Columbus Bar Lawyers Quarterly

Spring 2010

A SUPPLEMENT TO THE DAILY REPORTER
CONTENT PROVIDED BY THE COLUMBUS BAR ASSOCIATION

COLUMBUS BAR
Lawyers QUARTERLY
SPRING 2010

Columbus Bar Lawyers Quarterly is published by *The Daily Reporter* for the Columbus Bar Association, 175 South Third Street, Columbus, Ohio 43215, 614/221.4112, four times a year — Winter, Spring, Summer and Fall. Statements or opinions expressed herein are those of the authors and do not necessarily reflect those of the Columbus Bar Association, its officers, board, or staff.

CBA
COLUMBUS BAR ASSOCIATION

Work-Life Balance:
Not Just A Generational Issue

By Elizabeth J. Watters

"People try to put us d-down
(Talkin' 'bout my generation)
Just because we get around
(Talkin' 'bout my generation)
Things they do look awful c-c-cold
(Talkin' 'bout my generation)
I hope I die before I get old
(Talkin' 'bout my generation)

Why don't you all f-fade away
(Talkin' 'bout my generation)
And don't try to dig what we all s-s-say
(Talkin' 'bout my generation)
I'm not trying to cause a big s-s-sensation (Talkin' 'bout my generation)
I'm just talkin' 'bout my g-g-g-generation (Talkin' 'bout my generation)

This is my generation
This is my generation, baby"

The Who, My Generation, 1965

I am not a Millenial. I am not a member of Generation Y. Technically, I am a member of Generation X, but I am just one year shy of being a Boomer. So, I often think like a Boomer, but have the experiences and expectations of someone who came of age in the early 80's – essentially the post Title IX generation that believed in the ideal of a superwoman who could do it all and have it all. Regardless of your generation, however, one thing has become clear of late: attorneys of all ages and sexes are struggling to "juggle" client expectations with family and community responsibilities in an age of instant communications and hard economic times. It is a difficult topic right now. One you may not want to think about. But, as David Lisko's article (Better Lawyer, page 32) "The Modern Struggle For Sanity And Success," reveals, work life balance issues for many young lawyers and law students mean balancing one's desire for a legal career with feelings of fear, rejection, uncertainty and, many times, disappointment. It is a struggle just to get a job or keep a job.

So, what is the Columbus Bar doing about this issue? Exactly what you would expect: We are facing the issue head-on. Our Solo and Small Firm Committee is working hard to get attorneys who are transitioning into their own practice or who are hanging out a shingle straight from law school the information they need to succeed, including through our recent technology fair. The Columbus Bar's Staffing Solutions has expanded its services to extend beyond providing law office support staff to providing an online forum for attorneys to access job postings and post resumes. Members have seven-day advance access to job postings. Similarly, many lawyers are finding clients and referrals through ColumbusLawyerFinder and our Lawyer Referral program. We also have a senior lawyers committee headed by John Hartranft which will deal with the issues faced by attorneys who are over the age of 55 – planning for retirement, dealing with aging parents and adapting to a new technological age – work life balance issues that few over the age of 55 like to admit they are facing.

And, I am excited to announce that in the coming months the Columbus Bar will be rolling out its one-of-a-kind "Residency Program" for new lawyers. The program, chaired by John McDonald of Schottenstein Zox & Dunn and Franklin County Common Pleas Court Magistrate Mark Petrucci, has the immediate goal of providing legal experience and education to recent graduates who will increase their competitive advantage in securing employment and/or starting their own legal practice. The Columbus Bar hopes to provide qualifying new lawyers with training, mentoring and first-hand experience in handling cases and client matters by working with the Moritz College of Law, Capital University Law School, administrative agencies, and public interest groups. We are very excited about this program and believe it will become a model program for other bar associations across the country.

Finally, as a working mom, I would be remiss if I didn't point out that the work life balance issue is becoming even more difficult for parents in these tough economic times. In January, Women Lawyers of Franklin County had a luncheon meeting at the Columbus Bar to discuss the obstacles and opportunities for women in achieving advancement in the legal profession in light of recent studies showing that women lawyers are still not equally represented in the ranks of partnership or in firm leadership positions. Kudos to WLFC and the Columbus Bar for being willing to discuss the issue openly and honestly.

The numbers are sobering: We are going backward, not forward, in terms of the advancement and retention of women in the law. Some of this is due to the economy, but some of it is also due to the unspoken discrimination that working women face in the legal practice. As the ABA recently reported, a litigation partner in the law firm Eversheds in the United Kingdom questioned the commitment of a job candidate, a new mother. While he did not question the commitment of male candidates for the associate position, he decided that the woman candidate was automatically compromised in terms of her commitment to the firm and hours she was prepared to work because she had recently had a child. Unfortunately, I fear that this partner said out loud what some attorneys unwittingly think to themselves: women with children are less dependable, less committed, and not willing to work hard. While the mythological superwoman does not exist (at least not in my world), nothing could be further from the truth. So, I ask members to re-examine their thoughts about working moms, especially in law firms, and help me erase this unfair bias. It is not just a women's issue. It is not a generational issue. It is an issue that impacts every attorney who practices law, and will, most certainly, impact generations of lawyers to come. Everyone stands to benefit from a little improvement and help in successfully balancing their work and family lives.

ewatters@cwslaw.com

Elizabeth J. Watters,
Columbus Bar
President

THE BENEFITS AND PITFALLS OF MANDATORY LEED CERTIFICATION

By Nicole M. Loucks and Peter W. Hahn

Though you may be asking, "What is LEED and why should I care?" – LEED is fast becoming an industry standard that your clients will expect you to know – even if you don't consider yourself a construction or environmental lawyer. And when you consider the economic, environmental, and health benefits of green-building standards like LEED, you'll understand why your clients are starting to care so much about it. The rise in popularity of LEED-designed buildings has also raised legal issues regarding all stages of construction, from site selection to final completion.

LEED, or Leadership in Energy and Environmental Design, is a set of design, development, and construction standards for building environmentally sustainable buildings. The standards are written by committees of volunteers appointed by the U.S. Green Building Council, a non-profit trade organization. Under LEED standards, a project can be awarded up to 106 points across six major categories covering site sustainability, water efficiency, energy consumption, materials, indoor air quality, and design innovation. Projects scoring a minimum of 40 points are deemed LEED Certified. As a project earns more points, its certification can rise to Silver, Gold, and Platinum.

LEED standards are demanding and often require design and construction efforts beyond industry norms. That often translates to greater research costs by designers and more time and resources needed by contractors. Consequently, both the design and construction of a LEED project can be costlier than non-LEED projects. The energy savings over time on green projects, however, usually exceed the additional construction costs.

Because of these cost savings, public authorities around the country have begun mandating LEED certification for new and significantly renovated buildings. Washington, D.C., for example, will require all public and private projects to achieve at least a LEED Certified rating starting in 2012. Scottsdale, Arizona requires a Gold rating for all publicly funded projects. The Ohio School Facilities Commission, a state agency that administers the state's public school construction program, requires all new and significantly renovated schools to achieve Silver certification. Other public authorities, while not mandating LEED construction, offer attractive incentives to developers. Cincinnati, for example, grants an automatic 15-year, 100% real estate tax abatement for certain residential projects that achieve any level of LEED certification.

Mandates for LEED design, whether imposed by a government or a developer, can raise potentially expensive legal problems for a construction project. Designers and contractors, for example, may be liable for the loss of an economic incentive if a completed project fails to achieve the desired LEED certification, even if the project otherwise meets the developer's or the public authority's overall goals for environmental sustainability. Other issues, including delay claims and increased project costs, could arise if midway through a project LEED standards for attaining certification levels change, as they did in April, 2009. And if LEED standards are incorporated into an ordinance, a designer or contractor's failure to achieve those standards could constitute negligence per se, a significant litigation windfall to an owner. It is essential, therefore, for lawyers who represent any party involved in a LEED-mandated construction project to understand the LEED standards, how they are incorporated into the applicable municipal code, and how responsibility for incorporating LEED into the project is allocated among the parties.

Beyond the legal implications of mandating LEED standards on a construction project, there are significant economic, environmental, and health implications as well. Indeed, the main objective of green building is to reduce the overall impact a building has on the environment and improve general human health. According to the USGBC, green building not only reduces waste, pollution, environmental degradation, water consumption, and overall energy consumption, it also increases employee productivity, retention, and health.

Studies performed on green buildings demonstrate the true benefits a green building can have on employees. For instance, studies show that employees in LEED-certified buildings commonly demonstrate a 2 to 16 percent increase in productivity. LEED-certified buildings also have been shown to improve employee productivity and reduce employee absences, as well as workers' compensation claims. The increased control these buildings give for ventilation, temperature, and lighting also help with recruitment and retention of employees.

And though achieving the highest possible LEED certification should be the ultimate goal of green building, individual goals for these buildings and their inhabitants should also be kept in mind. The reality is that regardless of the level of LEED certification achieved, the building's occupants play a major role in keeping the building green and reducing waste production and energy consumption. The role in maintaining a green office could be as simple as the choice of which receptacle an employee will use to dispose of "waste," whether it is really necessary to print a document, and whether to reach for a ceramic mug or paper cup for one's morning coffee.

The statistics are staggering. The average American office employee uses approximately 500 disposable cups every year. Americans overall make 750,000 photocopies every minute of every day. The paper use for U.S. businesses is about 21 million tons per year. And each year, Americans place enough of that office paper in the trash to build a 12-foot wall from Los Angeles to New York.

Continued on Page 6

Continued from Page 5

In addition to paper, Americans unnecessarily throw away recyclable products and products they don't not need to use in the first place. Americans throw out enough paper and plastic cups, forks, and spoons every year to circle the earth 300 times. Every hour, Americans throw away 2.5 million plastic bottles instead of recycling them. And throwing away one aluminum can instead of recycling it wastes as much energy as if that can were half filled with gasoline.

But the good news is that this waste can be prevented. One ton of recycled pulp saves 17 trees, 3 cubic yards of landfill space, 7,000 gallons of water, 390 gallons of oil, and prevents 60 pounds of air pollutants from being produced. And recycling an aluminum soda saves 96% of the energy used to make an original can from ore, and will produce 95% less air pollution and 97% less water pollution.

Although the decision to build green may lead to initial time and cost burdens and unexpected legal issues during construction, the long-term tangible benefits for the environment, the economy, and the well-being of the nation's workers make LEED and similar green-building standards a more popular choice for developers and municipalities. But we don't need to wait for developers and civic leaders to make this choice for us; the choice to be green in our daily lives is ours to make every day. And statistics show that even one of us making a simple change in how we live can make enough difference to benefit your entire office.

nicole.loucks@dinslaw.com
peter.hahn@dinslaw.com

Nicole M. Loucks and Peter W. Hahn, Dinsmore & Shohl

Techies Will Love NEW COURTS BUILDING

By The Honorable David E. Cain

For barristers accustomed to dealing with the acoustically-challenged and AV-barren Hall of Justice, the new common pleas courts building will be a dream come true.

Microphones galore – both fixed and wireless – as well as ceiling mounted projectors and ceiling recessed motorized projection screens will be some of the standard fare for all courtrooms.

The AV package that recently went out for bids will also include audio systems that feature assistive listening and interpreter channels, noise masking for bench conferences and a single touch screen control in all courtrooms. The touch screens will allow for single point oversight of all audio/video systems and lighting levels.

Fixed microphones will be at all points in the courtrooms, including the jury boxes. All courtrooms will also be provided with witness and presenter video annotation as well as capability to print from a color printer located on each court floor.

Floors three through seven (the top floor) will each have four general courtrooms and two "magistrate" courtrooms (a little smaller and no jury boxes).

The second floor will hold the court's administrative offices as well as two large "special proceeding courtrooms." The "special" courtrooms will have all the same equipment as the others but, in addition, will be outfitted with high definition teleconferencing, digital audio recording and real time transcription displays, along with three wireless FM encrypted microphones.

