiest way to avoid these traps is to operate in an honest, above-board manner with the ultimate goal the greater good of the organization, not any one individual or group.

Can you teach a person to be a leader? You can certainly provide the tools. Classes can be given to develop and improve communication skills. Programs in situational ethics and professional conduct can provide training in making hard decisions. Problem-solving abilities can be honed through role-playing and class discussions.

But can you teach integrity and energy? Those are qualities that are unique to individuals and are a result of childhood training and innate strength. That is why you see leaders at all levels of society – not just the elite who have been identified and trained, but the natural leaders – individuals who stand out and are the organizers and leaders among the workplace support staff, in the churches, in the neighborhoods and in the schools, schoolyards and parent/teacher organizations.

So when you're looking at your organization to identify potential leaders, look first for inner-drive and a well-established moral compass. Look for past successes and organized thinking. These are the people who will benefit most from enrollment in Leadership Institutes.

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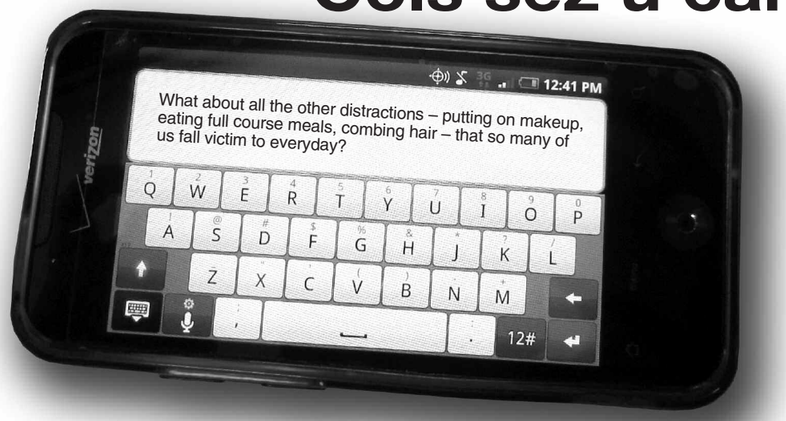
Marty Eisenbarth

Cols sez u cant txt & drv



By Stephanie R. Hanna, The Hanna Law Firm and Frank Kremer, Jr., Artz, Dewhirst & Wheeler

On May 5, 2010, Columbus joined Cleveland and Toledo as Ohio's big cities that have told drivers they can't write, send or read text or email messages while operating a motor vehicle. Other suburbs and municipalities including Delaware, Worthington, Hilliard, New Albany and Bexley have enacted comparable restrictions. Columbus City Code § 2131.44 defines a text message to include email messages and states that: "no person shall operate a motor vehicle while using a mobile communication device to (1) compose, send or read a text message; or (2) send, read, create, play or interact with internet-based content."

The statute does carve out some exceptions such as using a mobile communication device to report a health or safety emergency, while the vehicle is parked, standing or stopped and is removed from the flow of traffic, is stopped due to inoperability, or if it is being used in the course of the driver's duties while operating an emergency or public safety vehicle.

Statistics show that almost six thousand people were killed and a half-million were injured in crashes related to driver distraction in 2008. However, a Highway Loss Data Institute study found that state laws banning the use of handheld devices to make a call or send a text message while driving have not resulted in fewer vehicle crashes. Thus, there are many unanswered questions regarding the effectiveness and practicality of this new law.

Many believe this is a much needed and long overdue law and would argue that simply having a conversation on a cell phone while driving is dangerous. An Insurance for Highway Safety Motorists study found that motorists who use cell phones while driving are four times more likely to get into crashes serious enough to cause injury. In 2002, the Harvard Center for Risk Analysis calculated that 2,600 people die each year as a result of using cell phones while driving and estimated that another 330,000 are injured. According to the Human Factors and Ergonomics Society, drivers talking on cell phones are 18% slower to react to brake lights, and take 17% longer to regain the speed they lost when they braked.

If these are the statistics regarding simply talking on a cell phone, one would imagine the results would be worse for doing a more complicated and distracting activity, such as sending or reading a text or email message. A study from the Virginia Tech Transportation Institute found that of all cell phone related tasks, including talking, dialing and reaching for the phone, texting while driving is the most dangerous. Further, the study revealed that for every 6 seconds of drive time, a driver sending or receiving a text message spends 4.6 of those seconds with their eyes off the road.

Others would argue the contrary and against these statistics. The Highway Loss Data Institute released the results of a study examining insurance claims from crashes before and after cell phone and text messaging bans took effect in California, New York, Connecticut and Washington, D.C. That study found that claims rates did not go down after these laws were enacted and that there was no change in patterns compared with nearby states without such bans.

Does this mean that we have been giving cell phones a bad rap for all these years? What about all the other distractions – putting on makeup, eating full course meals, combing hair – that so many of us fall victim to everyday? Troy, Michigan, a city twenty-five miles north of Detroit, recently enacted a broad city ordinance designed to prohibit drivers from engaging in any activity that would prevent the driver from keeping one hand free of all other objects and on the steering wheel. The city ordinance identifies cell phone dialing and scrolling as prohibited behavior, along with eating, reading, writing, performing personal hygiene/grooming, physical interaction with pets, passengers or unsecured cargo. Many would argue that these restrictions are incredibly far reaching and intrusive, while others believe this more expansive prohibition gets to the core reason behind many of the text messaging bans: to eliminate distracted driving.

The City of Columbus will face many different challenges in meeting its burden of proof in proving the elements of this statute beyond a reasonable doubt in the courtroom. An officer must possess evidence that a driver was engaged in one of the prohibited behaviors outlined in Columbus City Code § 2131.44. What an officer may have perceived as composing a text message may have simply been a driver dialing a phone number, answering a call, ending a call, or the like – all acts that are not prohibited by the statute. This offense is a minor misdemeanor and thus the accused is entitled to a court trial within 30 days unless he or she waives speedy trial rights. Practical difficulties exist for the City due to these time restrictions because that is just about the length of time it takes for phone records to be subpoenaed from a cell phone provider. A minor misdemeanor is not a jailable offense and has maximum fine of only $150. Thus, it may not be cost or time effective for such action to be taken.

As of June 28, 2010, approximately seven weeks after the ban was enacted, only 13 motorists were ticketed for violating the new statute. With such conflicting statistics and practical difficulties in enforcing this law, it will be interesting to see how the law is enforced going forward.

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REFERRALOGY 101

To Accept or Not to Accept

Often, it is what the lawyer doesn't know about the referral prior to accepting the engagement that may come back to haunt him or her later.

By Jameel S. Turner, Bailey Cavalieri

Lawyers who have been practicing for more than a year or two know that the term "referral" can either be a gift or a curse. While we all appreciate referrals from family, friends and colleagues, failing to fully vet the issues involved and the amount of work necessary to take on the referral can often add more stress to a lawyer's life than it's worth. That's why it is important for any lawyer who receives a referral to take time to evaluate the nature of the referral and the amount of time required to complete the engagement before the lawyer is retained. While it is not a particularly productive habit to turn away clients, new lawyers quickly learn that refusing a client can actually save time and money in the long run.

There are a number of factors that a lawyer should consider before taking on a referral. While a lawyer usually has some indication as to the nature of the referral prior to the initial consultation, inevitably there is always more to the story. Often, it is what the lawyer doesn't know about the referral prior to accepting the engagement that may come back to haunt him or her later. The goal of the initial consultation should not just be to determine if you can help the potential client, but rather to determine if you are the right person to help. What follows is a short list of issues that should be considered before taking on an engagement and matters that must be addressed with a potential client prior to the onset of the attorney/client relationship.

Understand the nature of the engagement and get all the facts. This is the most important aspect of the initial consultation. The potential client is going to be ready and willing to tell his side of the story to an empathetic listener. Invariably, the potential client's story may purposefully not include information about any culpability he may have. As you listen to the story, take notes and write down facts that do not make sense or need clarification. If necessary, interrupt the client's story to ask probing questions about legally significant facts to determine if there are any tangential legal issues that may involve other areas of the law that are not your area of expertise. Create a comfortable environment, as a client who is more comfortable will likely be more open and honest about the facts and the nature of the engagement.

Take stock of the client's veracity. Assessing the potential client's ability to communicate and his veracity will be important if the matter ends up going to trial. Ask the potential client about his background and about any pending or completed civil or criminal lawsuits that he or she has been involved in. Remember, the questions you don't ask will likely be the ones to come back and haunt you, so be sure to ask the questions that might make the potential client uncomfortable. Also consider how the potential client is dressed and how he or she would present to a judge or jury.

Consider time constraints. Be sure to consider the necessary time constraints before accepting a new matter. Evaluate if any statute of limitations issues are present, as well as any conflicts in your schedule that would prevent you from completing a brief or attending a hearing related to the engagement.

Provide your background and experience. Chances are the potential client would not have been referred to you if the potential engagement is not in your area of practice. Nonetheless, give the client a summary of your legal experience in general and also how much experience you have with the particular issue at hand. Do not exaggerate your experience or embellish your resume. Aside from being an ethical violation, it, will only serve to create enhanced expectations in the mind of the potential client that you might not be able to meet.

Decide if you will take the engagement and discuss the fee. At this point in the initial consultation, you should have a good feel for whether you are the right attorney to represent the client and how much time you will need to spend on the matter. If you decline the engagement, explain why you do not believe you are the right person for the job and let the client know you will be happy to provide a list of attorneys who may be able to help. It is also wise, and likely required by your malpractice insurance carrier, to provide a written declination letter to the potential client. If you decide to accept the engagement, then you must discuss the fee with the client. Fee discussions can be somewhat tricky because most potential clients are unaware of the costs for legal services, especially those that involve a significant amount of litigation. Explain your fee structure and your hourly rate and be clear that any fee estimate that you provide is just an estimate. Also, make it clear that the estimate could increase significantly if the matter continues longer than anticipated. Always be sure to carefully document the agreed upon fee structure in a written fee agreement.

Do not give a guaranteed outcome. One mistake many young lawyers make is to give a client a guaranteed outcome of the case during the initial consultation. While this may seem like a good idea, it almost always brings nothing but trouble. Aside from being an ethical violation, providing a guaranteed outcome will almost always damage the lawyer's credibility if the case does not proceed as promised, which happens more often than not. Instead, provide the client with realistic expectations of the potential outcomes of the case and explain the aspects of the case that you believe are in the clients favor and those that are not. This will lessen the client's expectations and increase the client's appreciation for the lawyer's abilities when the desired outcome of the case is achieved.

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Jameel S. Turner

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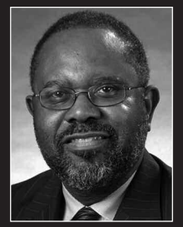

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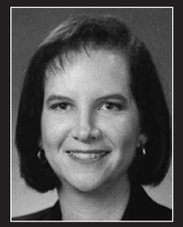

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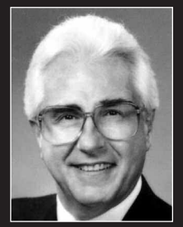

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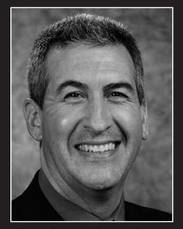

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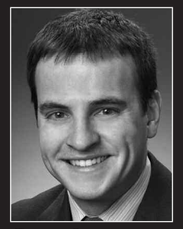

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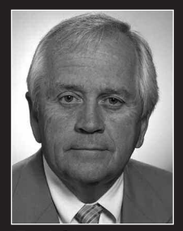

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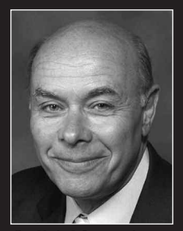

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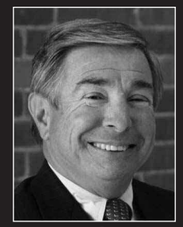

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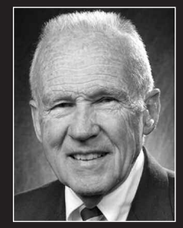

Mentoring
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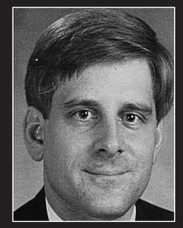

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LESSONS FROM LEBRON

People are going to make you mad and treat you poorly. If that hasn't happened to you yet, re-read this article after you finish your first week of kindergarten (the playground can be a cruel, cold place).