Two AV/evidence presentation carts will be provided for each of the five court floors to be shared among the general and civil courtrooms. The second floor will have one to share. Each cart will contain a document camera, DVD player, VHS player, touch screen for annotation display, microphone and easy connection for laptop or most other video devices brought in by attorneys and witnesses.

A mobile video display cart will be provided for each court floor for use in the holding areas between courtrooms where uncooperative detainees will be able to view and hear events going on in the courtrooms. Every courtroom in the building will have feeds for audio and video connection to the press room on the first floor and an external media pedestal along the service drive. Two mobile video display carts with DVD playback will be provided for shared use in the jury deliberation rooms. The press room will also be equipped for high definition teleconferencing.

Most of the first floor will be used for jury pools and clerk of court offices. Cable TV feeds will be provided to the conference/training room, the jury commission lounge, the jury managers' offices, each judge's private office, the court executive director's office, the press room and the security control room.

Electric rough-ins are being installed to allow installation of future flat panel docket displays at the public gallery entrance to each courtroom and in the building lobby. The facility has been planned to allow full coverage for wireless data access anywhere on the premises.

"It will be state of the art, that's for sure," Administrative Judge Charles Schneider declared. "We might tend to criticize the people who designed the Hall of Justice," he added, "but when it was built all we had were blackboards and flip charts."

Move In Date

Judges are still hoping the new building will be ready for occupancy by Christmas of this year. That way, the court could practically close down, except for duty matters, between Christmas and New Years Day when very little is going on. Although the move will merely be across Mound Street, it would obviously be nearly impossible while handling dockets. If the move cannot be done in late December, then it will probably have to occur on nights and weekends, taking much longer and causing untold additional problems.

If it can possibly be done by year's end, Judge Richard Frye, the chair of the court's construction committee, will make it happen. He is watching it closely as he has done for everything else since the project began.

Work Release

After a four-year hiatus, a work release program is again available for non-violent offenders on probation with the Franklin County Common Pleas Court. The new program is being operated by Alvis House and is especially appropriate for offenders who deserve punishment but who owe restitution or child support that is virtually certain not to be paid if the offender is in prison. The residents are expected to contribute 25 percent of their gross income to offset the costs of room and board.

The former work release program was operated by the court's probation department before the judges closed it on October 31, 2005, due to management and budgetary problems.

The probation department will now screen applicants who must be at least 18 years old and employed or employable. If unemployed, Alvis House will provide job search services.

Continued on Page 8

Continued from Page 9

Verdict: $7,300.00. Auto Accident. On January 18, 2005, Plaintiff Rebecca L. Arata was a passenger in her father's vehicle when it was rear-ended by a vehicle whose driver fled the scene. She brought uninsured motorist claims against Nationwide (her father's insurer) and Allstate (her insurer). Within a few days of the accident Ms. Arata sought treatment with her family physician for neck and back pain. Several months later she began to experience leg and arm pain. She was ultimately diagnosed with fibromyalgia. Plaintiff had treated with her family physician before the accident for various aches and pains including back pain. All three experts agreed that Plaintiff had fibromyalgia, but disagreed as to the cause. Medical Bills: $13,000. Lost Wages: None. Plaintiff's Experts: Trieu Hua, M.D. (family physician) and William Pease, M.D. (physical medicine). Defendant's Expert: Joseph Schlonsky, M.D. Last Settlement Demand: $50,000. Last Settlement Offer: $12,000. Length of Trial: 3 days. Plaintiff's Counsel: Tim Boone. Defendant's Counsel: Rick Marsh and Abby Joy Scholl. Magistrate Judge Skeens. Case Caption: *Rebecca L. Arata v. Pamela Pearson, et al.* Case No. 07 CVC 498 (2008).

Verdict: $3,782.68. Auto Accident. Defendant failed to stop for a stop sign and struck the Plaintiff's van behind his driver's door. The accident occurred approximately 30 feet from the plaintiff's house. Plaintiff believes that he was traveling about 15 miles per hour at the time of the accident and claimed that his left shoulder hit the driver's side window. He claimed ongoing headaches and neck pain. Medical Bills: $8,634. Lost Wages: None. Plaintiff's Expert: Adam Chaykin, D.C. and Edwin Season, M.D. Defendant's Expert: None. Last Settlement Demand: $8,634. Last Settlement Offer: $3,000. Length of Trial: 2 days. Plaintiff's Counsel: Jay Hurlbert. Defendant's Counsel: Mitch Tallan. Judge Reese. Case Caption: *Charles Myers v. Holly Self, et al.* Case No. 08 CV 10572 (2009).

Verdict: Defense Verdict. Auto Accident. On November 19, 2003, Defendant Shirley Pauley entered an intersection on a red light and was struck by a Rumpke truck operated by Plaintiff Chris Lacey (39-years-old). The parties stipulated negligence. Mr. Lacey claimed right shoulder and left side low back pain. An MRI revealed a full-thickness tear of the right rotator cuff which was surgically repaired on November 4, 2004. In March of 2005, Mr. Lacey returned to the orthopedic surgeon with complaints of decreased range of motion and continued pain in the right shoulder. At trial, the surgeon opined that Mr. Lacey would never again regain full rotation in the right shoulder. Defendant disputed that Plaintiff suffered any injury as a result of the accident and alleged that the shoulder injury was pre-existing. Medical Bills: $56,221.52. Lost Wages: $6,538.52. Plaintiff's Expert: Robert Westerheide, M.D. Defendant's Expert: Doug Morr (Biomechanical Engineer). Last Settlement Demand: $350,000. Last Settlement Offer: $2,500. Length of Trial: 3 days. Plaintiff's Counsel: Sydney McLafferty. Defendant's Counsel: Brian Bradigan. Magistrate Browning. Case Caption: *Chris Lacey v. Shirley A. Pauley, et al.* Case No. 05 CV 12003 (2009).

Verdict: Defense Verdict. Auto Accident. Plaintiff Isatou Toray was headed northbound on Cleveland Avenue and collided with a vehicle driven by Defendant Heather Giles. Defendant was turning left from the southbound turn lane of Cleveland Avenue onto Bretton Woods Boulevard. Plaintiff alleged that Defendant failed to yield on the left turn. Defendant alleged that plaintiff ran a red light. Plaintiff alleged soft tissue injuries to the neck and back. Medical Bills: $5,877. Lost Wages: None. Plaintiff's Expert: Heather Kight, D.C. Defendant's Expert: Leslie Friedman, M.D. Last Settlement Demand: $7,000. Last Settlement Offer: None. Length of Trial: 1 day. Plaintiff's Counsel: David Bressman. Defendant's Counsel: Michael W. Sandner. Judge Schneider. Case Caption: *Isatou Touray v. Heather Giles.* Case No. 06 CV 2182 (2007).

bbarnes@lanealton.com
mwaller@lanealton.com

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

Notes from the Federal Court

By The Honorable Mark R. Abel

As the deadline for this column was approaching, I was preparing for a court ceremony on February 12 to recognize my service as a United States Magistrate Judge. I am one of an increasingly rare number of workers who has worked for the same employer his entire career. I came to the courthouse as a law clerk to Judge Joseph P. Kinneary in June 1969; and although I've moved around the building over the years, I'm still there.

The ceremony gave me an opportunity to reflect on my experiences at the court and thank those who have helped me over the years and made my job something I look forward to every day. The first thing that stands out for me is how much chance played a role in my career. If one of my Moritz professors, Al Clovis, had not sat next to Judge Kinneary at an after the OSU football game party and asked whether he would like to get resumés from some of his students, I would never have applied for a judicial clerkship. Less than two years later, courts began appointing the first U.S. magistrates around the country. I was convinced Judge Kinneary would never consider a twenty-six year old, but he did.

In 1971, it wasn't clear exactly what a magistrate judge would be. So I have had the opportunity to grow as the office has grown to become an established part of federal trial courts across the country. Here in Columbus, magistrate judges perform a wide variety of duties in civil cases: meeting with counsel early to establish a case schedule; encouraging early consideration of settlement and managing the Court's Settlement Week program; being available for the prompt resolution of discovery disputes; ruling on non-case dispositive motions; and trying cases with the consent of the parties. We also issue reports and recommendations for the disposition of habeas corpus, prisoner civil rights and social security disability insurance cases. In criminal cases, we perform duties similar to municipal court judges.

Taking up those responsibilities at an early age, I was fortunate to have good role models and mentors. As a law clerk I enjoyed the company and advice of our bankruptcy judges, Duane Kelleher and Jack Dilenschneider, Clerk of Court Jack Lyter and a group of lawyers we regularly ate lunch with. Judge Kinneary was an imposing figure at the courthouse, mentor and role model. His love of the federal court has become mine. Early on, I had the pleasure of being the across the hall neighbor of Judge Robert M. Duncan. I have learned much from his good sense, work ethic, temperament and judgment. Although I failed miserably at his injunction to tell a new joke every day, I have benefitted over the years from his ability to introduce a little levity into a life in the law.

U.S. Commissioner Al Cincione helped me learn my responsibilities for issuing arrest and search warrants and holding initial proceedings in felony cases. I also benefitted from chatting with experienced criminal defense lawyers like Paul Cassidy, Harold Wonnell and Paul Scott after their appearances before me.

A judge could not meet his responsibilities without the hard work and loyal support of many people. I have had the good luck to have not one, but two excellent secretaries. Mary Jones could not only type over 120 words a minute but also never met someone who didn't become a friend. Mary left to pursue a business opportunity after over 19 years with me, and I again had the good fortune when Marty Doré came work with me. Marty had been secretary to Judge Duncan and then Sixth Circuit Judge Alan Norris. She brought a wealth of experience and good sense to running my office.

I have worked with three very skilled courtroom deputies: Jeff Cesner, Tammy Tornus and Spencer Harris. In the days before electronic filing, Jeff was unsurpassed in his ability to hunt down pleadings and briefs scattered around the building. When Jeff went to work for Judge John Holschuh, Tammy Tornus came to work with me. She followed in Jeff's footsteps and kept me organized and well-supplied with work. Tammy's hard work led to her promotion to manager of our Clerk's Office. Now she holds the same position with the United States District Court for the Middle District of Florida. Spencer Harris has been docketing, noticing hearings and running my courtroom for the last five years. Like Jeff and Tammy, Spencer is dedicated to public service and providing quality service to the court, litigators and the public.

Law clerks do much of the spadework when it comes to written decisions. They dig through the record, research the law and prepare the first draft of the decision. All the applicants I interview are well-qualified to do the job. I look for someone I think I would enjoy working with. And I've very much enjoyed working with each of my 24 law clerks, from my first law clerk, Steve Gariepy, now a partner with Hahn Loeser in Cleveland to my current law clerks, Rachel Rubey, who has worked with me for over five years and Benjamin Winkler, who is in his second year.

Continued on Page 12

Continued from Page 11

During my time as a magistrate judge, 20 district judges have served the court. I have had the opportunity to work directly with 11 district judges here in Columbus: Joseph P. Kinneary, Carl B. Rubin, Robert M. Duncan, James L. Graham, George C. Smith, Sandra S. Beckwith, Susan J. Dlott, Edmund A. Sargus Jr., Algenon L. Marbley, Gregory L. Frost, and Michael H. Watson. Each has been supportive and a pleasure to work with.

I have served with ten magistrate judges. I could not have had two finer colleagues and friends than Norah King and Terry Kemp.

All of these people are part of what Judge Kinneary fondly referred to as the court family, and they have enriched and nourished my life. But I've saved the best for last. As judges and lawyers, we are privileged to be a part of our great American judicial system. As a judge, I am tasked with the responsibility to take evidence with an open mind, listen carefully to the arguments of the litigants and render judgment in accordance with the law, without respect to person or position in the community.

Although the office of judge is a high calling, we are, of course, fallible and susceptible to error. Litigators and the adversary process are the backbone of our justice system. A judge can only be as good as the advocates who appear before him. And I have been very fortunate to be a magistrate judge in the Southern District of Ohio. The lawyers who appear before me argue vigorously to advance their clients' interests while maintaining cordial, productive relations with their adversaries. (To those lawyers: your advocacy informs my decisions and make my job much easier.)

I can't mention all the accomplished litigators whose advocacy I have enjoyed over the years. But I would like to mention a few of those from my early years at the court: Gundy Lane, Brooke Alloway, Jack Alton, Earl Morris, John Elam, Charlie Brown, David Young, Jack Chester, Sam Porter, Ed Strausse, Tom Palmer, Vic Goodman, Gerry Draper, and Denis Murphy.

Every week I look forward to Thursday mornings when I hold Rule 16 scheduling conferences. Forty years on and each Thursday I'm sure to hear a new legal argument or learn about a new technology or a business previously unfamiliar to me. And I get to enjoy the good company of litigators. I hope to do so for some years to come.

Mark_Abel@ohsd.uscourts.gov

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

How to Avoid Guardianships *(and When Not To)*

A guardianship is a court-imposed fiduciary relationship, where the guardian is responsible for the care and management of the affairs of the incompetent person.

By ***Bradley B. Wrightsel***

This article is meant to provide a general overview of the methods used to avoid guardianships. It does not cover the topic of avoiding probate court in decedent's estate administration, although the advantages may be similar.

Most estate planning attorneys encourage their clients to prepare for the possibility of mental incompetency[1] and the avoidance of a guardianship. A guardianship is a court-imposed fiduciary relationship, where the guardian is responsible for the care and management of the affairs of the incompetent person.[2]

The guardianship process is commenced by the filing of an application with the probate court. If a guardianship is established, the court maintains ongoing jurisdiction and is the superior guardian.[3]

Reasons to avoid guardianship

When the estate planning practitioner explains the disadvantages of guardianships to his client, the client usually responds by expressing a desire to avoid the probate court completely. Indeed, if one were to create a list of advantages of guardianships and a list of disadvantages, the disadvantages would clearly outnumber the advantages.

The probate court is a court of public record, which means all information is available to the public. Also, a fair amount of information is available over the internet.[4] In matters where the guardian has been appointed to manage financial affairs, an inventory of assets is required and is also available to the public.

The fact that an application has been filed claiming an individual's mental incompetency could create embarrassment and conflict among family members. A prerequisite to filing an application is securing and filing a statement of expert evaluation. The statement must be completed by a licensed physician or licensed clinical psychologist. This prerequisite can present logistical problems. Often you are faced with having a person evaluated who does not want to be evaluated. There may also be an issue in convincing a physician to complete a public document, addressing the individual's medical status.

After the guardianship application is filed, a court investigator serves the alleged incompetent with a notice of the hearing and explains the individual's rights.[5] The individual may perceive the unannounced visit of a stranger to read the individual's rights as almost criminal in nature.

Another concern for clients is the continuing expense of a guardianship. Clients generally understand that court involvement includes court costs and attorney fees. Each filing in a guardianship includes a court cost, and many filings, if not all, need to be prepared by an attorney. Since the guardianship process continues as long as the person is incompetent, these costs will continue for an uncertain period of time.

An additional guardianship is the court's choice of guardian. While a person can have a written nomination of a guardian, the court will ultimately decide whether that person is appropriate to serve. Regardless of who is appointed guardian, the court will require that the guardian post bond at twice the amount of the personal property; therefore, if the ward has personal property in the amount of $500,000, a bond of $1,000,000 will be required. Since it is an annual premium, this is another ongoing expense.[6]

Finally, only the probate court can terminate the guardianship. This means that the guardianship will continue until the ward passes away or an expert evaluation is prepared by a physician, stating that the ward is no longer mentally incompetent.

Methods to avoid guardianships

The probate court can deny a guardianship based upon evidence of a "less restrictive alternative."[7] One example is a durable power of attorney. It is almost always advisable for clients to have durable powers of attorney for healthcare and financial decisions.[8] The client's age is irrelevant since anyone may become temporarily or permanently incapacitated by accident or disease. The advantage of having separate powers of attorney is the ability to nominate different agents under each document. Generally, a durable power of attorney appoints the spouse of the married person and at least one other trusted person as an alternate.

The term durable means that if the grantor of the power of attorney becomes mentally incompetent, the incompetence does not affect the validity of the document.[9] The power of attorney should nominate a guardian in the event that one becomes necessary. While the general purpose of these documents is to avoid a guardianship, there are certain instances where the court may determine that the document is not an adequate lesser restrictive alternative to a guardianship.

Continued on Page 14

Continued from Page 13

Executing a healthcare power of attorney does not remove the individual's ability to make healthcare decisions. On the contrary, the clients continue to make their own decisions until they are no longer able. A durable power of attorney for financial decisions has become an extremely popular planning device, due to the relatively low cost and the flexibility of the document (compared to a funded living trust). The client may want to include language permitting gifting and dealing with trust matters.

With respect to a power of attorney relating to an interest in real estate, the power of attorney document must be signed and acknowledged in order to convey, mortgage or lease the property. Also, the power of attorney must be recorded in the county where the real property is located prior to the recording of any deed, mortgage or lease executed by the agent.

Another document usually accompanying a healthcare power of attorney is a living will. The purpose of the living will is to document the individual's wishes that life sustaining treatment be withheld if unable to make informed medical decisions and in a terminal condition or a permanently unconscious state.

While a financial power of attorney alone in some instances will suffice to protect persons against the necessity of a guardianship over their property, a living trust agreement is also viewed as a lesser restrictive alternative to a guardianship. A trust agreement authorizes a trustee to manage the assets of the trust for the benefit of the trust beneficiaries. If the settlor of the trust, who is often the original trustee of the trust, becomes mentally incompetent, the successor trustee can take over the duties and responsibilities of managing the assets. Often the trust agreement will provide the method of establishing whether the settlor is incompetent. Keep in mind that while a trust alone can be a useful way for a person to manage assets, it will not eliminate the possible need for a guardianship of the person where healthcare decisions need to be made.

When not to avoid a guardianship

Although we have discussed the disadvantages of a guardianship, there are some benefits of the guardianship process. It may be beneficial to have the probate court oversee the administration of the person's property. This oversight can prevent any misuse of the person's assets. Additionally, the probate court ensures that all decisions are based upon the ward's best interests.

If an agent under a power of attorney has been misusing the grantor's funds, a guardianship may bring this malfeasance to light. Despite the lesser restrictive alternative of a durable power of attorney, the probate court can determine that the agent is unsuitable to serve and appoint a more suitable guardian. Also, there are instances where family members do not want to be involved in making these types of decisions. If there is no one suitable to handle matters under a power of attorney, the court's involvement may be necessary.

Finally, if a person acting as an agent under a durable power of attorney is experiencing resistance from the grantor, it may be difficult to get anything accomplished. Also, if the agent is the attorney, he or she may have ethical issues in taking over control of his client's affairs against the client's wishes.

Advance planning permits one to select the person or persons who should make decisions if the individual is unable. This may be as simple as signing a durable power of attorney for healthcare, a durable power of attorney for financial decisions, and a living will. It also may include preparing a living trust for managing the grantor's assets. Although these lesser restrictive alternatives often provide great benefits to the client, there are occasionally situations which necessitate the guidance and oversight of the probate court.

---

1. Mental incompetency may be progressive dementia as with the elderly, or can be temporary incapacity. Ohio Revised Code §2111.01D defines "incompetent" as follows: "any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide, or any person confined to a correctional institution within this State."
2. Guardianships may also be established for minors since they have a legal disability to contract.
3. Ohio Revised Code §2111.50.
4. While the scanned image of a filing is not currently available, the Franklin County Probate Court is currently contemplating making these records available on line. The court's docket is available on line.
5. See Ohio Revised Code §2111.041.
6. Ohio Revised Code §2111.121 does permit an individual to nominate a guardian and direct the waiver of bond, but the Court has discretion whether to dispense with bond.
7. See Ohio Revised Code §2111.02(C)(5).
8. The length of this article does not permit discussion of other types of powers of attorney, such as a springing power of attorney where a certain event, such as incapacity, springs the power of attorney into effect.
9. See Ohio Revised Code §1337.11 and §1337.17.

Bradley B. Wrightsel, Wrightsel & Wrightsel

W-2s, Tax Returns, and Earnings

By Susan A. Moussi

When you need to determine an employee's income, do you rely on obtaining that information from W-2s? Do you look to Form 1040, line 7 of past tax returns? Do you use the net income reported on Schedule C for the self-employed person? Do you use the income listed on Schedule E for a partner or a shareholder of an S Corporation? If yes, do you truly have earnings? According to ORC 3119.05(a), the code section related to child support computations, "…earnings shall be verified by electronic means or with suitable documents, including, but not limited to, paystubs, employer statements, receipts and expense vouchers related to self-generated income, tax returns, and all supporting documentation and schedules for the tax returns." Here is why I believe you can't rely solely on W-2s and tax returns.

Tax Returns (Federal Form 1040)

If you are relying on line 7, of Form 1040, the amount of income reported here may be substantially lower or higher than the individual's actual earnings. Line 7 is the total of all W-2s, using the amount reported in Box 1. Box 1 reports the taxpayer's taxable wages, which is gross income adjusted for pre-tax contributions to 401k (or similar) plans, taxable fringe benefits, noncash payments, certain employee business expense reimbursements, and other items. I would recommend that you not rely on line 7 of Form 1040 as your only source document for determining earnings.

W-2's

You have obtained W-2s and, after reading the preceding paragraph, you know that you don't want to rely on Box 1 for determining the earnings. So you look around and you see Box 3, Social security wages. Please note, the amount reported here is capped annually. For 2010, the maximum reported here will be $106,800. Medicare wages, Box 5, will equal social security wages, except that the amount reported is not capped. Maybe this is a reliable source? Well, it depends on what you consider to be "earnings." In addition to wages paid, Medicare wages include noncash payments, certain employee business expense reimbursements, signing bonuses, taxable cost of group-term life insurance over $50,000, cost of health insurance premiums for a 2% or more shareholder, adoption benefits, and more. Again, I would not recommend that you rely solely on a W-2.

Pay Statements

I recommend getting the final pay statement for each year that you are reviewing. Granted, some companies issue pay statements that have codes and other information that need clarification by the payroll department, but this is where the detail can be found. Many times, the pay statement is the only source for detail concerning salary, bonus, commissions, over-time, shift-differential, stock option exercise, gifts and awards, non-qualified deferred compensation, pre-tax deductions and taxable noncash compensation. Information regarding employer-paid benefits may also appear on the pay statement. If you compare the total gross compensation on the final pay statement to the amount reported on the W-2 for that year, most likely you will find that the two amounts don't agree. This is because of all the adjustments that are made to the total gross before it is reported in Box 1 of the W-2.

Schedule C for the Self-Employed

A business owner is going to include Form Schedule C with the filed tax return, unless the business is a corporation (LLC may be filed on Schedule C) or an entity taxed as a partnership. The net income, gross receipts less expenses, is what gets taxed. Gross receipts will typically be cash collected. Expenses will typically be cash expended, except for a few notable exceptions. Depreciation and Section 179 expense is a noncash item. Section 179 is a special deduction that allows business owners to deduct immediately (subject to limitations), as an expense, the cost of acquiring property that would otherwise be required to be expensed over time. The amount reported for deductible meals and entertainment is typically only 50% of the actual amount expended. Wages are shown as total paid to all employees. Who are the employees? Deductions for the use of one's home would include a percentage of the mortgage interest, real estate taxes, insurance, utilities, etc of the home. Actual earnings may not be as simple as what is reported.

Schedule E for Partners and Shareholders

Partners and shareholders of S Corporations report net income from business activity on page 2 of Schedule E, which is attached to their tax return. The net income reported is not necessarily the amount of cash received by the partner or shareholder. For partners, the cash distributed is referred to as draws or guaranteed payments. Guaranteed payments are reported as income, but draws are not. The draws are reported on Schedule K-1, which the partner receives but does not attach to the return.