By Josh L. Schoenberger,
Williams & Petro

It has been almost a month since "The Decision." One flip of the calendar since Lebron James announced to the world, in a one hour special on ESPN, that he was "taking his talents to South Beach." Since then, almost everyone has weighed in on the issue. A Google search with the key words "Lebron" and "narcissist" goes eighty-one pages deep. Whether your hate him or love him, Lebron and "The Decision" provided many lessons that should be examined, learned and lived.

First, it's okay to break up with your girlfriend, but it's advisable to spare her feelings. No one should get married out of a feeling of obligation. You should marry someone you love with all your heart, someone with whom you want to spend the rest of your life. If you don't love her, break up with her and let her find love with someone else. No rational person would blame a guy for such a noble decision. Let's just say Lebron went in a different direction. Lebron dated his high school sweetheart for seven years. He occasionally told her how much he loved her, but was honest enough to let her know that he was not ready for marriage. After taking some time to think it over, he invited her to dinner to talk about their future. They went to the nicest restaurant in town. After thirty minutes of small talk, Lebron waived to the maitre d' to bring over the violinist. As she gazed into his eyes, he got down on one knee, reached in his pocket, clutched her hand and told her they were breaking up because he is in love with a super model. The next day, his high school sweetheart was forced to watch Lebron partying on television with his new super model girlfriend while she lay sobbing, clutching his letterman's jacket.

People are not only judged on what they do, but on how they do it. Every person faces a time or two in life when he or she has to break some bad news to someone. Whether you are telling your boss that you are leaving the company, letting a client know you didn't get them a good result or telling your kids that (spoiler alert) there is no Santa Clause, do it with class and dignity. The people who receive the bad news will appreciate your honesty and class. In the long run, they will likely even "forgive" you.

After watching "The Decision," I couldn't help thinking that it was one of the most unprofessional acts by a respected businessman I had seen in a long time. That lasted about two hours. Then I read Dan Gilbert's open letter to the fans. This brings us to lesson number two. Continuing the relationship analogy, Mr. Gilbert, the lover scorned, dealt with his grief by skipping over denial and going straight for the anger. He left the restaurant after being dumped and immediately sent an email to everyone he knew. He told them that the former love of his life wet the bed in high school, owns the Backstreet Boys box set and cried during the Notebook (but who didn't). He told them that he was going to be better off, even though his ex was way out of his league and the only people left in town to date were described by most as having "great personalities." He put all of his ex's stuff on the front lawn and tore pictures (or billboards) in half.

People are going to make you mad and treat you poorly. If that hasn't happened to you yet, re-read this article after you finish your first week of kindergarten (the playground can be a cruel, cold place). You are going to get unprofessional, arrogant, sarcastic and demeaning letters, voice mail messages, emails, texts and even tweets. When that happens you are going to get the urge to respond in an equally unprofessional, arrogant, sarcastic and demeaning manner. My advice, DO IT! Sit down and write an email tearing into your "opponent." Let them know why they are wrong, pointing it out ten different ways. While doing that, point out their character flaws and why children and dogs likely don't like them. Write it, read it, revise it. Then take a deep breath. Do not hit send. Sleep on it. If you wake up the next morning and you still want to send it, go back to bed. There is something cathartic about expressing your anger on paper; however, more times than not, you are going to regret stooping to their level. I am not suggesting that the more refined members of society let the miscreants off the hook, but I am suggesting that you will feel better if you respond in a forceful, yet professional manner. There is nothing better than letting the other person know that he or she did not get under your skin. It will feel better than "Gilberting," I promise.

The final lesson learned from "The Decision" came to me while watching fans burn their number 23 Lebron jerseys. This lesson really only applies to adults. Stop buying jerseys of professional athletes (feel free to stop buying jerseys all together). It's just like the letterman's jacket, you're not going to want it when he's gone. And if we have learned anything about professional sports in the past ten years, he is going to be gone.

Even though I'm a Cleveland sports fan and the Lebron decision was a huge disappointment, maybe I should send him an email thanking him for "The Decision" and how it taught and reinforced such strong life lessons. Or maybe, after a deep breath, I will email him that I think he is narcissistic, immature and overrated and I wish I hadn't wasted the last seven years of my life rooting for him. Oh yeah, I burned your jersey. SEND.

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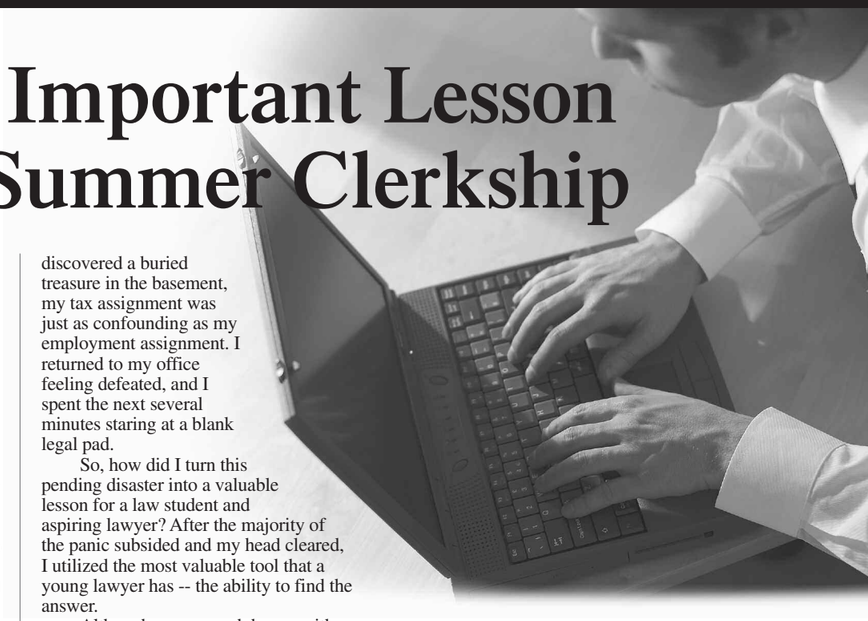
Josh L. Schoenberger

The Most Important Lesson from My Summer Clerkship



By Joseph Lipps
The Ohio State University
Moritz College of Law (3rd year)

I drove downtown and parked in the garage before the morning rush. I was eager for my first day as a summer associate and I did not want to take any chances with traffic or parking. Even if I had a flat tire, ran out of gas and the Scioto started flash flooding, I would have made it to work an hour early.

I knew this summer was my opportunity to prove myself and finally apply the legal skills I have developed through those long hours of studying in the library. It was time to turn my hypothetical clients into reality. During my first two years of law school I had learned the rule against perpetuities in property, the canons of statutory interpretation in legislation, the rules of complex joinder in civil procedure and I learned when lunch counts as a tax deduction. It did not take long for me to realize that the knowledge I had garnered thus far was not nearly as helpful as I originally anticipated. And in the practice of law, there are few rules that can be condensed into a neat law school outline.

On the first day, I entered the firm filled with excitement. I had my own office, voicemail and unlimited access to legal pads and pens. I settled in, looked out the window and felt confident I could conquer any legal conundrum. Soon after arriving, I received my first telephone call about my first assignment. With a fresh legal pad and pen I went to the attorney's office and wrote feverishly. My first assignment was an employment issue, and, although I had just finished a course in employment law, it was an unfamiliar topic. I went back to my office, reread my issue and contemplated what to do.

It did not take long for a state of near panic to set in. I had no idea where to start. I felt completely unequipped for my task. I began questioning whether the faculty at the Mortiz College of Law had failed me. How could I begin researching my assignment when I still had trouble understanding the question? Perhaps I was not destined to be lawyer, I thought. Could my legal career be over before it begins? I realized that this employment issue soon became not just my first assignment, but rather a threshold obstacle into my rite of passage to become a lawyer -- the albatross around my neck. As my mind raced in a state of emergency, I received another call -- my second assignment.

Now I had not only an employment question to research but also a tax question. I had taken a tax course, but without a business lunch to deduct or a hypothetical client who discovered a buried treasure in the basement, my tax assignment was just as confounding as my employment assignment. I returned to my office feeling defeated, and I spent the next several minutes staring at a blank legal pad.

So, how did I turn this pending disaster into a valuable lesson for a law student and aspiring lawyer? After the majority of the panic subsided and my head cleared, I utilized the most valuable tool that a young lawyer has -- the ability to find the answer.

Although my research began with imperfect search terms, I slowly began finding documents which clarified the contours of both assignments. As I read more, I developed enough background information to make the questions easier to understand so I knew I was moving in the right direction. Later, using the information I had gleaned from my background research, I went to the firm's library and located sections of treatises directly on point. As noon arrived, lunch had to take a back seat to my legal career; I felt it was a worthwhile sacrifice. And then, more quickly than I expected, I had a file of statutes, cases and secondary materials that would help me complete my assignments. At that moment I felt comforted that my legal career would live to see another day.

As I continued to read, I soon realized that the questions I was presented did not have concrete answers. Examining how courts treated the issues, I realized that if the question had been clear, the attorneys would not have needed the research in the first place. In examining arguments addressed by the courts and attorneys, I began to formulate various ways to interpret each issue. My analysis mirrored that of a law school classroom, but I now knew that I could formulate my own views on the issues without the probing questions from professors. Unbeknownst to me, a new way of thinking had overtaken my brain. All of the class discussions and the Socratic method provided me with much more than an understanding of a narrow point of law -- they gave me a legal mindset and the tools to analyze a difficult issue.

By the end of my first day of work, I was able to draft a memorandum on each issue that displayed not only a comprehensive understanding of the topics, but several different interpretations of the issues. Rather than being the end of my career as I had feared, the only drawbacks from the day were my hunger from skipping lunch, and the difficulty I had sleeping after drinking twelve cups of the office coffee.

For aspiring lawyers, I believe my first day illustrates one of the most important lessons to learn. While it is important to have confidence in one's own abilities and have a general understanding of common legal doctrines, it is more important to understand how to figure out the answer in a society where the law is constantly changing. Indeed, the law school experience has an underlying purpose even though that purpose is not always crystal clear. Over time, law schools across the country have consistently developed successful and knowledgeable attorneys who have entered into legal fields that were undeveloped during their law school tenure. While law school is a great time to learn complex doctrine and the intricacies of bluebook citations, once you know how to find an answer and analyze an issue, potential as an attorney is limitless.

Another important lesson -- rather than fear the endless body of legal knowledge, learn to embrace the unknown. In fact, I think lawyers should be grateful that their profession does not require them to know all the answers; it just requires them to work hard to find the right answers -- even though the right answers usually begin with "it depends."