Shareholders of S Corporations typically receive two types of income. They may receive wages, which are reported on a W-2, and they may also receive distributions or draws, which only appear on the Schedule K-1. The distributions or draws are not taxable income (unless in excess of basis) to the shareholder and may not agree with the amount reported on the Schedule E as income from the S Corporation.

Determining earnings may not be as straightforward as it seems. Having the appropriate documents is critical when determining "earnings."

smoussi@armcpa.com

By Susan A. Moussi, CPA, CFP®, CDFA, CVA, Ary Roepcke Mulchaey, P.C.

An Opiate Epidemic

By Deborah Hoy

There is a fast growing population of prescription opiate drug abusers using prescription pain relievers for non medical use. Prescription abuse often begins during adolescence. The Safe and Drug Free Schools Consortium PPAAUS Survey, (Primary Prevention Awareness, Attitude and Use) an anonymous survey of 82,090 sixth to twelfth grade students from 16 Franklin County public school districts and 37 non-public schools, reveals that reported drug use is down, with one exception: prescription pharmaceuticals. Survey results from 2003 and 2006 document the rising abuse of prescription medications in adolescents. The results of the 2009 survey are expected to show a continued escalation in this pattern of use. In 2007, the office of National Drug Control Policy found prescription Vicodin to be one of the top five drugs of choice in adolescence. For the teen abusing opiates, progression to heroin is just a matter of time and circumstance. Heroin is chic. It is sexy. It is cheap. It takes away the appetite. Heroin chic became popularized in the mid 1990's fashion industry, characterized by jutting bones, pale skin and dark circles under the eyes.

Fifteen years ago heroin sold for $300 an ounce on the street. Today it is $80 per ounce. With improved methods of extraction, purity levels of heroin are much higher today and can be as much as 72% pure, contributing to the surge in opiate related deaths.

With repeated use, more and more of the drug is needed to achieve the desired effect. Tolerance develops. Prescriptions run out and the individual looks to the street trafficking of opiates where there is an abundant supply of the drug. Heroin is easy to find and the next step in the progression of the disease.

Harry is 25 years old. He started popping pills at high school "pill parties," sometimes in combination with alcohol. In 2008, Oxycontin was prescribed to treat pain from a back injury. He found that one pill helped, two was better and four better yet. His prescription ran out early. At his next visit to his family physician the strength of the prescription and amount dispensed increased. Again, he ran out early and his physician would no longer continue the prescription. Harry looked for his own supplies, visiting the local emergency room, and taking his wife's old Vicodin prescription. He finally turned to the street for purchase, with a daily expense of $200 a day. He would use just to get up and out of bed in the morning. The entire day revolved around getting and using the drug. Everything else was secondary. Finally with mounting debt and desperation to "keep the sick off," he tried heroin. Cheap, effective and incredibly addicting; there was no turning back. Heroin, a white, brown or black sticky substance, is often cut with powdered milk, cornstarch, and sugars or just about anything. It is called H, Smack, Junk, Horse, China White, Black Tar and Dope. Harry said he would never "shoot it." That lasted a week. He says "I crossed a line and my life is out of control. I'm sick and tired." The downward spiral of his life accelerated beyond his comprehension. He lost his job and now is facing criminal charges of forgery and theft.

The heroin addict thinks he is falling asleep, but the heart rate slows, breaths become shallow, the lips turn blue and the breathing stops.

Opiate related deaths in Franklin County increased over 435% in 2009.

Harry meets the criteria for opiate dependence, a maladaptive pattern of drug use leading to impairment or distress. Withdrawal is a painful process. Heroin withdrawal begins 6-8 hours after the last dose. Withdrawal includes hot flashes, chills, heavy sweating, muscle twitches, restless legs, goose bumps, runny nose, watery eyes, racing thoughts, anxiety, full body shakes, insomnia and the overwhelming craving for more heroin despite the knowledge that one more hit could be the last. Ultimately, the heroin addict thinks he is falling asleep, but the heart rate slows, breaths become shallow, the lips turn blue and the breathing stops. Opiate related deaths in Franklin County increased over 435% in 2009.

The language to describe addiction is changing. Abuse leads to dependence which more accurately defines the disease process. Chemical dependency is characterized by impaired control of the use of a substance. There are those who argue that addiction is not a disease, but a failure of character or lack of willpower. Research in neurochemistry of the brain offers a more contemporary perspective and understanding of this poorly understood disease. Research findings are correlating chemistry and genetic predisposition with the choice of a drug of abuse. The chaos created in the brain neurochemistry progresses with repeated abuse to a state where there is no more euphoria or "high" but a compulsion to use just to prevent withdrawal symptoms. A day in the life of the addict revolves around getting, using and recovering from the drug, only to begin the using cycle again. The use is compulsive with growing consequences that are physical, emotional, financial, mental, legal and cultural.

Treatment for opiate dependence is complex. Once physical dependence occurs, inpatient detoxification is often the initial treatment of choice. Ongoing treatment monitors abstinence from all mood altering drugs and includes toxicology screens along with education, and treatment. Recovery requires a new way of living. The 12 step recovery community offers over 800 Alcohol, Cocaine and Narcotic's Anonymous meetings weekly in the greater Columbus area for patients and their families.

Treatment does not insure sobriety. For many, relapse can be a part of the process. Talbot Hall has been providing treatment for over 35 years. Services include inpatient detoxification, partial hospitalization, family education, and intensive outpatient services. In response to a high relapse rate for opiate dependence, Talbot has developed a specialized outpatient treatment program which includes a contract for treatment and monitored abstinence, participation in a specialized opiate treatment group, and weekly meetings with a physician who gradually tapers detox medication. Suboxone, a combination of an opiate and opiate blocking agent, eases the post acute withdrawal symptoms. Suboxone is prescribed for a short term taper; not for opiate maintenance. New research supports improved recovery outcomes with an extended taper of Suboxone. For alumni of Talbot treatment programs, there is an opportunity for follow up care through participation in an aftercare program. This program further improves the odds of sustaining recovery and is a free service for alumni of Talbot. After a year of recovery living, participants are encouraged to begin citizenship activity as a part of their recovery living plan.

Those interested in learning more about Talbot Services may contact Talbot at 257-3760 Information about addiction education may found on the following website: www.addictionstudiesinstitute.com

deb.hoy@osumc.edu

Deborah Hoy,
Clinical Nurse Specialist,
Addiction Medicine, Talbot Hall

LAWYER HEAL THYSELF?

By Brad Lander, PhD, LICDC

It is a widely held conviction that physicians are the worst patients. This is not so; lawyers are. It is not their fault. They are a product of their profession. The attributes that make lawyers successful make them a health care worker's root canal. This is especially true at Talbot Hall, the Addiction Medicine Department of The Ohio State Medical Center, as lawyers present some unique challenges for our staff.

The problems start with their relationship with alcohol. (Cocaine is a common drug of abuse too, something they have in common with car salesmen and gamblers.) But the practice of law is a high stress endeavor. There is conducting research, conferring with clients, preparing briefs, preparation for court, keeping abreast of the latest laws and judicial decisions. Work hard, play hard. (Litigation lawyers are the worst; they are the "surgeons" of their field.)

So many lawyers drink to unwind or to reward themselves. Drinking, even heavy drinking, is part of the culture and accepted behavior. Many lawyers even see it as an expectation, a part of the job, a rite of the brotherhood if you will. It is a precept and practice that begins in law school. Alcohol is present at most functions. Weekends for many lawyers begin at 3:00 on Friday.

The development of alcoholism or drug addiction conflicts badly with the basic personality of the lawyer. Lawyers are by nature competitive, intellectual, perfectionistic, workaholic and self-reliant. Addiction to alcohol or a drug, then, is seen as a weakness and personal failing, and this is unacceptable. There is a fear that the perception of weakness will ruin their reputations and their careers. Weakness is a trait they find demeaning in themselves. The result is that lawyers will try to control their addiction. They try to hide it and deny it to everyone, including themselves, while they try to "handle it themselves." But the more they try to control it, the worse it gets.

So the idea of treatment is abhorrent. It is the abject admission of failure. It is little wonder, then, that it is so hard to get a lawyer to go for treatment. For someone who believes failure is not an option, it's General Custer watching the Cheyenne stream over the bluffs.

The Talbot Hall intake staff always knows they are in for a time with lawyers. Lawyers read every piece of paper and ask for explanations. (Don't they know no one actually reads those things?) They are argumentative and want to negotiate the "terms" of treatment. They want to know the therapist's credentials, years of experience, what school they attended and their GPA, if they have ever worked with someone like them before, and so on infinitum. They look for any incongruence that will "prove" they don't really need treatment. Lawyers tend to believe if you win an argument that makes you right.

Almost inevitably, the lawyer enters treatment where the onus falls on the doctors and therapists. The lawyer's personality is antithetical to alcohol/drug treatment. Lawyers tend to be introverts, preferring to collect and process information within themselves, drawing their own conclusions. They don't like to be "told things." On standard personality tests they score very high in "pessimism" and "skepticism" which makes them cautious, self-protective, and untrusting of people they don't know well. They tend to resolve conflicts by competing and avoiding, i.e., win big or walk away. They score low on emotional intelligence, meaning they tend to miss or misread other people's feelings. For lawyers, emotions are more cognitive than sensed. And this holds true for their own emotions as well. They are often not aware of their feelings and find themselves "surprised" they actually feel a certain way about something.

At first blush, these traits may seem less than desirable. But it is these traits that make lawyers successful. These are not "bad" traits; they just don't mesh well with counseling and therapy, especially alcohol/drug therapy. Alcohol/drug treatment is typically done in groups where people talk and share at a more honest and personal level than is found in social settings. It is about taking instruction and utilizing social support. It is about integrating thoughts and emotions. It is about trusting other people to help you. Yikes!

At first in treatment, lawyers do the "lawyer thing" and try to figure it all out. They apply the "show no weakness" rule and stoically deny that drinking has caused any problems in their lives or the lives of others. They are very good at presenting the evidence that it is someone else's fault, or that they were being treated unfairly. They are, however, more than willing to help out the other poor people in the group who have "real problems." They also treat the therapy session like it was court (Therapist: "You lied about your OVI." Lawyer: "Objection, prejudice outweighs its probative value, your counselorship.")

Then there is the emotions thing; it's like a lost ball in tall grass. Lawyers seem to understand emotions; they just don't know what to do with them. When someone in the group becomes emotional, the lawyer will look confused. They know something important is happening, but they don't know what. When asked about their own emotions, they have trouble identifying what they are feeling. They don't have a very deep emotional vocabulary. This is functional in a court of law where you need to remain objective to analyze proceedings. In understanding yourself and nurturing relationships, it is an impediment.

But what starts as an obstacle becomes an asset. Lawyers are of higher than average intelligence (average 115-130 IQ). They are quick learners and recognize facts and overwhelming evidence. When the "I will not fail" mindset attaches to getting clean and setting up a recovery program, they become tenacious about achieving that goal. Competitiveness, perfectionism and dogged determinism all are strong traits that facilitate recovery.

Lawyers also have the advantage of support within the law community. At Talbot Hall, we have almost universally found the leadership of law firms to be very supportive of their attorneys in treatment and returning to the practice. There is a strong support from other recovering lawyers (and there are a lot of them) who are willing to help. And of course, there is the Ohio Lawyers Assistance Program (OLAP); a private organization that helps judges, attorneys and law students get treatment for alcohol and substance abuse problems. All communication with OLAP is confidential and they can be reached at 800-348-4343.

Brad Lander, PhD,
LICDC Clinical Director
Addiction Medicine at Talbot Hall
The Ohio State University Medical Center

Interiors

Out of the Darkness

By James A. Readey

It was April 10, 1988, when I went to pieces. But I am already ahead of myself in this story.

I do not know when the illness started - it was months, if not years, before that day, I would guess. But for the sake of brevity, I will start the story about a month before that day.

I was working on my first real megacase. I had been working on it for more than two years. I had had other big cases – two-or three-week trials, but nothing like this. Trial was set to begin April 4. In March, I had still been flying around the country for discovery depositions, and drafting discovery motions and briefs. All the while, I spent countless hours on conference calls with witnesses; dictating and editing long, detailed reports to the client's general counsel; and in strategy sessions with the more senior partner in the firm who would try the case with me. I made seemingly endless notes and lists about tasks yet to perform before trial began and used every waking moment to get some of them done. And, of course, I was also doing all the typical stuff: motions in limine, legal memoranda against the other side's motions in limine, demonstrative exhibits, jury instructions, questions for jury selection, opening statements, witness examination outlines, and on and on, seemingly ad infinitum.

This was, of course, not all new to me. I had been preparing and trying cases for years. I knew the demands of the work and the stresses of the lifestyle. Balancing professional and family obligations, client responsibilities, and other things was a familiar – if not conquered – challenge.

I think I had been exhausted mentally and physically for at least the six months leading up to this point, but I plowed on, relying on what in retrospect I best could call adrenaline or nervous energy. I had been working 60- to 70-hour weeks, and lately that range had increased to something like 70 to 80 hours. This, I knew, would be the norm until the trial ended.

"Jim, this is the biggest case our company has ever had. Leave no stone unturned, no task unperformed. We absolutely must win." These were the words and messages conveyed to me by the client's general counsel for well over a year. Did he think I was deaf, I wondered. A management partner in my firm confided to me that this was the firm's best and largest longstanding client, and if we did not win this case, we could lose the client altogether. Great, more pressure, thanks for the support and advice, I thought.

The subject of the lawsuit was accounting malpractice, a world totally unfamiliar to me. The facts and theories challenged me mentally and intellectually. So did the documents – some 58 bankers boxes of them. In the two years since filing the case, I had learned much, but I hadn't always understood it thoroughly. I had to read and reread voluminous case materials, studying and discussing them with our experts to gain a real command. And by the opening day of trial, I had pretty much mastered it.

Sleep had become impossible. In the last months before trial, I. would wake up in the middle of the night sweating, my skin tingling, thinking of even more things to do to be well prepared – and typically unable to go back to sleep. My wife knew I was not sleeping well, and so did I.

When I would get home at night, rarely before eight, I was uncommunicative with my family. I was too preoccupied, too tired; just withdrawn. I explained that I had too much to do and too much to think about, and once The Trial was over, we could get back to normal. It had, for a long while already, become "The Trial." I watched no TV, read no newspapers, ate poorly, and smoked incessantly. I promised I would either cut back or quit smoking once The Trial was over.

My wife, Linda, always patient, felt all the pressure, and wanted The Trial to be over. At this point, so did I. Frustrating settlement attempts failed to end the case, by then a real disappointment to me, and only added weight to my already burdened shoulders.

So we started. We had the jury picked in a couple of days and argued some pretrial motions. For three long hours, I delivered my opening statement, which I had outlined the previous entire weekend. It was a complex and convoluted fact scenario that had stretched over five or six years, leading to a multimillion-dollar loss for our client. Mercifully, the weekend arrived before we started with testimony. I still had to prepare the direct examination of the leadoff witness – no small task, as he ultimately was on the stand for more than three days.

I, of course, worked all day Saturday, On Sunday, Linda asked if I would go to Oakland Nursery to help her buy and bring home new plants for the yard. She knew I had gotten up yet again around 4:30 in the morning to start working on the case and now it was nearly noon. The fresh air and change of scenery will do you good, she urged. I relented and hoped she might be right. Our two sons stayed at home to play and studyfor school. We would be back in a couple of hours, we said.

She drove. I sat in the passenger seat, lost in my thoughts. My skin was tingling again, but I did not want to talk to her about that. She said, "You've got to get more rest." "How can I?" I asked. "I've got too much to do on this case. It's just my nerves. I wish I didn't have to go back to court tomorrow. I wish I could just stay home with you and the boys."

Silence.

I wandered around Oakland Nursery with Linda, pushing the cart as she loaded it. I kept thinking to myself, more and more, "I really don't want to go back to court tomorrow." My left shoulder started hurting. My stomach felt queasy. I wished that my darned skin would stop tingling and burning.

On the way home, Linda asked me, with real concern in her voice, "Are you okay?" I mumbled, "No," and started to cry. I cried and cried. I couldn't stop. I cried all the way home – probably a 25-minute drive. My immediate thoughts were simple. This is stupid! Why can't I pull myself together? Why can't I stop crying?

Linda pulled the car into the garage. I bolted into the house and up to our bedroom. I didn't want my sons, who I noticed were playing in the backyard with friends, to see me like this. I closed the door, flung myself on the bed, and let loose crying even harder.

When Linda came in, I was curled up in sort of a fetal position. I tearfully asked her not to make me go back to court the next day – in hindsight, obviously not a fair or sane position to have put her in. I told her my left shoulder and chest were hurting; I said I might be having a heart attack. What a pitiful site I must have been.

Continued on Page 20

Continued from Page 19

Linda sat on the bed and quietly tried to comfort me, She said she was going to call a doctor friend of ours for advice. I let her do it and resumed my meltdown, which now was reduced to a slightly lower gear. I was in more of a continuous whimper.

Our friend – good friends are so valuable, and I remain to this day so grateful to him — listened attentively to Linda. He told her to get me to the hospital right away. We spent the afternoon in the emergency room,

They hooked me up to an EKG and tested my heart. No heart attack, thank goodness. The nurses and doctors had heard Linda and me give my history and describe my symptoms. Now l heard them in low tones saying things to Linda like "anxiety attack" and "panic attack." I wanted to object – get this, always the trial lawyer, I wanted to object – that it was actually much worse than that. The chest pain was real, not imagined. My skin actually was tingling and truly was burning. One thing I was sure of, it was not "all in my head."

In troubled tones, I told them I was a trial lawyer and just beginning a huge trial. "What do you think will happen if I don't show up tomorrow? Everyone will know," I protested. "Our case and our firm will be ruined, and so will I."

They gave me some antidepressant medication to take and prescribed an antianxiety pill – Xanax – for me to take "as needed," whenever I felt the tingling in my skin, the tightness in my stomach, and other symptoms come on. They gave me another pill to help me sleep, and sent me home.

I was back in the courtroom the next day, and I did my job. Inside, I was still a wreck. My trial partner, with whom I had shared my experience by telephone the night before, was fantastic – reassuring, concerned, and supportive. He said at the end of the day he was amazed because even he couldn't tell that my knees were shaking (as I was certain all could see) or that I was fearful of making mistakes (as I was certain all must have known). He assured me that I looked and acted normal and did a good job, and reiterated that no one could tell anything was wrong.

That first day back, I took five or six Xanax tablets just to get through. It was not always that many each day after that, but from that day till the end of the trial, I did not go a single day without taking at least two or three, including every Saturday, Sunday, and holiday.

And thus it was that my partner and I labored on through what became 14 and a half more weeks of intense trial. And I tell you candidly, I hated every minute of it. I stayed on all of the medications, and, when I could, I counseled with a psychiatrist. In the end, we triumphed at trial. We won a large, multimillion-dollar verdict for our client.

And, personally, I emerged with an identified condition: clinical depression. The immediate diagnosis was "major depression," which I had always thought of before as a "nervous breakdown." Whatever its proper name, it is an illness, a disease, a sickness. And, it was – and is – treatable.

The joke, if there is one, is that in a manner of speaking, it was pretty much all in my head after all. But real, and medical, nonetheless.

My psychotherapy and medication treatments continued in earnest for the next eight months. During the nearly 20 years since that summer of 1988, I have had periods when I have still needed to take antidepressants, but it has been at a very, low maintenance level. The illness can, however, sneak up on me and return, but now I know the signs to look for, and I am equipped with multiple coping measures and skills to head it off. It does not interfere with the high quality of life that I now enjoy – quite a contrast to the day it totally disabled me.

I knew I needed to change careers after that, and not only for the reasons related to my illness. Because of my health and also wholly independent of it, I realized that I simply could not be happy doing trial work for decades to come. A positive byproduct of my illness, after 23 years of litigation experience, was my discovery that I really did not relish or enjoy the role of the warrior. Instead, what I yearned for was to be the peacemaker.

I wanted to bring people together to settle their differences. I learned from my first few early volunteer mediation experiences that I felt more passionate about serving as intermediary than as advocate. I found it personally satisfying and fulfilling to help people end their difficult disputes, find closure, and move on with their lives.

I kept trying cases for the next five years or so and then ventured out on my own as a sole practitioner with the goal to serve people as a full-time professional mediator. In a city and state that at the time had absolutely no court referral practice for mediators, no certification or credentialing, and no market at all for private mediation, I was scared stiff and hoping somehow just to make a living.

The mediations were indeed sparse those first three years, but my practice continued to grow steadily as I stayed true to my commitment and labored on in what I knew was a meaningful vocation for me. In so many ways, the professional change has saved my life. I have been a full-time mediator for the last 15 years.

I ultimately quit my 32-year smoking habit, slowed-down my life, and reconnected with my family in a great way. I became comfortable again with who I was, with who I am.

It has been very, very difficult, even nearly two decades later, to tell this story. Through the years, I shared it with very few people. I sensed a stigma to letting others know of my health problem. I still fear that others will think less of me, that I was not "tough enough" to avoid or overcome my illness.

But lawyers need survival-guides as much as we need how-to lessons. And a hallmark of our field is what we learn from each other informally and by chance. You, for example, just happened to read this essay; and, I, choosing to risk embarrassment, have just recently begun to tell my story – for, I hope, a good cause.

Our profession, with its high pressures and demands, is particularly susceptible to the disease and consequences of depression. It is a treatable illness. No one should hesitate to get medical help when the symptoms are recognized. How many attorneys who have had disciplinary charges filed against them, give a history, in mitigation of their violations, of having become afflicted with depression and having gotten into trouble because they did not seek professional help when they needed it? How many marriages, how many family relationships, how many professional affiliations have been jeopardized because of these effects?

There is a good, productive, happy life after treatment for depression. I am proof positive – Exhibit No. I.

Published in *The Journal of the Section of Litigation (ABA)*, "Out of Darkness" first appeared as "From the Closet," in *Reflections on Life and the Law*, published by the Columbus Bar, June 2006.

jarmediate@columbus.rr.com

James A. Readey

Better Lawyer™
a columbus bar publication for new lawyers

Confessions of a Self-proclaimed Sell-out

Making the Leap from the Public Sector to the Firm

By Megan H. Boiarsky,
Carlile Patchen & Murphy

I'm a sell out. After five years as a public attorney with the Ohio Attorney General's Office, I left for greener pastures. And while I feel as though I have begun to embrace my new identity, the decision to move to the private sector was a difficult one. In the spirit of a confession, I am going to tell you about my experience as a public attorney, the move and how I've adjusted to life on the other side.

Rewind five years. Like most new law school graduates, I was green. I mean really green. I won't bore you with the laundry list of all things legal that I didn't know. But I consider myself a relatively quick learner and, within the first few weeks of my arrival at the AG's office in September 2004, I learned a lot; namely, that (1) I looked young enough to be a client's daughter (or so she told me); (2) accepting rounds of golf from anyone was completely unacceptable, (though, in the spirit of the confession, golf is not a fan of mine, and I don't like it much either, so this wasn't particularly difficult for me); and (3) I had better learn to swim (and fast) because I was getting thrown into the deep end. I learned early on that the AG's office was a place that embraced the "practice" of law, even for a new attorney. And I loved it.

Continued on Page 22

And so, one day in June 2009, a networking contact of mine indicated that he had heard through the grapevine of a firm looking for a three-to-five-year labor and employment associate. I was all over it.

Continued from Page 21

In September 2004, I was placed, to my great satisfaction, in a sub-group called the Labor Relations Unit within the larger Executive Agencies Section. I earned my sea legs representing the State Employment Relations Board in unfair labor practice violations; the Manufactured Homes Commission in its rule-making processes and procedures, and public records issues; and the Ohio Department of Commerce, collecting minimum wage and prevailing wage payments.