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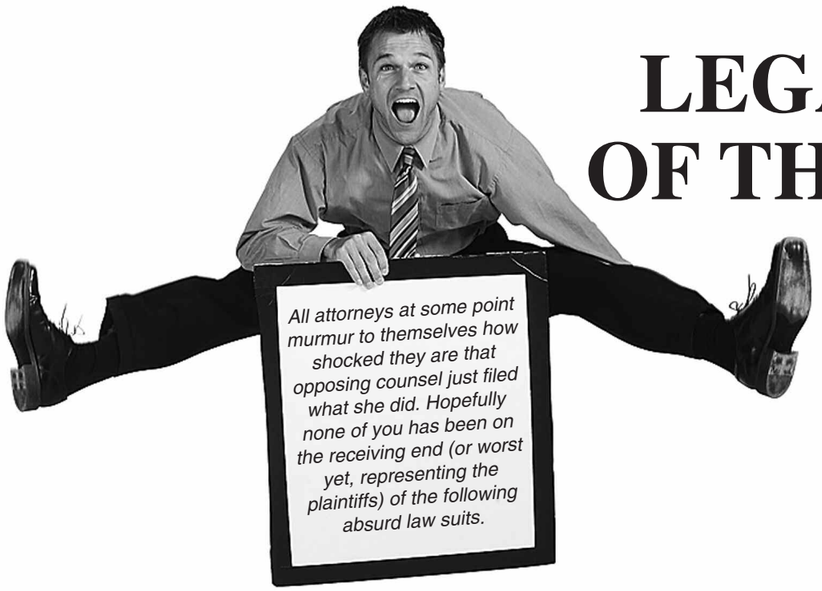
LEGAL NEWS OF THE *WEIRD*



By Matt Austin, Barnes & Thornburg

All attorneys at some point murmur to themselves how shocked they are that opposing counsel just filed what she did. Hopefully none of you has been on the receiving end (or worst yet, representing the plaintiffs) of the following absurd law suits.

Tis the season for golf outings, and should you see railroad tracks on your favorite course, those tracks could net you $40,000 – at least that's how much one woman was awarded after her ball ricocheted off the tracks and hit her in the nose. The course had a "free lift" rule that allowed players to toss balls landing near the tracks onto the other side of the tracks. Because of this rule, the golf course was held to have acknowledged the rails to be a hazard and did not protect the golfer from her own errant shot.

Richard Schick robbed a convenience store with a shotgun because of the stress he felt as a result of being discriminated against by his employer on the basis of his sexuality and disability. Feeling his pain, a jury awarded him over $300,000 for the discrimination, but he must still serve ten years for armed robbery.

Similarly, a man tripped an alarm while robbing a bank, but did not hear the alarm because he was nearly deaf. The bank teller allowed the robbery to continue during the alarm and the robber was then caught red-handed. The robber sued the bank for exploiting his disability.

In another robbery-related case, bar owner Jessie Ingram set a trap around his windows to deter future break-ins. The window displayed warning signs, but Larry Harris shockingly didn't see them when he tried to break into the bar, tripped the trap, and electrocuted himself. Even though the police refused to press murder charges, a jury awarded Larry's family $150,000 in a wrongful death lawsuit – which was cut in half because the judge felt Larry "should share at least half the blame."

A Michigan man's vehicle was rear-ended. Four years later he sued the owners of the vehicle that hit his, claiming that the accident turned him into a homosexual and caused him to leave his wife, move in with parents and frequent gay bars. For this change, he received $200,000 and his wife received $25,000.

The next traffic case hails from the Nagano Winter Olympics in Japan where the organizers were ordered to pay damages for mental anguish to a spectator who missed the event due to heavy traffic.

Not all crazy law suits result in favorable verdicts for the plaintiffs. For example, one surfer sued another for "taking his wave," but the suit was dismissed despite the plaintiff's plea of immense pain and suffering caused by watching someone ride "the wave that was intended for you." In another pain and suffering case, a jury denied payment to a patron who sued a strip club seeking $15,000 for whiplash he allegedly endured while watching "Tawny Peaks."

A man sued Anheuser-Busch for false advertising averring that unlike the beer commercials suggest, drinking Bud Light did not cause bikini-clad girls to suddenly break into a volleyball game and invite him back to their hotel room. He claimed he was owed $10,000 for pain and suffering associated with hangovers, as well as the financial loss of continuously buying and drinking more Bud Light.

Even Robert Glaser was denied compensation after attending a Billy Joel and Elton John concert in San Diego after noticing women using urinals in a number of men's restrooms. Alleging that embarrassment prevented him from relieving himself until he returned home, he sued the concert venue and the city for $5.4 million, but lost.

Michael Vick, the professional football player notoriously known for his involvement in a dog fighting ring, was named in a $63 billion lawsuit; yes, that's a "b" for billion. The plaintiff filed his lawsuit from prison alleging that Vick stole two pit bulls from him, used the dogs in fights, sold them on eBay, and used the proceeds to buy missiles from the Iranian government. The complaint further alleges that Vick has sworn allegiance to al-Qaeda and subjected plaintiff to microwave testing. As heinous as Vick's true crimes were, I'm pretty certain the court properly dismissed this lawsuit against him.

The Kliner family sued WalMart and Microsoft after their baby died in a house fire claiming that an overheated Xbox power cord was the culprit. Their case was extinguished quickly since the house burned down in 2004 and the Xbox was released in 2005. WalMart was also sued by a lady who suffered cracked and broken toenails after her overfilled, plastic grocery bag broke and food fell on her foot.

Even divine intervention couldn't salvage these next two lawsuits. Christopher Roller sued David Copperfield and David Blaine demanding that they reveal their secret magic tricks to him and that they tithe to him ten percent of their total income for life. Why? Because Roller claims the magicians use godly powers to defy the laws of physics in their tricks and since he is God, they are stealing his powers.

Lastly, Nebraska State Senator Ernie Chambers sued God claiming he made terroristic threats against the people of Omaha and caused "wide spread death, destruction, and terrorization of millions upon millions of Earth's inhabitants." Effecting proper service on God proved to be the Senator's stumbling block despite his proffer that because God is omniscient he is already aware of the lawsuit against him. Perhaps the Senator should have served Christopher Roller, just in case.

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Matt Austin

GENERALISTS AND SPECIALISTS — LOOKING GLOBAL

By Gus M. Shihab

The area of immigration law is extremely complex and touches on many other areas of jurisprudence. Without doubt, immigration law in the United States is going to become a major public interest issue in the next several years. Ohio will particularly have significant interaction with immigration law due to its demographics and because it is home to many corporations and organizations that employ foreign nationals. The City of Columbus has almost a 10% population of foreign born individuals according to the most recent census data. Cincinnati and Cleveland have approximately 5% of such population. In addition, Ohio is home to hundreds of thousands of employees working in both highly skilled and unskilled positions. Here are some examples of situations where you, the practitioner, might have interaction with immigration law.

Family Law

Unless they are careful, family lawyers could inadvertently subject their foreign born clients to experience complications if not properly counseled regarding the consequences of divorcing their U.S. citizen spouses. Immigration laws allow foreign individuals to gain permanent resident status or to obtain a visa by virtue of their relationship to a U.S. Citizen. Once those relationships are terminated, foreign nationals could find themselves deportable.

Employment Law

Hiring and firing international workers could have consequences to both the employer and employee. There are several legal means by which foreign nationals can obtain gainful employment in the U.S. Depending on the visa circumstances, U.S.immigration laws could require the corporation to make certain promises to the federal government relative to the working conditions of U.S. workers and wages paid to such foreign nationals. In addition, there are certain record keeping requirements imposed on the corporation, the absence of which could expose the employer to liabilities.

Employee or Independent Contractor?

Some industries have unfortunately fallen into the bad habit of trying to avoid these employment liabilities by attempting to negate the existence of an employer-employee relationship and create an independent contractor scenario with certain suspected undocumented workers. Recent enforcement efforts by the U.S. government have defeated such attempts by reconfirming the existence of an employer-employee relationship and attaching constructive knowledge to the employer relative to the employment of undocumented workers. This is a serious matter which will lead to serious criminal liabilities. Employment and corporate law counsel must have sufficient knowledge in this area to advise their clients about instituting standard operating procedures to cause compliance.

Criminal Law

This area has one of the largest impacts in the area of immigration law. Many seemingly minor crimes could lead foreign nationals to face draconian immigration consequences. Certain crimes may be deemed to involve "moral turpitude" or may be classified as "aggravated felonies" and could cause otherwise lawful permanent residents to end up in deportation proceedings. Other crimes could cause the foreign national to be lacking in "good moral character" and thus become ineligible for citizenship. Criminal law practitioners must know when their defense work could jeopardize the foreign national client's legal status in the United States.

Corporate, Securities and Taxation Matters for Foreign National Clients

Despite a lagging U.S. economy, foreign investment interest in the U.S. has quadrupled in the last three years. The falling value of the dollar and the recent crash in the real estate market have made investment into U.S. enterprises an attractive option for foreign investors as they are now able to get more for their money than ever before. U.S. immigration laws allow certain foreign nationals to obtain visa or residence status by virtue of investment. If your client is recruiting foreign investors, there may be certain securities laws that must be complied with. In addition, if your client is a foreign investor, structuring the U.S. enterprise is germane to the immigration process and for the movement of foreign personnel in and out of the U.S. In addition, structuring the U.S. enterprise can have certain international taxation consequences that must be adequately considered.

Immigration law will continue to be an important aspect of the U.S. business landscape. The U.S. can no longer work in a vacuum and will continue to take its proper place within the international community. Whether you are for or against immigration, the fact is that it cannot be ignored. The matter of resolving the status of the many millions of undocumented workers living in our communities will lead to additional interaction between practitioners in other areas and lawyers practicing immigration law.

Postscript: If you practice in international, agricultural, criminal, domestic, corporate, employment or securities law -- the 8th Annual Fall Immigration CLE Conference, organized jointly by the Columbus Bar and the Ohio Chapter of the American Immigration Lawyers Association, will be held November 5. For more information, go to www.cbalaw.org.

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Concealing Due Process

State law is deceptively clear: a county sheriff shall revoke a concealed carry license if the licensee does anything on a laundry list of mostly criminal acts.

By Derek Andrew DeBrosse

As a firearms enthusiast and Second Amendment advocate, I naturally jump at the opportunity to represent clients with firearms issues. And while I expected some twists and turns in an otherwise straightforward practice area, I never imagined that firearms law could be one of the most nuanced aspects of my practice. The weapons control laws were poorly written from the start (a final "poison pill" effort to kill concealed carry), and because the General Assembly amends the laws almost every year, the statutes are full of pitfalls, ambiguities, and conflicts. Here are some of the problems that may arise in the course of a concealed handgun license revocation. Although these are relatively rare, a revocation comes with serious consequences to the licensee and serious responsibilities on the part of the county sheriff who revokes the license.

Is it an administrative proceeding?

State law is deceptively clear: a county sheriff shall revoke a concealed carry license if the licensee does anything on a laundry list of mostly criminal acts.[1] Based upon the experiences of my clients, some county sheriffs have considered this commandment the beginning and the end of the process for revoking a licensee's CHL. But as every lawyer learned in Constitutional Law, most licenses cannot be revoked without due process. Law enforcement officers are often experts in due process and equal protection in a criminal context, but are understandably less familiar with these Constitutional principles in a civil setting. Therefore, it is not unusual to discover a CHL revocation that almost certainly afforded the licensee something less than true procedural due process.