After a year and a half, I decided I wanted to practice in an area that I later termed the "sex, drugs, and rock-n-roll of law" and, in April 2006, I transferred internally to the Employment Law Section. For three and a half years I defended Ohio's public employers in cases of alleged race, sex, age, and disability discrimination, retaliation and hostile work environment. I loved what I did. I came to work every day to learn and to practice. Like the rest of my section, I worked hard and I worked until my work was done. Despite the government employee stereotype, our hours were always in excess of 40 per week and, many times, extended to weekends, holidays, and vacations. I joined Special Litigation (a group of attorneys that worked together on the higher-profile litigation of the office), the "Green Team," (a group created to help make our office more environmentally conscious), and the Office's Book Club, and I kept on paddling.

The work, however stimulating, paled in comparison to the relationships I built with my co-workers in the section and throughout the Office. Without the pressure of the billable hour and the fight for self-preservation that comes with it, or the ever-elusive partnership track, the environment fostered a balancing of independence and reliance coupled with learning and teaching. Of course, there were politics and office squabbles, but no more so than in any other office. In fact, I don't mind telling you that there was very little I disliked about my job. Well, except one – and it probably won't come as much of a surprise (and herein lies the heart of my self-proclaimed "sell out" status): money.

The fact is, I had none. Embarrassingly, five years out of school, I was finding it impossible to cover my student loans in addition to groceries and the mortgage. As for getting married or starting a family – only if weddings were free and children lived exclusively on love. From 2006 to 2009, I started teaching power yoga as a part-time job. I brought my lunch to work every day, resisted the urge to buy new clothes or go on expensive vacations, and toughed it out. With help from my father, I was able to keep my head above water – but barely.

And then came the crashing economy and yes, pay cuts. I began to panic as the realization struck that I would have to ask my dad for yet more money. The tired government cliché kept playing over and over in my mind: the money situation was untenable, but I loved my job. What to do? At last I realized that, at least for now, the only way up was out. And so, grudgingly, I slowly began to accept the reality of billable hours, partnership tracks and a potential shift in the work-life balance. But first, where was I going to go? The economy was in the mud and most firms were laying people off and delaying first year hiring.

Interviews were sporadic and maddeningly few and far between. I began to truly understand and appreciate the power and importance of networking. As I began to network, my perspective on Columbus changed from that of an ocean to that of a fishbowl.

And so, one day in June 2009, a networking contact of mine indicated that he had heard through the grapevine of a firm looking for a three-to-five-year labor and employment associate. I was all over it. Lunch with my future supervisor in June was followed by several months of waiting and treading water. Anyone who knows me will tell you that I am far from the most patient person in the world. The waiting was excruciating and I hoped that my efforts to cover the stink of desperation with daily applications of faux-confidence was working. And then, unthinkably, more waiting. Finally, in October 2009, all signs were go. I was offered and accepted a position at Carlile Patchen & Murphy as an Employment Law and Business Litigation associate.

The departure from the AG's office was a tearful one. Literally. I cried while telling my Section Chief that I was leaving and I cried while telling the Assistant Section Chief. Yes there was more crying when I told each of my co-workers and my administrative assistant. And then I cried again because I had no idea what I was getting myself into. I was told that I was lucky to find a job in this economy since, under normal circumstances, the AG's office had a turnover of around eight to ten attorneys per month. I was number nine for the year. Even so, it was a tough choice.

And so I left my warm and cozy nook with the AG's office to brave what I perceived as the turbulent, shark-infested waters of private firm life. I started at the firm on October 30, 2009, and now, with a whopping four months under my belt, I feel that I have at least some perspective to offer. Though things are different here, I am certain that my fears of transitioning into the private practice were not well supported. I'd be lying if I told you the transition was seamless, but it certainly wasn't as bad as what I had prepared myself for. The first few weeks I felt utterly homesick, filled with nervous energy, and so ready to prove myself I had to talk myself down from the cliff. I missed my friends, I missed being able to understand the computer system, I missed not having to bill hours and I missed feeling comfortable. And what the heck is a matter number, anyway? Wait, you mean I have to learn COBRA? But slowly, as the weeks passed, my comfort level has risen, and with it, my confidence. I realize now how invaluable my experience at the AG's office had been, how much I had learned, and how applicable it is to the private sector.

As a relatively new associate at a firm, I have learned to appreciate a number of things about private firm life: (a) I can afford my student loans, my mortgage, and my groceries all at the same time, which is nice (especially if you ask my dad); (b) everyone hates billable hours – get over it; and (c) I still have a lot of learning to do.

One thing bothers me and will, perhaps, continue to do so throughout my practice. In those cases in which my client is actually in the "right" I have been unable to reconcile my clawing (and yes, I'll admit, idealistic and sometimes unrealistic) attempt to do justice and find truth, with the exorbitant price tag that justice sports. For most clients, that price tag is well outside of the budget, so much so in fact, that it is simpler (and less expensive) to simply settle cases. Too often, however, especially in those cases in which my client is being taken advantage of by an arguably greedy plaintiff, "settlement" connotes yet again a sense that I am "selling out" (are you catching the drift here?). In other words, in most cases, even if my client has the best facts in the world, it is going to cost more to prove they are right under the law than simply to throw money at the opposing party to resolve the matter and move on. In the public sector, the client was not responsible for footing the bill for any attorney fees. As such, my sights were set on the ideals of principle and justice, rather than a balancing of justice and economics. Perhaps the balancing act will, at some point, become easier to manage. At this point, it remains a daily struggle.

In the meantime, I am still learning to swim, and with a bit more confidence about venturing outside the safe waters I had become accustomed to and with the appreciation and understanding that the water isn't as deep as I think it is. And even if it is, I know I can swim. If nothing else, there's always dog paddling.

mhb@cpmlaw.com

Megan H. Boiarsky

Attorney Fee Agreements

What Ohio Lawyers Need to Know

By Rasheeda Khan, Kegler Brown Hill & Ritter

The ethical requirements for fee agreements are primarily found in Ohio Rule of Professional Conduct 1.5, which focuses on the factors determining what a lawyer can ethically charge and the requirement for new attorney-client relationships, the fee agreement needs to be established before or soon after commencing the representation. Under Rule 1.5(b) attorneys are required to communicate to the new client, preferably in writing, "the nature and scope of the representation and the basis or rate of the fee and expenses, … before or within a reasonable time after commencing the representation. In other words, it is not enough to have a general conversation about fees with your client. Instead, the rule requires the lawyer and the client to have an agreement, a meeting of the minds, on what the lawyer is expected to do and what the client will pay.

Although fee agreements, with the exception of contingent fee agreements, are generally not required to be reduced to writing, they are expressly encouraged under Rule 1.5(b) and the Lawyer's Aspirational Ideals. This makes sense as written fee agreements are the most effective way to avoid misunderstandings about the scope of the representation and payment terms and defend against allegations of commencing a representation without promptly addressing the terms of the representation.

Because fee arrangements and types of clients can vary, depending on the nature and scope of the representation, it is important to make sure that your fee agreements are specifically tailored to each matter. The written fee agreement is also referred to as an engagement letter because, in addition to confirming the payment arrangement, it serves to formalize the establishment of the attorney-client relationship, the scope of the representation, and the identity of the client. These letters can become critical when determining whether someone is a current or former client for purposes of assessing conflicts or, if there is an expectation that you will be responsible for continuing the representation for purposes of taking a case to trial, filing an appeal or objections to a decision or providing updates on other matters you know impact your client but are unrelated to the representation.

Situations involving confused clients who have paid good money to their attorneys under the mistaken assumption that the scope of the representation was much broader than what their attorney agreed to can easily turn into a disciplinary investigation. These situations are much easier to resolve and even to avoid if you have a well-written engagement letter for the representation. To that end, the Columbus Bar website has model fee forms available online that can serve as an excellent starting point. The website has several different types of fee agreement letters that can be modified to fit your needs and are available at www.cbalaw.org/resources/forms.fee.

Regardless of what your fee agreement / engagement letter looks like, it should always be reviewed to confirm that it is consistent with the parties' understanding of the scope of the representation and the identity of the client. Because very few of us provide the same type of service to the same type of client without any variation, there is really no such thing as a "one size fits all" form that can be used for every representation. It also makes sense, whenever possible, to spell out in the agreement what happens in the event the client discharges the lawyer before the representation reaches the originally intended point of completion. This is particularly important when you have agreed to represent a client for a flat fee or under a contingent fee relationship.

Specific Considerations:

Contingent and Earned on Receipt Fee Agreements.

Under Ohio Rule of Professional Conduct 1.5(c), all contingent fee agreements must be confirmed in writing, signed by the client and the lawyer. These fee agreements are also required to include the percentage the attorney is entitled to receive if the case is resolved by trial or settlement, and address the terms under which the client will be responsible for litigation fees and other expenses. If you are charging clients a flat fee for performing a specific service or representation in a criminal case, you should be aware that under Rule 1.5(d), any nonrefundable or "earned upon receipt" fee agreement is required to be in writing and must expressly advise the client that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund of all or part of the fee.

Payment of fees by a third party

Under Rule 1.8(f), in situations where a third-party has agreed to pay for your client's legal fees, the client must give informed consent to the arrangement. Informed consent requires the attorney to confirm with the client the payment arrangement along with an explanation of the risks and available alternatives to such an arrangement. Although the rule does not expressly call for the client to give informed consent in writing, confirmation of informed consent in the fee agreement is most effective and efficient way to confirm compliance with Rule 1.8(f).

Fee Disputes

We all learned in law school that when drafting a contract, the best way to avoid disputes it to, whenever possible, avoid ambiguity. This is particularly true when it comes to fee agreements because ambiguities will be construed against the lawyer that drafted the fee agreement. As explained by the ABA/BNA Lawyer's Manual of Professional Conduct, "the rule of contract interpretation construing ambiguities against the drafter counts double when the drafter is a lawyer." Furthermore, fee arbitration programs such as the one offered by the Columbus Bar is an effective means to resolve a fee dispute with a client. However, it is important to know that while clients are not required to participate in a fee arbitration program, lawyers who have been requested to participate are required to do so under Gov. Bar Rule V (4)G. Cooperation is mandatory.

Rasheeda Khan

What Offices Need to Know about OSHA

The Occupational Safety and Health Administration is a federal government agency responsible for ensuring that safe and healthy working conditions exist for all employees. One of OSHA's duties is to investigate workplaces to make sure employers follow the legal standards articulate in the Occupational Safety and Health Act (OSH Act).

By Matthew D. Austin,
Barnes & Thornburg
And George S. Kunz, Midwest Management Consultants, Inc.

What is OSHA and why does it apply to Offices?

The Occupational Safety and Health Administration is a federal government agency responsible for ensuring that safe and healthy working conditions exist for all employees. One of OSHA's duties is to investigate workplaces to make sure employers follow the legal standards articulate in the Occupational Safety and Health Act (OSH Act).

Although most people think of factories, hospitals, warehouses, and private schools when discussing safety and health at work, OSHA does not discriminate against what type of company it investigates, and office settings, including law firms, are no exception. OSHA's Regulations cover all places of employment that have at least one employee.

Several OSHA Standards require compliance if companies have a certain number of employees, such as 11 or more employees for Injury and Illness Recordkeeping. These minimum number standards frequently confuse employers into erroneously thinking that if they don't have the requisite number of employees, they are exempt from OSHA inspections, citations, and penalties.

Employers should place a premium on becoming aware of OSHA's Rules and Regulations. Manufacturing settings that receive the majority of injuries frequently have a full time employee serve as the OSHA compliance officer to ensure that injuries are reduced and compliance is achieved.

Office settings receive far fewer injuries than manufacturers, and OSHA compliance is frequently never discussed or minimally followed. However, offices can be the target of an investigation just as easily as a manufacturing facility. Therefore, offices need to be prepared when OSHA shows up unannounced and begins investigating. Routine compliance checks will cost the employer less time and money than defending or paying an OSHA penalty for an unknown violation.

At a minimum, office settings and others must have the required OSHA written programs in place that affect its business, such as an Emergency Action Plan, a Hazard Communication (OSHA's most cited standard) and others if the place of employment has machinery or equipment such as a photocopy machine.

Probably the most relevant OSHA issue for office settings deals with ergonomics. Offices must ensure their employees are properly fitted at their work stations. OSHA's website even has a checklist for employers that cover such things as working posture, seating, keyboards, monitors, and other items commonly found in office settings.[1] OSHA will likely soon implement a new ergonomic standard, so routine checks of OSHA's website is prudent.

OSHA Investigations

OSHA frequently arrives at an office unannounced to begin its investigation. An investigation is conducted for several reasons, including:

A former or current employee made a complaint;

Other government agencies have reason to believe the employer is violating OSHA's Rules and Regulations and informs OSHA of that belief;

Generally scheduled inspection based on the employer's injury and illness data;

The employer is in an industry that OSHA has a national or local emphasis program for; these programs change each year based on injuries and illnesses.

There was a recent accident or fatality at the work place.

When OSHA visits, the Compliance Safety and Health Officer will show his or her credentials and state the purpose of the visit. The CSHO will then ask to speak to the highest ranking person at the work place.

An opening conference will be held to review any issues and the CSHO will request to review certain items such as: the employer's written programs; OSHA Injury and Illness Records (if required to keep them); and documentation of any previous OSHA-related training. The CSHO will then request to perform an inspection, interview employees in private, take photographs, and document any apparent hazards he or she found.

Particular to office settings, OSHA compliance officers will want to inspect the following:

The OSHA Poster (to ensure it is appropriately hung)
Fire Extinguishers (to ensure they are properly inspected, maintained, and not blocked)
Emergency Lighting (to ensure they are properly inspected and maintained)
Material Safety Data Sheets, if applicable
Exits signs (to ensure they are lit and visible)
Means of egress (to ensure the exits and a pathway to the exits are not blocked)
Ergonomic issues
Electrical (to ensure proper grounding, no blocked panels or switches, and appropriate use of extension cords)
Housekeeping for such things as water or liquids on floor and trash cans.
To ensure nothing appears to increase the likelihood of employees or visitors slipping, tripping, or falling on the premises
Proper storage of materials in racks or on shelving
To ensure the First Aid and emergency response kits are appropriately stocked and in place

After the inspection, the CSHO will hold a closing conference to discuss any issues they found and administer citation paperwork, if necessary. The CSHO then asks the employer for abatement dates, meaning by what date OSHA can expect the violations to be remedied. Employers must comply with the abatement dates or seek an extension of time to abate. The failure to abate within the compliance timeframe dramatically increases the violation penalty for each day the violation is not abated.

Employers that do not agree with the citation, abatement dates, or penalties can request a conference at the OSHA Area Office. These conferences are informal, and attorney participation in them is not encouraged but is permitted. Rather, OSHA consultants or in-house OSHA compliance personnel should attend the meetings unrepresented. Requests for informal conferences must be made within 15 government working days after the employer signs the citation. The failure to make this request results in a final order that cannot be appealed.

Employers not satisfied with the outcome of the informal conference can file a Notice of Contest within 15 government working days from the informal conference. It is advisable that attorneys are consulted before a Notice of Contest is filed.

As you can tell, OSHA compliance is not just limited to factories, hospitals, warehouses and private schools. Office settings must also comply with OSHA or face the same sanctions and penalties for non-compliance as other work places. These penalties can be severe, and once a work place has been cited for a violation, the likelihood of a repeat, unannounced investigation is increased.

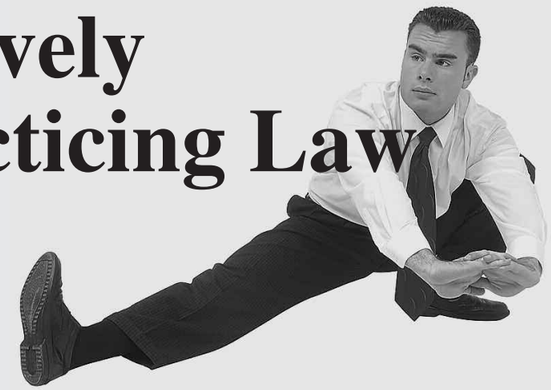
---

1. That web page can be found at: www.osha.gov/SLTC/etools/computerworkstations/checklist.html

matt.austin@BTLaw.com

Matthew D. Austin, and George S. Kunz

Actively Practicing Law



By Lisa Kathumbi,
Ohio Department of Health

During my second year of practice, I developed extreme chronic back pain. As I consulted with several doctors to no avail, I grew concerned that I might be facing a serious condition. I was finally referred to a physical therapist who offered me a simple solution to apply to my work day – "learn to stretch and get moving."

Transitioning from law school to the practice of law can be a major adjustment, even physically. Combine long hours and short deadlines and it is easy to fall into a sedentary routine. Sitting at a computer for eight plus hours a day, however, is not good for the body. In fact, even if you routinely engage in moderate or vigorous exercise in the mornings or evenings, studies have shown that sitting for prolong periods of time can lead to chronic neck, back or joint pain and can increase an individual's risk for lifestyle-related diseases.

In addition to carving out time for extended exercise and creating a healthy diet, there are simple things that can be done throughout the work day to promote a healthy lifestyle:

Take a Stand: You burn more calories by standing, so look for opportunities to stand during the day. For example, stand while talking on the phone or when proof reading documents.

Step Right Up: Try ditching the elevator and taking the stairs. This "green activity" not only builds leg strength but increases aerobic capacity.

Walk More. A good habit I learned from one of my early mentors is to look for small ways to walk more during the day. For example, walk to the court house or to out of office meetings when possible. Instead of using the phone or e-mail to deliver a message to a co-worker, walk to their office. If you drive to work, park at the far end of the parking lot or garage.

Stretch: Learn how to properly perform minor stretches that can be done in your office. It can be something as simple as turning from left to right a few times every hour to stretch your back, which has helped me tremendously to relieve my own back pain.

Stay Upright: One of the worst things you can do for your body is sit slouched and stationery for hours at a time. Force yourself to sit up straight and remember your posture throughout the day. In addition to looking more professional, sitting up straight can help you avoid back pain, headaches, and fatigue.

Become a Fan of the Water cooler: Try to take in more water throughout the day. Your body will benefit from the water you consume and from the walks to the water cooler.

Be Aware: While it is easy to lose track of time during a busy work day, try to budget a few minutes to get out of your chair to stand, stretch or walk down the hall.

Practicing law can be rewarding, but it can also be stressful and time consuming. You might think there is simply not enough time to make these types of minor adjustments, but studies have shown that adding just a little movement to your life can reduce the risk of heart disease, stroke and diabetes, improve joint stability, increase and improve range of movement, improve mood, increase concentration and memory, and reduce stress. Additionally, I have personally found that "actively practicing law" throughout the day makes me more focused and effective.

The thoughts and opinions in this article are based on my experiences and research. They have not been evaluated or endorsed by a medical professional or by the Ohio Department of Health. It is always best to consult with a health care professional before starting any exercise routine.

Lisa Kathumbi

Dealing With Difficult Clients

More often than not, however, we end up with odd clients from time to time and the question quickly becomes how to deal with them.

By Mark Kafantaris, Kafantaris Law Offices

A strangely dressed woman walked into a lawyer's office and said only that "my mother died and my sister is not giving me any money." The doubtful secretary summoned the lawyer who proceeded to examine the file in the neighboring county, and sure enough found that the sister had in fact taken advantage of her odd sibling. He requested an accounting from the fiduciary's lawyer and soon thereafter obtained a sizable settlement for his client.

In another instance, a young lawyer received a crash report and scattered medical records from a man who was unhappy with the work of his previous lawyer. Unknown to him at the time, just about every other personal injury lawyer had received the same package and they had all called previous counsel who essentially told them that the client was loony and difficult to deal with before summarily deciding to turn the client away. He was tempted to call himself but decided to have the man come in to review his case. As it turned out, the accident was straight forward with clear liability and serious injuries. He filed suit and after brief discovery, settled the case for a handsome fee.

These examples show that cases can be good even though the clients may be odd – be it in dress, speech or personality. Thanks but no thanks is often our natural reaction, and this is generally a prudent decision as the best client is sometimes the one we do not take. Nonetheless, if there are no warnings coming from our gut – where we keep a wealth of latent wisdom – perhaps we should approach the seemingly odd client with a more open mind. After all, tolerance, understanding and a keener awareness of human frailty is what has traditionally distinguished our profession from others.

More often than not, however, we end up with odd clients from time to time and the question quickly becomes how to deal with them. What follows are some of the typical client personalities you will likely confront in practice, together with some suggestions on making the most of things during the representation.

The Dazed and Confused Client: Just sued, fired, charged with a crime or in need of an urgent bankruptcy filing, this client knows little of ordinary matters and even less about the legal process. You give a thorough explanation of the law relative to the situation at hand along with options and consequences. And though you may have done a pretty good job at it, the explanation seems to have somehow gone in one ear and out the other. Distracted, hysterical, unsophisticated or just plain confused about the nature of our work – we are confronted by a curious gaze. To some extent, this confusion should be embraced by us inasmuch as our role as counsel is partly that of teacher and the misunderstanding may reflect a weakness in our presentation. Due attention should be put on written materials for the client, complete with easy to understand diagrams, photos and bullet points.

Of course, even the best explanations can prove fruitless and we must realize that some clients simply do not care to understand the underlying issues in their case. More difficult, however, is the client who chooses to ignore clear concepts because they lead to an outcome that is difficult for them to accept. Debtors in bankruptcy have difficulty "understanding" that property with equity beyond state law exemptions is subject to liquidation for the benefit of their creditors. Fathers in the midst of a divorce proceeding simply cannot understand why visitation is so limited despite their recurrent record of abuse in the household. And criminal defendants simply cannot grasp a prosecutor's firm stance as to sentencing.

The Absent-Minded Client: Good natured and overall decent people, these clients forget important details and documents requested, show up late to court hearings and depositions, and otherwise run afoul of tasks customarily expected of them. These clients require a lot of hand-holding and you can delegate much of it to your staff. A quick reminder phone call the day before – or even the hour before an appointment – can go a long way to get them to where they are supposed to be. Do not count on all your letters being read or forms being completed and returned. Get them into the office where staff can help them. For court appearances, be more direct than usual on how they are to dress and behave. This is also true of trial witnesses who sometimes need tremendous help getting cleaned up and appropriately dressed for their court appearances.

The Web-JD Client: Unlike our dazed and confused clients, these folks are usually somewhat sophisticated and come armed with an online understanding of their case. Though this is somewhat helpful, it becomes overbearing to hear a dissertation from the lay perspective on what ought to be done in the case. Every aspect must be vetted and approved by this client before filing – including such trivial niceties as prayers in a complaint demanding damages in excess of $25,000.

The best course is to gather your patience and explain why things are being done as they are and why the alternative route suggested by a friend is not dispositive of the issue. If they continue to meddle and second guess you, it may be necessary to let them go, as this is a sign of more problems ahead or a loss of trust in your ability. When Abraham Lincoln found that his mule preferred a different route, he told him "if you are going to get on, I am going to get off."

The Oil and Vinegar Client: This one may not be odd and may in fact be perfect for someone else. Soon, however, you realize that his personality, outlook, philosophy or version of the facts cannot be reconciled with how you understand things to be. You may find yourself representing someone you find distasteful or even abhorrent. This was what a young lawyer was trying to avoid when he quoted an unusually high fee for an appeal. "He won't be back at that price," the lawyer thought. Three days later, the client paid the entire fee to his staff and quickly left before the lawyer could intervene. The lawyer did the appeal and even reversed the lower court's decision, but he declined representation for the new trial.