To ensure that licensees who face revocation proceedings are given the full dose of due process, the General Assembly enacted the Administrative Procedures Act, which regulates the process by which licenses are formally revoked, and the ways in which an aggrieved licensee may appeal the revocation.[2] The concealed carry law specifically states that a sheriff must consult and apply the APA whenever the sheriff *denies an application* for a concealed handgun license, but it is silent on the sheriff's obligations when seeking to *revoke* an otherwise valid license.[3]

Looking beyond the pages of the concealed carry statutes to the APA itself, though, the picture becomes more clear. The Act states that it applies to any "agency," and defines an agency as any entity that has authority to issue, suspend, or revoke a license.[4] Because a county sheriff has absolute authority to issue, suspend, and revoke a CHL, the sheriff is, for concealed carry license purposes, an "agency." Therefore, most sources agree that the APA does apply to revocations of concealed handgun licenses.

What Due Process is Required?

Based on reports from my clients, Ohio's eighty-eight sheriffs each provide a different "kind" of due process. Some sheriffs conduct full-blown administrative hearings, others have a quasi-hearing, where the licensee can respond in writing, and, unfortunately, a few are perfectly happy to summarily revoke a CHL as long as the licensee isn't aware of his right to demand additional process. I don't believe that this discrepancy is motivated by malice, but is instead the natural and foreseeable consequence of turning a peace officer into a judge – a role that is both foreign to a county sheriff and totally unprecedented elsewhere in the Revised Code.

Sheriffs are, first and foremost, peace officers. They are experts in due process of a different kind, including the protections of the Fourth, Fifth, and Eighth Amendments that the Fourteenth Amendment incorporates to the states. They are not always familiar with the requirements of the Revised Code outside of Chapter 29 and certain other criminal provisions. It is, therefore, not unexpected that a county sheriff may not fully understand his obligations under the APA. And since the APA is not even mentioned in the concealed carry revocation statute, even a diligent sheriff who thoroughly read the law might not know of his obligation to provide notice and a hearing.

So how should a sheriff properly revoke a CHL? Due process in the context of a license revocation requires a minimum of two things: notice of the proposed action and an opportunity for a fair hearing.[5] The concealed carry license revocation statute requires the sheriff to provide written notice to the licensee of the sheriff's intention to revoke the licensee's CHL.[6] That letter, combined with a fourteen day response window, probably satisfies the notice requirement of the due process clause.

As for the hearing, there is no judicial authority on what, specifically, is required. Because due process is a fundamental right, it is likely that a court would view anything less than a full-blown administrative hearing with suspicion. The best practice is for a county sheriff to convene a true evidentiary hearing. The sheriff should allow the licensee to attend in person and present testimony, evidence, and other legal arguments. A record, perhaps including a transcript of the proceedings, should be created and preserved for appeal.[7]

In exchange for the painstaking process of conducting such an extensive hearing, the sheriff gains the opportunity to exercise broad discretionary powers.[8] Perhaps more important, the standard of review in appeals from agency orders is very much in the agency's favor. Legal issues are reviewed *de novo*, but factual issues are reviewed under a hybrid standard that emphasizes the agency's findings of fact.[9] A CHL revocation, if ordered after a full and fair hearing, is much more likely to be affirmed on appeal than one conducted under some lesser process.

Unfortunately, some county sheriffs and the assistant prosecutors who advise them are unfamiliar with the APA. As a consequence, some CHL revocations are conducted without due process and can be set aside by the lawyer who is aware of the constitutional requirements of the Fourteenth Amendment and the provisions of Ohio's APA.

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1. R.C. 2923.128(B)(1).
2. R.C. 119.12 et seq..
3. R.C. 2923.125(D)(2)(b); 2923.128.
4. R.C. 119.01(A)(1).
5. *State ex rel. LTV Steel Co. v. Industrial Comm'n of Ohio* (10th Dist. 1995), 102 Ohio App.3d 100, 103-104, 656 N.E.2d 1016; *State ex rel. Finley v. Dusty Drilling Co.* (10th Dist. 1981), 2 Ohio App.3d 323, 325, 441 N.E.2d 1128.
6. 2923.128(B)(2).
7. *See* R.C. 119.09 (setting forth the process for administrative adjudication hearings).
8. *Finley v. Dusty Drilling Co.* (10th Dist. 1981), 2 Ohio App.3d 323, 325, 441 N.E.2d 1128.
9. *See Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570; *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio ST.2d 108.

Derek Andrew DeBrosse, The Law Office of Derek A. DeBrosse

Due Process

ABOUT THAT PROPOSITION . . .

By Jack D'Aurora, The Behal Law Group

U.S. District Judge Vaughn Walker's decision overturning California's Proposition 8, which prohibited same-sex marriage, has sparked angry comments.

Commentators, such as Cal Thomas, dismiss Walker as an "activist judge" and suggest he is immoral. But morality was not the issue at trial.

The issue was whether Prop 8 violated the due-process and equal-protection rights provided by the 14th Amendment. It's easy to blur the distinction between morality and constitutional safeguards because legal matters and morals are often consistent, but here they weren't.

Think about it. The Ten Commandments outlaw theft and murder, and so do the laws of every state in the Union. On the other hand, the commandments prohibit adultery, but there's no criminal sanction for sleeping with your neighbor's wife.

Because marriage long has been recognized as a fundamental constitutional right, for Prop 8 to be held constitutional, its proponents had to prove that its limitation on gay marriage serve a compelling government interest. To that end, the proponents attempted to prove that Prop 8 did four things: It maintained California's definition of marriage as excluding same-sex couples, affirmed the will of Californians to exclude same-sex couples from marriage, promoted stability between men and women and promoted "statistically optimal" child-rearing households.

Their position came down to an interest in encouraging sexual activity between people of the opposite sex in stable marriages because sexual activity may lead to children, and the state wants to encourage parents to raise children in stable households.

As to the plaintiffs who challenged Prop 8, the judge listened to gay witnesses who testified about why marriage was important to them. He also heard from several experts in psychology, economics, political science and history who testified about the benefits that marriage provides in areas such as insurance and employment benefits, taxes, inheritance, etc., and how these benefits have been denied to some simply because of their sexual orientation.

For California to have attempted to regulate marriage through Prop 8 was nothing new. Though solemnized by religious ceremony, marriage always has been a matter of civil law, which has evolved. Many states once carried laws, since held to be unconstitutional, that prohibited whites and non-whites from marrying. Other laws, known as coverture, once limited a woman's rights in marriage.

After two weeks of trial, Walker concluded that Prop 8 had no rational relationship to the state's interest in promoting stable marital relationships between opposite-sex couples and that allowing gay marriage did nothing to impair the relationships between opposite-sex couples.

The court found that domestic-partnership laws do not offer equality because they may not be recognized in other states and are not recognized by the federal government.

Perhaps most significantly, there was no evidence that permitting same-sex couples to marry would affect either the number of opposite-sex couples marrying and having children or the stability of opposite-sex marriages.

At a hearing conducted sometime prior to the trial, Walker asked the lawyer representing the Prop 8 proponents how same-sex marriage impairs the state's interest in marriage being for procreation. The attorney answered, "I don't know." Neither do I, and I doubt that anyone can offer a cogent explanation for how gay marriage interferes with stable marriages between opposite-sex couples and procreation.

Our society isn't founded on religious principles, though religious principles have helped shape our nation. The nation is founded on a Constitution that guarantees certain basic freedoms and equality to everyone. We should be troubled by the idea of denying any citizen, simply because of his sexuality, the benefits that the rest of us enjoy.

It took years before we acknowledged that race and other differences are irrelevant to equal treatment. We're now dealing with sexual orientation. The question is whether religious advocates can reconcile their personal beliefs with constitutional mandates and subdue their outrage.

Anyone who criticizes Walker hasn't read his decision in Perry vs. Schwarzenegger. It's a great primer on evidence, fact-finding and constitutional rights and, though 136 pages, an easy read. Give it a try: www.cand.uscourts.gov

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Basic Legal Research — Part III

By Ken Kozlowski

This is the third and last of our series dealing with basic legal information. Part III looks at various reference sites, places to find software programs and reviews (along with hardware as well), and concludes with some pointers to web logs, or blogs (or blawgs, for the legally-inclined). One caveat before we start. The reference section will not have a lot of legal websites included, but will point out some locations where basic reference tasks (e.g. non-legal) can be accomplished. Let's get started.

Have you ever had an assignment to find an obscure reference or quotation? One site that has been around for a while is Bartleby (http://bartleby.com/). Bartleby offers searchable access to classics and reference works in the public domain and is a great place to search for those obscure quotes. In particular, Bartleby offers access to the 10th edition of Familiar Quotations, the 1989 edition of Respectfully Quoted, and the 1922 edition of Hoyt's New Cyclopedia of Practical Quotations. Other sites that offer the same type of information include The Quotations Page (www.quotationspage.com/), Quoteland.com (www.quoteland.com/), and the Quotations Home Page (http://theotherpages.org/quote.html). For those who want to keep a book by their nightstand, check out the Yale Book of Quotations (http://yalepress.yale.edu/yupbooks/book.asp?isbn=9780300107982) or The Oxford Dictionary of American Legal Quotations (http://tinyurl.com/2v8sufm).

Another language tool on our list is Dictionary.com (http://dictionary.reference.com/). Dictionary.com bills itself as the world's largest and most authoritative online dictionary. It provides access to millions of word definitions, synonyms, spelling, audio pronunciations, example sentences, and translations.

Next, we move on to a few calculator sites. One of them, Calculators On-Line (www.martindalecenter.com/Calculators.html), has been around since the early 1990s. The site offers access to an astounding 23,825 (as of July 28, 2010) calculators relating to various subjects such as mathematics, engineering, meteorology, and geosciences. If you need a calculator, you will probably find it here. Another favorite of mine is Oanda at www.oanda.com/. Oanda offers real-time currency tools, including a converter that provides rates for 164 currencies and historical converters as well. The latter might help those who need to resolve values in the estate planning area.

What would a section on reference tools be without a mention of the ubiquitous Google (www.google.com/intl/en/options/index.html)? The page referenced above offers quick access to all 45 of their search mechanisms, social web applications, and even mobile web helpers. Some favorites include Google Book Search, Google Docs, Patent Search, and Scholar. Users can also use their mobile phone to access some of these resources.

A site that may help you either personally or perhaps with estate work is Kelley Blue Book (www.kbb.com/). They offer easy access to new and used car pricing. It took about two minutes to determine that my 1998 Plymouth Grand Voyager with 181,000 miles is supposedly still worth some cash in a trade-in (not much, however). Another site that will help with the same type of information, and one I have used in the past for purchasing new cars, is Edmunds.com (http://www.edmunds.com/).

Our final stops on the reference section of this tour offer search mechanisms for finding lawyers. Martindale.com (http://www.martindale.com) is the online version of the venerable multi-volume (and very expensive) hardcopy resource Martindale-Hubbell. Users can find lawyers and/or firms or use the advanced search to really narrow down the scope of a search to perhaps law school attended or foreign language spoken. The other big player in this area is the Thomson Legal Record (http://legalrecords.findlaw.com/ss/search_index.jsp?ch=LP), which can be found on Findlaw. Users can search by name, or experience. The latter includes type of legal issue, jurisdiction/judge, or office location.

When you need trial versions of software, reviews of both software and hardware, and news concerning the latter plus just about anything electronic or geeky, there are four sites that I use extensively.

On the legal side of things, start with the ABA's Law Practice Management Section (http://www.abanet.org/lpm/home.shtml). The site offers both public and member-only resources. All lawyers who have any responsibilities in the tech arena, and are members of the ABA, should extend that membership to cover the LPM section. The public area offers pointers to information in the areas of marketing, management, technology and finance. With membership, you will get access to all of their research and articles.

Another favorite of mine is Law Technology News (www.lawtechnews.com/r5/home.asp). I still get this in hardcopy, but the articles and reviews can be accessed online. The LTN Daily Alert can be delivered via email, and that will bring you the latest from American Lawyer Media publications, leads to blog postings, and a lot of other commentary. This is a must-see for anybody steeped in law and technology.

The two non-law sites that I use extensively are ones that have been around for quite some time: clnet and PC World. clnet (www.cnet.com/) is a very complete site that offers news, reviews, downloads, and pricing information for all types of software and hardware. PC World (www.pcworld.com) is similar in scope to clnet, but it never hurts to have two sets of reviews when you decide to make a purchase. They also offer downloads of freeware and shareware to help you make a decision.

Both clnet and PC World offer a plethora of e-newsletters on various technology subjects, or you can just subscribe to technology news and leave it at that.

Our last stop on the tour will be in the blogosphere. Blogs are everywhere these days. You may even subscribe to a number of them already. However, if you want to take the pulse of the legal blawg world, the following sites will help you separate the wheat from the chaff.

Head on over to Blawg (www.blawg.com). They are currently tracking almost 3,000 blawgs with over 780,000 posts. Users of the site can peruse featured blawgs or search by topic, subtopic, or the entire blog world. Justia Blawg Search (http://blawgsearch.justia.com/) offers up 2,395 blogs in 72 subcategories. Users can browse blawg favorites, burrow in via a category list, check out some recent posts, or piggyback on search terms that others have used. Law Professor Blogs (www.lawprofessorblogs.com) attempts to offer a little more meat in their posts, and not just rants like some other blog sites. The blogs focus on particular areas of law with each one combining both (1) regularly-updated permanent resources and links, and (2) daily news and information of interest to law professors (and practitioners, if you don't mind a bit of education-ese). The materials posted are not just of interest to professors, but to all who may research these particular areas of law.

Our last site for blawgs is the Legal Blog Watch (http://legalblogwatch.typepad.com). This Law.com site keeps an eye on a number of blawgs that have been created by legal practitioners having great reputations in the legal and blogging arenas.

That wraps it up for our three-issue foray into basic sites that will keep you abreast of the legal research/news world. I've been receiving some emails with commentary and suggestions for additional sites - please keep them coming.

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The DMCA & Video Games and Passwords

Copyright management information can include, among other things, the title of the work, the author of the work, the status of the copyright of the work, identifying information about the work as well as terms and conditions for the use of the work. In short, this section of the DMCA is designed to prevent circulation of false or altered copyright information on a copyrighted work.

By Andrew Mills Holford

In 1998, the Digital Millennium Copyright Act, 17 U.S.C. 1201 et seq., was enacted to amend and bring copyright law into the age of information technology. The DMCA addresses circumvention of copyright protection by technological means, protects the efficacy of copyright information management systems, and creates two key safe harbors. The media has focused on cases filed against infringers on behalf of members of the RIAA and/or MPAA for unlawful access, reproduction and copying of "bootleg" music and video files. But, enforcement of the DMCA has taken place in a wide variety of fact patterns including printer cartridges, software developers and rogue employees engaging in computer espionage. Oftentimes, the DMCA has been vilified as a severe sanction against everyday people that serves only corporate interests. However, the DMCA offers important protections to independent artists, small businesses and big corporations. As we know, legislation is rarely perfect.

The first major enforcement provisions of the DMCA concern copyright management information. Copyright management information can include, among other things, the title of the work, the author of the work, the status of the copyright of the work, identifying information about the work as well as terms and conditions for the use of the work. In short, this section of the DMCA is designed to prevent circulation of false or altered copyright information on a copyrighted work.

The second major enforcement provisions of the DMCA, and the more controversial aspects, involve circumvention of technology controls and trafficking in such technology. This aspect of the DMCA covers devices that control access to a copyrighted work as well as devices that protect rights created under copyright law. For instance, think black boxes and reverse engineering and you're probably getting warm. However, this provision is more nuanced and less obvious in many of its applications than the first provision. In fact, proof of copyright infringement is unnecessary in this section, although it can frequently be shown, as it is directed more at the methods and means used. Of course, where permission is granted by the copyright owner an action will not lie.

The DMCA also created two primary exceptions to liability. The first safe harbor extends to internet service providers as statutorily defined (i.e. You Tube or

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Cases interpreting this defense tend to focus on when the internet service provider knew or should have known about the infringing conduct and what they did to stop it once they became aware.

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Facebook). This aspect of the statute places the burden of enforcement on the copyright owner to "police" on its own any violations. This section provides insulation to the unwitting internet service provider. Cases interpreting this defense tend to focus on when the internet service provider knew or should have known about the infringing conduct and what they did to stop it once they became aware. The second safe harbor extends to copies of computer programs made for the express purpose of maintenance or repair of a machine (i.e. a Mirror Image of a crashed or compromised hard drive). The rationales for extending these protections were based, in part, on economic policy concerning the information technology sector and issues surrounding workability through private enforcement of the DMCA.

The following cases illustrate some of the more recent and interesting developments in DMCA jurisprudence and offer insight into the different ways DMCA issues arise.

Video Games

In *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 616 F.Supp.2d 958 (D. Ariz. 2009), the maker of World of Warcraft, a popular online video game, filed against the maker of another software program that essentially allowed players to "cheat" by playing the game on a smart autopilot feature while they were away from the game. This autopilot feature allowed players to accumulate game assets quickly. Ordinarily, players needed to expend a great amount of online time and effort to accumulate game assets. Among many other causes of action, *Blizzard* counterclaimed under the DMCA for violations of the technological circumvention provisions of the Act. Essentially, the autopilot feature would log into the game and take over when a player so desired. Blizzard used two separate technological measures called "Warden" to safeguard against such programs. One measure scanned a user's computer for unauthorized programs before they logged into the online game. The other measure would request the user's game client software send portions of the game's memory to the game server for review. *MDY's* autopilot program, at the time of filing, could not be detected by either of Warden's technological measures. The district court found violations of the DMCA as the autopilot program avoided Warden's security features and allowed access to aspects of the game Warden was designed to protect against. This decision provides an excellent in-depth review of the current state of DMCA law and was recently heard by a panel of the 9th Circuit Court of Appeals.

Passwords

In *R.C. Olmstead, Inc. v. CU Interface, LLC*, 657 F.Supp.2d 878 (N.D. Ohio 2009), *affirmed at* 606 F.3d 262 (6th Cir. 2010), an established developer of credit union accounting software filed claims against a newer developer of credit union accounting software. One of the claims alleged violations of the DMCA. In short, the defendant was provided access to the established developer's program by the credit union as well as under the contract between the credit union and the established developer. At the time, the established developer's protocol for passwords and access to their end-user program was entirely discretionary and left to the credit union client. The defendant developer was an outside computer support company that was eventually hired to create an independent credit union accounting program. They were successful and the established developer filed suit. In finding for the defendant developer on summary judgment, the district court noted only two arguable technological measures were used. One was individualized password protection and the other involved a general key stroke. The court's rationale centered on the amount of discretion given to the credit union client in password use and the critical distinction between "avoiding and bypassing the deployed technological measure" – a violation – and "avoiding and bypassing permission to engage and move through a technological measure" – not a violation. In short, the court found developer defendant merely used the approved methodology to access the software. Recently, in *Actuate Corp. v. Intl. Business Machines Corp.*, 2010 WL 1340519, (N.D. Cal. 2010), the district court overruled a 12(b)(6) motion to dismiss that cited to the *CU Interface* case and other authority arguing unauthorized password use is not a violation of the DMCA. The district court analyzed the small split of cases concerning password use and the DMCA and allowed the complaint to stand on a different line of local cases. To be sure, this area is growing and a company's internal policies and procedures concerning password restrictions and access to their intellectual property is becoming ever more important.

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The Lost Art of Listening

By Brad Lander, PhD, LICDC

Technology, tight schedules, deadlines, distractions and interruptions are all part of a lawyers life. You are on the phone and someone comes to your door. Someone is having a conversation in the hall and your cell phone rings while an email notification pops up on your computer screen. You are hearing what the person on the phone is saying, but are you listening?

Many of us take pride in being able to "multitask," but multitasking is a myth. The brain is designed to focus on one thing at a time. Switching points of focus requires the brain to reorient, each time creating inefficiency. Some people may be faster at this than others, but it still results in a loss of information.

Listening involves more than the collecting of data, it involves processing. A communication moves between the right and left hemispheres of the brain, through the emotional and memory centers. Each part of the brain adds meaning, texture and nuance to the message. A good listener gets much more from a message than simply its content.

Essentially, there are three parts to any conversation; the verbal, the para-verbal and the nonverbal. The verbal message is, of course, the manifest information. But this, too, is multi-layered. Word choice is significant. There is a difference in meaning between "What do you *need* me to do?" versus "What do you *want* me to do?" When we take time to listen to the weight and subtle meaning of words, we hear more.

The para-verbal elements of communication involve *how* something is said. This is the emphasis on certain words, pitch and pacing. Take the phrase "I can't see it." Say the phrase four times, each time emphasizing a different word. Now say it fast and loud. Now quietly and slowly. The given phrase isn't merely a single phrase, we just made it six *different* phrases, and we could give it virtually an infinite range of meanings if we choose. We can even make it mean the opposite of the composition of the words (a.k.a. sarcasm). In written communication we use punctuation, italics, bold print, fonts, capitals and even emoticons to add meaning to our messages. (I once sent a hasty text to a colleague with the caps lock on and he responded back, "Are you mad at me?")

Nonverbal elements include gestures, facial expressions, posture, spatial distance and eye-contact. Nonverbal expressions are powerful in their own right. In a famous study, Albert Mehrabian and Susan Ferris found that over 50% of the meaning of a message is nonverbal. This can add a great deal of clarity or a lot of confusion. When the verbal and nonverbal messages contradict, it is the nonverbal communication that is believed ("He *said* he was sorry, but…"). Much nonverbal interpretation and expression is cultural. Norms about "the meaning" of body space and eye-contact differ between cultures and can lead to significant misunderstanding. It is very much our interpretation of someone's nonverbal behavior that determines whether we immediately like or trust them. It takes time to learn someone's nonverbal style.

We can learn to be better listeners. We first have to understand that listening is an *active* process. It requires effort and concentration, and there are many things we can do to facilitate this process. We can start by maximizing the amount of available information. Face-to-face communication is superior to all other forms. To see everything from a quizzical look to a foot tapping, we need to be able to see the person. Phone calls, texts and emails do not afford the same opportunity to exchange meaning. To get to know the needs and expectations of clients, meet with them in person.

The environment is also important. Eliminate distractions. No TV's. No radios. Silence the phone ringer and turn off the cell phone. If you take that call, you just said "this call is more important than you." (I remember the guilt I felt the first time I was on call and I had to put my mother on hold.) Don't allow people to knock on your door (use an In Session sign) or interrupt your conversation. If you are busy, let the person know you only have five minutes and then give your full attention for the five minutes. If you are on the phone, don't sign papers or pull up your email.

Talking from behind a desk or positioning yourself above someone sets up a dominant/submission dynamic that will strongly influence the flow of communication. At times this is desirable (like a judge on the bench), but if you truly want to communicate with someone, face the person at a comfortable distance, at eye level with no obstacles between you. This enables you to best catch the nonverbal cues.

Focus on and process what is being said. Let the person finish what they are saying before you speak. You can't listen if your mind is already planning what you are going to say next. A well known problem with doctors is that they tend to listen to a patient only to the point at which they think they understand the problem. According to Dr. Jerome Groopman, a physician generally makes an interpretation within 18 seconds of talking with a patient. He estimates that this results in a misdiagnosis in about 20% of all cases. Once you think you've "got" the idea, the listening stops. To be sure that you heard the person correctly, paraphrase or reflect back what you heard them say. Give the person a chance to verify or correct what they were communicating.

As a psychologist, listening skills were drilled into me. My offices were set to maximize listening and communicating. Only once in 30 years have I been interrupted in a therapy session. (It was the police telling me the person I had in my office had a gun.) Generally, lawyers simply need to be reminded of the importance of listening and to put some simple guidelines to work. These guidelines work for a 20 second conversation as well as they do for conference length meetings, and for clients as well as colleagues, spouses, children and shopkeepers.

References: Mehrabian, Albert & Susan R. Ferris (1967): Inference of attitudes from nonverbal communication in two channels. Journal of consulting psychology 31 (3): 248-252.
Groopman, Jerome E. (2007): How Doctors Think: Houghton Mifflin Harcourt, Boston MA.

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Hiring A Police Expert?
Five points to examine

By Dr. Richard Weinblatt

Your client comes in and tells you a tale of woe from an interaction that happened the night before with law enforcement officers. It is not uncommon for people to have contact with law enforcement officials. The most visible and omnipresent manifestation of our government, local law enforcement officers are engaged in countless exchanges with members of the community every day. While the majority of those interactions are uneventful or otherwise are depictions of sound police practices, there are a few that fall out of the scope of accepted police procedures. But how do you know if your client has a good case or is their version just a case of sour grapes?

Enter the police expert. Harking back to the adage it's hard to find good help; it's tricky to find a police expert who has the proper mix of credentials that can help you evaluate the validity of your client's case involving law enforcement. While many say that they can tackle the job, you need to be sure they have the right mix of ingredients to bring to the table.

There are five things you should be examining as you ponder the retention of a police expert consultant and witness to assist you with the case: experience, education, training, publications, and media. It is rare that an expert is able to present a blend of all of those components. They are all necessary as the expert witness business is a serious undertaking with real consequences for the real people involved. Beyond the very important analysis of whether your client really has a viable beef with the cops, a good police expert with these five areas covered gives your client and your case credibility, impact, dynamic presentation, and the ability to explain complex issues in a simple manner.

Experience

An expert with varied experience enables a macro perspective and exposure variation. Ideally, you want your expert to have experience at different levels of policing including patrol officer and chief executive, as well as experience in divergent size agencies and varied roles within policing.

Education

Due to the complexity of the legal process and the need for skilled analysis and communications skills, a solid education within a regionally accredited college framework is essential. Certainly, bachelors and masters degrees should be required within the framework of your search for a competent police expert. Better still, a doctorate. As for areas of study, majors that encompass criminal justice, criminology, public administration, and education are clearly pertinent. Other degrees, management and business administration are also relevant.

Training

Beyond the basic law enforcement academy, there is much variety in the training that law enforcers undertake. Your expert should be well versed in that training and how it should be conducted. An emphasis on high liability areas most likely to cross your desk certainly makes sense. One way to demonstrate expertise is for your expert to possess instructor certifications in areas such as Taser, ASP expandable baton, pepper spray (OC), firearms, Vehicle Operations/Driving, and defensive tactics/subject control.

Publications

The ideal expert should have a reputation for trying to improve the profession by writing for law enforcement industry publications going back a number of years. This long-established credibility within the field helps to bolster your case with a reputable and unbiased critical thinker of police matters. Among the well-known police publications to look for are American Police Beat; Law and Order: The Magazine for Police Management; Officer.com; PoliceOne.com; Police Link.com; Police: The Law Officer's Magazine; and Sheriff Magazine.

Media

Most incidents involving allegations of police misconduct are not like having a plumber go afoul. They are often high profile events and your expert should be accustomed to dealing with the media. An expert's past experience with the media also yields a verifiable public track record and a built-in credibility ascribed to those who are sought out by the media.

Experienced media communicators have honed the skill of explaining complex issues in simple, understandable terms. That talent is sorely lacking in police experts who often talk as if recounting a jargon-laden, dry and long-winded police report. The ability to communicate is needed within the courtroom and deposition setting to support your case.

All of these five things help to portray your expert to the court, opposing counsel, and the public as having a verifiable track record and reputation of being balanced, credible, independent, and impartial. These five areas also help your expert to be able to do the meat and potatoes of what experts do -- conduct a thorough case file analysis evaluation, review and analysis, a document review and analysis, a police policies and practices review and analysis, prepare expert reports, provide litigation support, and give testimony at depositions, hearings, and trials.

With the five areas of credentials covered, you can be sure you have retained the most competent expert to support your efforts on behalf of your client.

www.TheCopDoc.com

Dr. Richard Weinblatt, The Cop Doc

THE LIVING CONSTITUTION
BY DAVID A. STRAUSS OXFORD UNIVERSITY PRESS, 2010

Reviewed by Janyce C. Katz

Constitutional discourse is not new. Each time the Constitution is interpreted, the questions raised are basic. How should the Constitution be read to meet the changes in society and does such interpretation become arbitrary to the point where an unrestrained judiciary decides cases as it pleases and thereby totally undermines our democratic system? The answers have been debated for almost as many years as the U.S. Constitution has been in existence.

One theory has been that the Constitution needs to be read and interpreted as it is and judiciary should be restrained. In this camp, one could place the late Justice Hugo Black, known for his support of the New Deal and the disenfranchised to the point where his defense of the procedural rights of unpopular minority groups led to him being hanged in effigy. Justice Antonin Scalia has also been classified as a textualist, even though the results of his decisions are vastly different from those of Justice Black. Scalia has also been known to follow precedent in addition to original text, with a belief in following precedent, which may lead decisions away from the purity of a totally textual based decision. Both Black and Scalia shared the belief that the Constitution created a limited government and the justices should be the bulwark against abuse rather than becoming the abusers.

This theory of interpreting the text of the Constitution became prominent after July 9, 1985, when then attorney-general Edwin Meese III stood before the ABA and called for a Jurisprudence of Original Intent. He essentially argued that the law rather than a monarch should be considered the ruler of society. He suggested that the constitutional text as written should guide the Supreme Court and expressed concern that justices, without such guideposts could issue decisions that would be undemocratic, producing big swings in the interpretation of constitutional law, and, thereby, destabilizing the system.

Meese's theory based the interpretation of the Constitution in the sense of the terms written by the founders. As noted by Steven G. Calabres, in a book he edited to commemorate the 25th anniversary of the Federalist Society,[1] Meese maintained the idea of the Constitution as a higher law that binds officials, thereby allowing the justices to declare a law unconstitutional. Under his theory, there is no liberal or conservative interpretation of the Constitution, there is only the correct or the incorrect interpretation.

To simplify an argument to which many law review articles and books have been dedicated, Original Intent allows for the Rule of Law, not of men. By trying to discern what the founding fathers intended, justices permit the words of the Constitution not their own passions to prevail as a guidepost to the law. This is essential when passions are high so that neither the majority nor a particular minority is able to dominate the rest of the population.

David A. Strauss's book restates the argument against Original Intent held by many including the late Justice William J. Brennan who offered his thoughts in opposition to Meese's strong argument at the 1985 ABA meeting. Strauss argues that Originalism is incompatible with our real lives because much of what the founding fathers thought just does not apply. For example, he indicates that they probably accepted flogging someone publicly while we would see such a punishment as excessive and cruel. He also found a problem with ascertaining the original understanding of the text.

Justice Brennan made a similar argument. Both repeat the statement allegedly made by Jefferson, that the hand of the dead should not rule the living – i.e. – the interpretation of the Constitution must comport to modernity.

However, Strauss, the Gerald Ratner distinguished Service Professor of Law at the University of Chicago and an editor of the Supreme Court Review, argues that the interpretation of the Constitution does not have to be seen as either ruled by the dead or by justices and judges turned loose to create chaos by imposing their own wills on every set of facts.

Stauss has personal experience arguing. He served as Special Counsel to the United States Senate Judicial Committee. As Assistant Solicitor General of the United States, he argued eighteen cases before the U.S. Supreme Court.

Strauss interprets the Constitution as a living document, something that has been evolving, just as common law has through the centuries. As with common law, constitutional interpretation has developed partially based upon precedent and partially based upon societal needs at a given point and time. The grounding in precedent prevents the arbitrary rule by judges which is a central fear of those who support Original Intent.

As examples of the evolution of the interpretation of the Constitution through precedent, Strauss uses the expansion of the First Amendment speech principle, civil rights leading to desegregation, and women's rights, all of which have been major changes in civil society.

Sure, he writes, certain parts of the Constitution offer clear guidelines that can be followed as originally written. He points to the provision that states the term of a member of the House of Representatives is two years. While the term "seven days" in reference to the biblical interpretation of the creation of everything has been debated, Strauss indicates that no one debates the term "year" or the number "two." The use of the certain specific terms in the Constitution, Strauss argues, settles questions by offering definite answers.

The interpretation of the nonspecific parts of the Constitution, just like common law, is based upon precedent. Or, if the precedent when applied to the facts is not clear, then the justices may decide a case based upon good social policy or upon fairness, a la Solomon and the baby. Strauss suggests that constitutional interpretation be based upon a simple thesis: when the stakes are low, it is more important to settle the matter and when high, more important to settle the matter correctly

This short but extremely readable book offers an important theory about the manner in which the Constitution should be interpreted. Strauss's former colleague at the University of Chicago, the newest Justice, Elena Kagan allegedly also believes in the living constitution theory of interpretation. As a result, this book might also provide guidance to understanding future battles between justices at the Supreme Court.

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1. Originalism, A Quarter-Century of Debate, Regney Publishing, Inc. 2007, Introduction.

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ON JUDGES — A TRIPTYCH

By S. Michael Miller

Nearly 43 years ago, I was preparing for a habeas corpus hearing in the United States District Court, Southern District of Ohio. I was representing the State of Ohio and the petitioner was a convicted axe murderer who was represented by a pair of seasoned lawyers.

The hearing was projected to last two full days and numerous witnesses would testify. The trial transcript was approximately 1,000 pages. It was an important hearing. It was my first federal hearing. It was before The Honorable Joseph P. Kinneary.

The courtroom then, as it is now, was majestic and, to me, more than a little foreboding. In that courtroom I always felt I was in Oz and the man behind the curtain was Judge Kinneary.

I had heard, of course, many stories about the Judge and how the slightest error by a practitioner could result in punishment that could be Draconian and embarrassment that knew no limits.

Fortunately, I survived my two-day ordeal. When it was over and the Judge had taken the matter under advisement, I began carrying my books, transcripts, etc., from the courtroom to my automobile. It took a number of trips. As I was leaving for the third time, the Judge's bailiff informed me that the Judge wished to see me. I was terrified. Dark thoughts flashed through my mind as I tried to recall what I had done that had raised the Judge's ire. What grievous error had I made that was about to end my short legal career?

As I was shown into the Judge's chambers, he rose from his chair and came toward the front of his desk. He grasped my hand and warmly complimented me on my conduct in his courtroom the two previous days.

I left that courtroom a different person than I was only minutes before. I felt like a lawyer. My confidence skyrocketed and I believed in my abilities.

As the years passed, I spent some time with the Judge at a few gatherings. After 25 or 30 years, I privately told him how much I appreciated his kindness those many years before. It meant a lot to me then and it still means a lot to me now.

I have seen other judges use their position in unique ways. About 25 years ago, I walked into a common pleas courtroom to see a judge about a minor matter. The judge was in a hearing on a motion to suppress. It was a very serious charge and both the defense attorney and the assistant prosecuting attorney were giving no quarter. It was contentious and both sides obviously felt that they were correct.

The defense attorney was one of the finest attorneys in the area. He was honest intelligent, thorough and fair. He was liked and respected by every prosecutor and every judge. But on this day, he lost his temper, albeit briefly. When the judge overruled an objection of his, he turned to his client and muttered, "It's a kangaroo court." Unfortunately, he said it a little too loud.

I was the only one in the courtroom other than a courtroom security deputy and the court reporter. No one said a word for a minute or two. The judge then quietly and calmly stated he would take a five- minute recess. He ordered the deputy to put the defendant back in custody.

The reporter left, leaving only the judge, the defense attorney, the assistant prosecuting attorney and me in the courtroom. With that, the judge stood up, stuck his hands out in front of him with his wrists bent downward, and literally hopped down the few steps from the bench and then into his chambers. The tension and acrimony that had been in the room moments before vanished.
The defense attorney immediately apologized to the judge in a most sincere fashion and it was over. The hearing was concluded in the highest professional manner.

The judge could have handled the situation another way and I'm sure many believed he should have. But I will always remember what he did and how he achieved the desired result without damaging the reputation of an outstanding lawyer.

Many years ago, a defendant was on trial for killing eight or nine people in the course of various robberies and burglaries. It was, of course, a trial with incredible interest and enormous media attention. Once again the prosecutors and defense attorneys clashed repeatedly. After a particularly contentious incident, the trial Judge called the lawyers to the bench. He then began chastising the assistant prosecutor for his actions. The prosecutor tried to blame the defense attorney, but the judge cut him off saying there were more important things going on than this case. All of the attorneys looked at the judge in an incredulous manner. What could be more important than a case where eight or nine people have been murdered? The judge then said, "Haven't you heard? The Red Chinese just invaded California." Everyone just stared. The judge called a short recess and the tempers quickly receded. For the most part, the case flowed quite properly until it ended.

Trials can be an ordeal; often they are filled with tension, stress and highly charged emotions. But sometimes a judge can control his court and get everybody back on track by a simple act or comment that, while unusual, is nevertheless perfectly suited to the moment. And when that trial is over, the judge who takes the time to compliment, privately, a new lawyer is giving a gift that will last forever. Those are the judges I will never forget.

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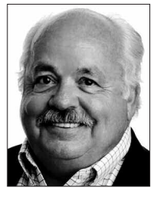

S. Michael Miller,
Kegler Brown Hill & Ritter

HEY, DUDE!

Nicholas Longworth, IV

By Lloyd E. Fisher, Jr.

Any list of colorful Ohio lawyers would include Nicholas Longworth IV (1869 – 1931). He was a fourth generation member of a prominent wealthy Cincinnati family whose ancestor was a banker, a merchant, a horticulturalist and one of the founders of the Ohio wine industry.

Nicholas graduated from Harvard and Cincinnati Law School and soon entered politics. He served in the Ohio House and Senate and then was elected to the U.S. House in 1903. After serving for ten years, he lost one re-election battle, was out for two years, and then returned in 1915 to serve until his death in 1931.

One day while campaigning, Nick got off a train in Newark where the station was located among the tracks of the B.&O., the Pennsylvania and the Big Four railroads. Every time he tried to speak, a passing train interrupted him. Finally he said: "What's the use of my trying to uplift my voice against this great roar of Republican prosperity!".

Longworth served as majority leader of the House during 1923 through 1925. In 1925 he was elected Speaker, succeeding Frederick Gillett, and continued in the chair until the Democrats returned to power in 1931. Although he had been one of the leaders in the fight to reduce the power of the Speaker during the term of "Uncle Joe" Cannon, he quietly reinstated many of the policies he had opposed.

When Democrat "Texas Jack" John Garner became minority leader in 1928, he and Longworth established a personal relationship that lasted until Longworth's death. Neither Longworth nor Garner supported Prohibition and they regularly met in a private room in the Capitol at the end of the day to "strike a blow for liberty" with bourbon and water. Other Republican and Democratic members were invited and the group acquired the name "Board of Education." New members of the House were often included for "education" and the informal atmosphere helped keep essential legislation moving in the House. After the meetings of the "Board," Nicholas often drove Garner home in the official Speaker's car. Garner kept calling it "our" car and reminding Longworth to take care of it since Garner expected to use it when the Democrats regained the majority.

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Nicholas was a bon vivant darling of the society set; dressing in stylish suits and spats and carrying a gold-headed cane. Musically talented, he played both violin and piano and sang well. During his early days in the House, he cut a wide swath in DC circles and courted a number of young Washington ladies, some of them married. A story making the rounds in Congress once described Nicholas as sitting in a chair in the House anteroom when a passing Representative rubbed Nick's head and said: "This feels like my wife's bottom." Longworth rubbed his head and said: "So it does."

In 1906, he married Alice Roosevelt, the daughter of Theodore Roosevelt, in a White House ceremony. As time went on, Alice and Nicholas were not models of marital monogamy. Both of them had affairs with other partners. Alice gave birth to a daughter, Paulina, in 1925 and while Nicholas was always listed as her legal father, it was common knowledge that her biological father was William Borah, a Senator from Idaho. A story circulated in Washington that Alice wanted to name her daughter "Deborah" but Nick objected because of the connotation of "de-Borah."

Alice was an outgoing non-conformist who delighted in shocking Washington traditionalists. She smoked and drank in public and kept a pet snake. She relished gossip and innuendo and was famously quoted as saying: "If you can't say something nice about someone, sit next to me!" Following Nicholas's death in 1931, Alice continued to apply her tart tongue to Washington figures. She described Thomas Dewey as "the little man on the wedding cake." After two mastectomies late in life, she said she was "the only topless octogenarian in Washington."

Nicholas died in 1931 while visiting friends in South Carolina and Alice returned his body to Cincinnati to be buried in Spring Grove Cemetery. In his honor, one of the House office buildings is named The Longworth House Office Building.

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Lloyd E. Fisher, Jr.

MUSTER ROLLS — *THEN AND NOW*

By Bruce A. Campbell

In 1934, the year in which the Queen Mary and Donald Duck were both launched, an about-to-be-ticketed OSU law grad, perhaps lacking anything better to do while waiting to start building his book of business, ginned up a book of a different sort. That frayed and faded work has survived seven plus intervening decades housed in the official Columbus Bar Association Archival Vault, which is to say a bottom drawer of a filing cabinet that, for the last twenty-eight years, has been closely guarded by Esther Kash, the CBA's Curator-by-Default (among her many other job titles).

The nascent lawyer/publisher was Don S. McNamara, and his publication was named The Rules of Practice and Directory of Attorneys for Franklin County, a title fairly dripping with erotic promise. Even these seventy-six years later, it is an enticing read -- if you happen to be a bar history junkie.

Young Don (I am reliably informed by his eighteen-years-younger brother, Keith) was pressed into service by the Barrister's Club to produce this potboiler to be sold by the Club to raise funds for its "professional enhancement activities" (wink wink), many of which were conducted at the bar of the Neil House. I suspect the directory duty may have been part of an initiation ritual for the neophyte.

The book starts with lists of the local legal grandees: three Court of Appeals judges, six Common Pleas judges (plus one scratched out by hand prior to publication), a Probate judge, a Domestic judge plus five Municipal Court judges. Some of these birds (e.g. the Hon. Dana F. "Curley" Reynolds) were still on the bench when my class of '65 hit the old, old courthouse.

Perhaps the most notable then-verses-now difference in the front section of the book is a list of thirty-four Justices of the Peace from thirteen jurisdictions within the county (including Camp Chase, Amlin, and Hilliards [sic]). And we think trooping from one Mayor's Court to another is a pain?

Following the troop dignitaries in the book is the parade of working stiffs of the bar, some 850 of them. With a county population of 360,000 at the time, each lawyer had potentially 425 citizens to sign up for legal services. Now, the ratio is down to about 1 lawyer per 150 citizens, which seems to suggest that population increase has been spectacularly outpaced by lawyer inflation (referring here to numbers, not ego size).

Familiar names pop up in the rank-and-file listings: John W. Bricker, then Ohio Attorney General, later Governor and U.S. Senator; John J. Chester, Sr. who had been the Prosecuting Attorney in the sensational 1926 murder trial of Dr. James Howard Snook (recently chronicled in the book Gold Medal Killer); three Crabbe's; only one Larrimer; the legendary trial lawyer, Collis Gundy Lane; three Metcalfs; two Vorys, four Saters, one Seymour, but no Pease.

Of personal interest to me was the listing for Samuel Zuravsky, a gentleman who was kind enough to aim a string of cash-bearing clients toward my door in my early years of practice. Sam graduated from the Columbus YMCA Law School and spent major part of his waking (and "working") life thereafter in Y's handball courts -- in later years against emphatic medical advice. When I knew Sam, he always held the last spot in the yellow-page listings, which bit of alphabetic serendipity alone brought in a considerable number of clients in those days when other attorney advertising was considered anathema. Oddly enough, in the '34 Directory, Zuravsky was beat out of the ultimate spot by one Rollin Zurmehly.

As an aside, Sam left me with a piece of "wisdom" which seemed to serve him well but which I have tried not to follow. He told me, "If you ignore problems [including your client's issues] long enough, most of them eventually go away of their own accord, and then you can take credit for solving them." As Bar Counsel, I can attest that Sam's approach does not fly with contemporary consumers of legal services. But I digress.

Due to a marked tendency of 1936 vintage lawyers to use initials rather than names, it is hard to discern the actual number of women lawyers; only ten are clearly identifiable in this list. Two of those, Louise Dillman and Louise Gillman share the same address. Either this was a remarkable coincidence or, more likely, young McNamara did a double entry for the same person. Among the others was Goldie S. Kanter (later Mayer) who was still plying the halls of Municipal Court when I started. Goldie was a volunteer, one-woman Legal Aid Society, a diminutive force of nature. Her miscreant clients were invariably held up by her as upstanding "boys" or "girls" from "a good family" to the judges, all of whom she had implored and beguiled into submission so many times that they knew they might as well just cut to the hand-slap sentence or a dismissal and move on to the next case. There were rumors that Goldie had an occasional paying client, but these reports were not to be credited.

As with the modern Bar Directory, there were ads in the McNamara book. There are pitches for vendors of legal supplies, desks, bonds, office space and the Columbus Automobile Club ("striving to better motor conditions everywhere"). The back page touts the Ohio State Journal, a newspaper that "has served not only the professional and business world of central Ohio, but an able-to-buy reader clientele as well." Where is that "able-to-buy clientele" hiding out in these days of economic distress?

Archived

The climax of Don's sexy opuscule, the Court Rules section, would not be particularly foreign to current practitioners except for references to "terms of court," "demurrers" and distinctions regarding "Jury or Chancery" cases. One Common Pleas scheduling rule, however, holds that "no law firm shall be required to try more than two cases at the same time." Apparently they were not contemplating firms comprising hundreds of lawyers handling thousands of cases ("Sorry Your Honor, but two of my firm's associates I've never met are trying cases I know nothing about somewhere in this courthouse, so I'll be taking today off -- by court rule"). This small relief from enforced multi-tasking notwithstanding, the Rules made clear that the Court was serious about moving its caseload. "Effective and steady movement of the trial work depends [on] literal enforcement [of docketing rules]. It is up to counsel to be carefully watching the advance [of their cases] on the blackboard outside of the Assignment Room." I suspect that chalkboard these days would be covered with graffiti – not all of it applied by the public.

Today's Columbus Bar Directory runs to well over four hundred pages; McNamara's 1934 version topped out under forty. Is more less?

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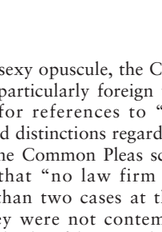

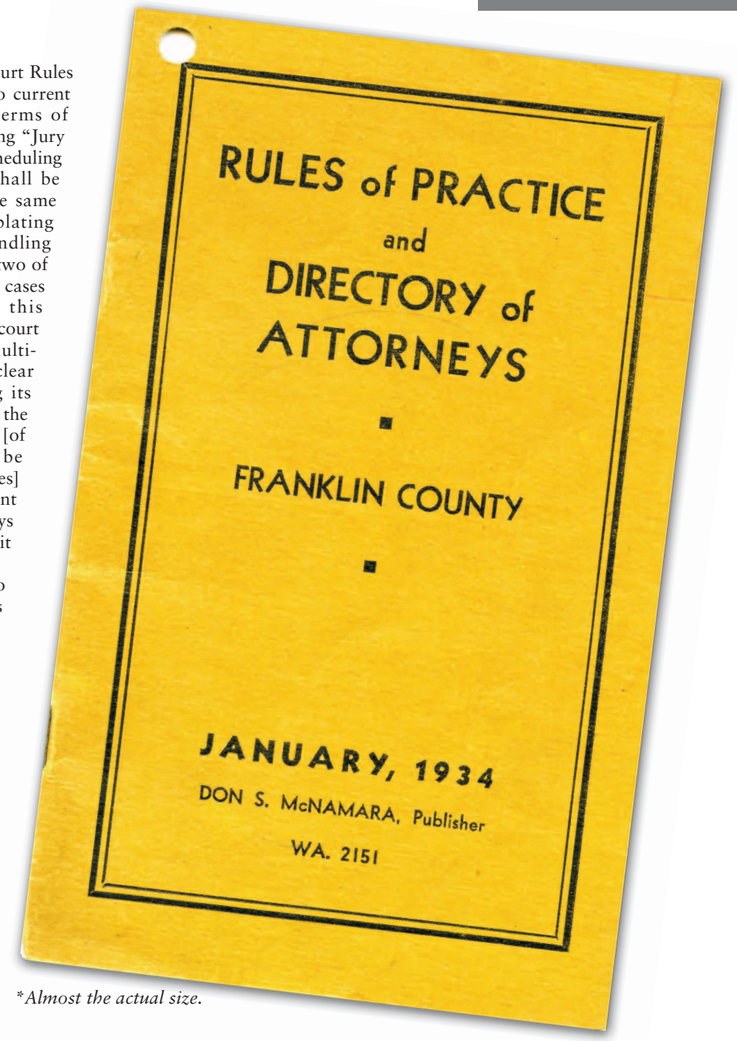

**Almost the actual size.*

No Shortage of Travel Ideas

By The Honorable David E. Cain

Want to shop for the most exciting destinations on the planet?

Go to Adventure Center.com.

Or, better yet, talk to Judge Anne Taylor.

She just got back from the North Pole. She also has been near the South Pole a couple of times and a host of exotic places in between.

Where was the best place on earth? "I have no favorite (trip) as such. It's always the one I just took – or am about to take."

The last one was the one that took her "about 500 miles from the top of the world (the geographic North Pole)." The next one will just be a long weekend – kayaking in Alaska's Prince William Sound.

The Arctic trip began by plane – to Chicago, to Copenhagen, to Oslo, to Longyearbyen, a territory of Norway above the Arctic Circle, on an island called Spitsbergen and, then by boat (originally built for the Chilean Navy) to circle Spitsbergen. The first stop after that was at Ny-Alesund, the most northern human settlement in the world.

"After that, we didn't see another living soul until we got back. No people at all, no nomadic people like in northern Greenland. And no trees. The nearest tree was in Oslo – four hours to the south."

But there were plenty of places to hike with interesting birds, animals and plants and some remnants of abandoned explorations. "It's the only place in the world where you can see polar bears on ice," the Municipal Court judge pointed out. And she saw quite a few of them – from the boat, of course.

"I climbed for three hours to get to the Polar Ice Cap. I just wanted to touch it and head back."

And night never fell. It was brighter at 3:30 a.m. there, then at 3:30 p.m. here, she said. Then, there is total darkness from November until April.

"We were the first group this year – and it was in the middle of July – to make it all around the island (Spitsbergen). Everyone else got stuck in the ice."

Judge Taylor contrasted her latest trip with earlier ones in the Antarctic. "We went to the bottom of the world to see penguins." Judge Carrie Glaeden accompanied her the last time and they saw thousands of the colorful creatures.

And there were human beings to visit at various research stations, Taylor commented.

She said she would recommend Bhutan and Burma, both in Southeast Asia, as great travel destinations.

As for places to live, it would have to be New Zealand for its awesome natural beauty.

Bhutan has "a wise leader who runs a mountain kingdom (nicknamed the Land of the Thunder Dragon) where people honor their traditions: Buddhism, food, clothing. And it's very clean. They produce hydroelectric power for India." Bhutan got its first road in 1962 and an international airport in 1983.

"In Burma, go to the mountains near China. One can find 2000 Buddhist Temples in the middle of a field. Some very small. Some drop dead gorgeous. Beautiful architecture all over the country. Many older people speak perfect English because of their exposure to the British during WWII."

Judge Taylor said she also loved the country of Oman on the Arabian peninsula in the Middle East. "A lovely, peaceful country with mountains and ocean. New roads and infrastructure. And the tour guide said I was the first American he had ever met."

A trip to South Africa a few years ago is a great memory because it included "a whole bunch of people from the court (bailiffs, prosecutors, defense attorneys)," she said.

Eleven years ago, the Judge climbed to the top of Kilimanjaro, the highest mountain in Africa at 19,565 feet. "The summit day was hard and the first day coming down was a killer," she commented.

But for someone who wants to climb a big mountain, Taylor would actually recommend going to Borneo to ascend the highest mountain in Southeast Asia, Mt. Kinabalu. "It's a tough two-day climb, but it's a great nature adventure and super cheap. You can see pigmy elephants, orangutan, and troops of proboscis monkeys."

Now the senior judge on muni court, Taylor is finishing her 19th year on the bench.

For her 60th birthday in January, she said she is looking to do a trekking trip in Burma or going to see big cats in India.

She has learned how to get the most out of the 30 days of vacation each year (as provided by statute).

For example, the trip to Prince William Sound will use up only two vacation days (a Friday and a Monday).

And she's not afraid of running out of ideas.

"There's always a new place to explore. And when I retire I will do the rest of this country."

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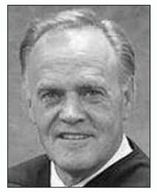

The Honorable David E. Cain, Franklin County Common Pleas Court

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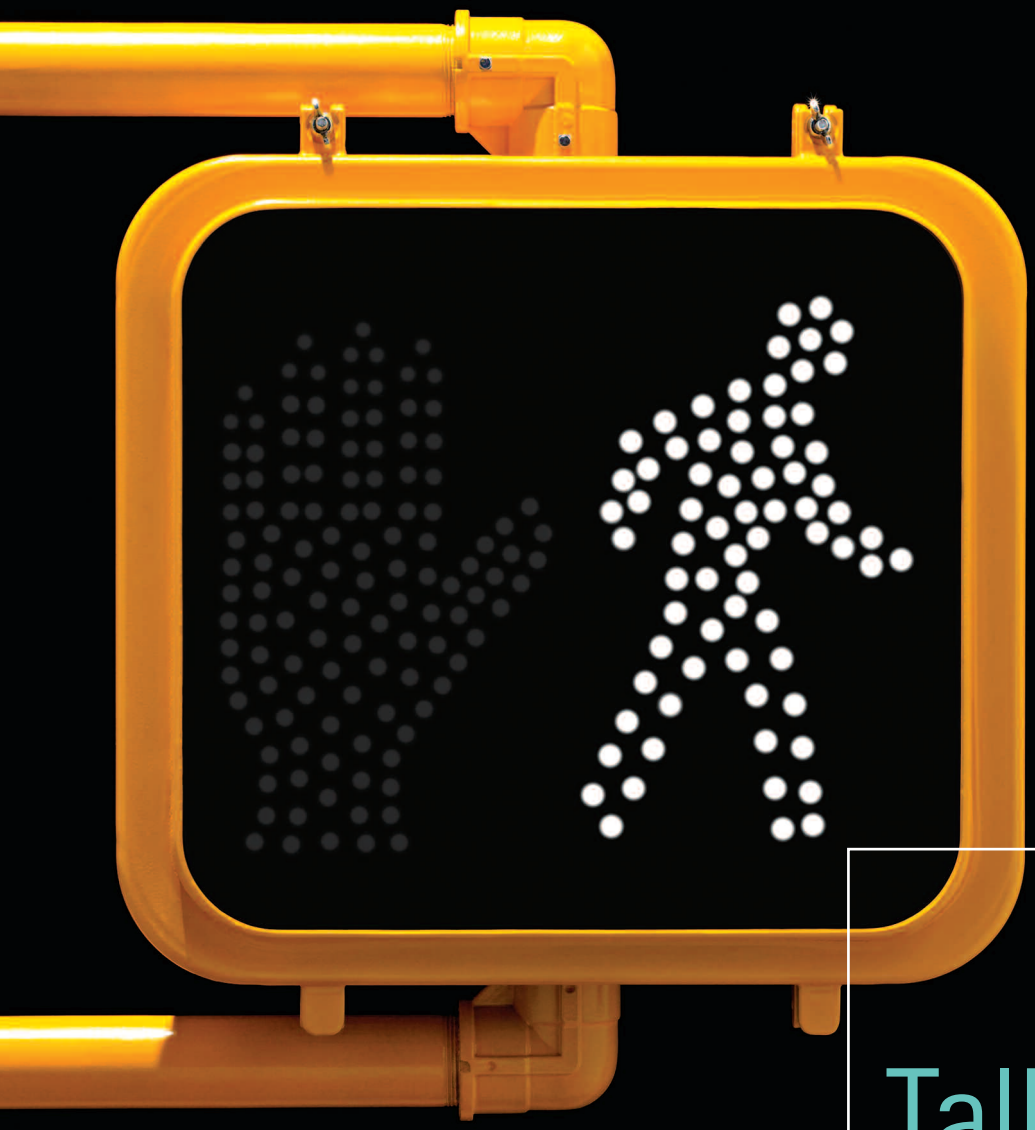

Talk v. Walk

To start a new enterprise, you have to be willing to walk the talk. Sure, it's important to have a vision of your success in the marketplace. But do you have the conviction and energy to ensure you'll succeed? We opened our 10th office in Columbus in April 2009, offering what we believe is a unique platform – a large full-service firm focused on dynamic U.S. markets, with an entrepreneurial and value-based approach to both client service and its own business. In other words, we are walking the talk.

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