The Paranoid Client: These clients have a deep distrust of others and usually question even your loyalty at some point during the representation. This was a problem even for an experienced criminal defense lawyer who had managed to negotiate a manslaughter plea with a relatively short sentence for a client who had killed a man during a wildcat union strike. After a discussion regarding sentencing, the defense lawyer and prosecutor left the judge's chambers together laughing at a joke just told by the bailiff. Seeing this merriment, the client presumed he had just been sold down the river. He refused to plea, and instead hired a big name defense lawyer from out west. The jury found him guilty of murder and he got life.

You can hold nothing back from the paranoid client and whenever possible, you should have him or her present during negotiations. Be sure to mind appearances, too. This includes chatting in the hallways and getting chummy with opposing counsel in their presence. Just as jurors continue to evaluate you during recesses, your own clients are observing your loyalty as well. They may not always expect you to win for them, but they require that you remain fearlessly loyal and put up a good fight. So save the jokes for the evening, or finish them up in chambers where everyone can speak frankly without getting clobbered.

The Ungrateful Client: This is perhaps the most difficult client to deal with because the ingratitude typically manifests itself in cases involving a great deal of personal sacrifice by the lawyer. Countless uncompensated hours on the file aside, these clients are quick to claim little effort by you when results are not immediate or readily apparent. Since your blood will quickly boil when they tell you this, it may be a good idea to send out a letter outlining what you have done, the costs you have advanced and the delay and unpredictable results typically associated with the legal system.

If you surmise that you might be dealing with an ungrateful client from the outset (e.g. he came from another lawyer and is telling you that he had done nothing for him), it is best not to take the case. If you do take it, be ready to deal with both the difficult case as well as the ungrateful client. Since ingratitude is difficult to accept when it comes unexpected, it is utter foolishness to sign up for it when you see it coming.

mark@kafantaris.com

Mark Kafantaris

Legal Writing Tip of the Month

The Etiquette of E-Mail

By Jameel S. Turner, Bailey Cavalieri

Despite the popularity and ease of using email in the era of technology, it is surprising how many attorneys and businesses do not spend more attention educating themselves about the importance prompt, meaningful replies to email inquiries. As lawyers, many of us receive at least 25 to 50 emails a day, sometimes more. This being the case, many young lawyers fail to take advantage of those 25 to 50 daily opportunities to make a lasting impression on their email recipients.

Most authorities on email etiquette agree that rules on email etiquette are necessary in order to promote an attorney's or company's professionalism and efficiency. Well-written emails promote professionalism by conveying a professional image that imprints onto the recipient. Emails are directly connected to efficiency because short emails that get straight to the point are more effective (and actually read) than poorly-worded, lengthy emails that never really answer the question.

With this in mind, I offer the following tips on email etiquette geared toward helping young attorneys take advantage of opportunities to make great impressions through email replies.

Be Concise: Keeping emails short sounds simple, but usually the length of a response depends on the complexity of the question. Reading online is not a great way to increase comprehension of complex legal issues. Thus, any topic that requires a response more than two or three paragraphs is probably better handled by letter.

Be Prompt: While we are all very busy, most email responses are most effective if they are received within 24 hours of the time the inquiry was received. Try to set aside an hour in the morning or in the afternoon solely dedicated to responding to emails. Your clients will appreciate the promptness and you will find your work product improves when you give your complete attention to producing an effective response. The exception to this rule is when you are angry with the recipient. Always wait at least 24 hours to respond to an email recipient you are angry with.

Be Complete: A good email reply answers both the questions asked and potential follow up questions. If you fail to answer all of the questions asked in the original inquiry, you will undoubtedly be bombarded with follow up emails about the unanswered questions. In addition, complete responses will preempt relevant questions and your audience will be grateful and impressed with your thoroughness.

Wait to Fill in the "TO" Email Address: Consider waiting to fill in the "TO" email address until you are completely through proofing your email and you are sure that it is exactly the way you want it. This will keep you from accidentally sending an email prematurely. In the past, we all have accidentally clicked on the send icon, when we really meant to click on the attachment icon. Waiting to fill in the recipients email address will help to prevent this common mishap.

Restate the Question in the First Sentence: Most readers do not have time to reread exactly what they sent you, so do them a favor by restating their question(s) in the first sentence of your reply. Senior attorneys whom you work for and clients will appreciate it.

Don't Be Too Informal: Use sound discretion about what is best to say to a recipient and what is safe to put into writing. Realize that anything you say in an email can be passed to someone else or potentially discoverable in litigation. It is axiomatic that any email you send should be properly proofed for spelling and grammar mistakes, and devoid of special characters such as emoticons.

Don't Overuse: I recently took a seminar with Steven D. Stark that included a brief discussion of email etiquette. Mr. Stark pointed out that, especially with internal communications, young lawyers often will ask questions in email that they would never ask in person or on the phone. Emails are interruptions. Thus, ensure that emails you send are relevant and complete, so that you do not waste your audience's time with trivial or insignificant matters that can be addressed in person or at a later date.

Keeping these helpful reminders in mind when drafting email responses will put you in position to draft professional and efficient email responses. Email is undoubtedly the most popular form of communication due to its relative ease and worldwide reach, so it is not going anywhere anytime soon. So those who can take advantage of its widespread use by mastering the art of responding will leave lasting impressions on their recipients, some of whom may turn out to be future clients.

jameel.turner@baileycavalieri.com

Jameel S. Turner

New Lawyer Spotlight – *Spring 2010*

Lauren Hilsheimer

Employer: *Baker Hostetler*
Law School: *The Ohio State University Michael E. Moritz College of Law*
Undergraduate Institution: *Vanderbilt University*
Practice Interests: *Business, Tax, and Environmental Law*

By Mark Hatcher, Baker Hostetler

Prologue: The Editorial Board thought it would be a good idea to feature a new lawyer in each edition of the Better Lawyer publication to share insights, perspectives and best practices with other new lawyers and future lawyers as well. I recently had a chance to sit down and interview Lauren Hilsheimer, a 2009 graduate of Moritz and first year associate at Baker Hostetler.

1. What led you to pursue a career in the law?

At Vanderbilt, I majored in engineering science with a focus in environmental engineering and mathematics. Science and engineering have always fascinated me, and mathematics comes naturally. However I wanted to have a career where I would interact with people on a daily basis, be intellectually challenged, problem solve, and have a chance to make a positive impact on society. While many engineering internships and jobs I held were intellectually stimulating, I was not interacting with people on a daily basis. I realized relatively quickly that this was something that was very important to me. Pursuing a legal career with an emphasis on Business, Tax, and Environmental Law seemed to give me the proverbial "best of both worlds."

2. Describe your law school experience? If there were something you could change about your law school experience, what would it be?

I enjoyed law school. Now, I do not mean that every day I woke up excited to go to class, but I generally enjoyed the classes, the professors, and my classmates. I met some of my closest friends in law school, and many others for whom I have a great deal of respect and would not hesitate to call for advice.

I was a managing editor on The Ohio State Law Journal. I believe that experience helped me learn how to manage my time effectively and improve my writing skills.

If there was something I could change about my law school experience, it would be that I would have tried to figure out what types of classes I was interested in during my first or second year. It took me until the start of my third year to figure out that I enjoyed business and tax classes. I wish I had had the opportunity to take more of these types of classes.

3. How has your transition from law student to practicing attorney been?

I have enjoyed the transition! I think there are a few things that have made my transition easier than for most. First, I was a summer associate at Baker Hostetler prior to joining the firm last September. As a result, the transition has been much smoother – I knew most of the attorneys and staff when I started; I was familiar with the firm's policies and procedures; and I generally knew my way around the office.

Second, I decided to join Baker Hostetler because I genuinely enjoy the people here. The attorneys are friendly, helpful, and caring. People at Baker Hostetler work diligently together because they want to do a good job for our clients.

4. How do the realities of the practice of law compare to what you thought the practice would be like as a law student?

Again, working at Baker Hostetler as a summer associate prior to joining the firm last September gave me a more realistic picture of what the practice of law would be like. I was also a summer associate at another law firm here in Columbus – Zeiger Tigges & Little – during the summer after my first year of law school, which I believe helped also.

5. Identify some of the skill sets that have served you well in the practice of law thus far.

I am a good listener, and I am not afraid to ask questions. I think that is one of the biggest mistakes young attorneys tend to make – they are tentative about asking questions. It is much better to ask a ton of questions at the beginning of a project, or during a project, then to have completed a project incorrectly because you did not understand the assignment. Furthermore, if you have a question during a meeting or conference, there are probably at least one or two other people in the room who have the same question. Understanding that no one expects you to know everything about practicing law when you begin has served me well, and if they do, they are most likely being unreasonable.

6. Are you involved in any bar related or community activities outside of the firm?

I am currently coordinating Baker Hostetler's participation in the 27th Annual Bowl for Kids' Sake event, which benefits Big Brothers Big Sisters of Central Ohio. I have enjoyed working with members of our office and the Ohio community to benefit a good cause. Both of my parents have been extremely active in the community, and have always stressed how important it is to give back. As I settle further into my career, I hope to increase my participation in community activities.

7. What advice do you have for other new lawyers entering the practice?

Ask questions, listen carefully, and work hard. Read everything at least twice before you turn it in, send it out, or email it. However, make sure you keep doing all of the things you loved doing before you were a lawyer! Of course there will be times that you cannot make it to your basketball game or dinner with your friends, but try your hardest to stay balanced. Don't forget all of those people who have supported you along the way, and are the reason you are here in the first place.

If there is a lawyer you would like to see featured in our New Lawyer Spotlight, please contact the Better Lawyer editor, Jameel Turner, *jameel.turner@baileycavalieri.com.*

Mark Hatcher

PRODUCTS LIABILITY CASES
And Legislation To Watch In 2010

By Erika Schoenberger,
Frost Brown Todd

In the product liability arena, this year should be interesting as lower courts determine how preemption issues play out after the U.S. Supreme Court's ruling in Wyeth v. Levine. Over 70 individual trials are scheduled this year in Florida tobacco litigation, which could dictate the terms of thousands of such suits still pending. And 2010 could also produce high impact legislation as new laws and rules are proposed in the wake of tougher consumer product safety laws and significant medical device legislation.

Here are a few product liability cases to keep track of in 2010:

Decisions After Levine

In the Levine decision, the Supreme Court held that failure to warn claims against a generic drug manufacturer are not preempted specifically because the drug is a generic drug. The Levine ruling came down in March, causing a seismic shift in the law of preemption by finding that product liability claims made under state law are not preempted by federal law. The ruling has drawn particular focus to the subject of preemption, especially in the pharmaceutical area, as the lower courts are now seeking to define the scope of the Levine decision.

The Dobbs v. Wyeth is one of the first to address the scope of the preemption doctrine in the wake of the Levine decision. The plaintiff in Dobbs alleges that Wyeth Pharmaceuticals' prescription antidepressant, Effexor, caused her husband's December 2002 suicide. She claims if additional suicide-related warnings had been provided, the suicide would not have occurred. (Dobbs v. Wyeth, Case Number 04-cv-01762, in the U.S. District Court for the U.S. District for Western District of Oklahoma.)

The lower court granted Wyeth's summary judgment bid with respect to the plaintiff's failure-to-warn claims based on federal preemption, and the plaintiff appealed her case to the U.S. Court of Appeals for the Tenth Circuit. The court stayed the case pending the Supreme Court's ruling in Levine.

Another preemption case, Miller v. SmithKline Beecham Corp., focuses on the issue of whether the ruling in Levine undermines the argument that the FDA's intentional effort to avoid overwarning with respect to modern antidepressants has preemptive effect. The case is Miller v. SmithKline Beecham Corp., Case Numbers 08-cv-05042 and 08-cv-05050, in the U.S. Court of Appeals for the Tenth Circuit.

In that case, the plaintiff accused GlaxoSmithKline PLC of failing to adequately warn consumers of an association between the antidepressant Paxil and violent and suicidal behavior, which she claimed was the cause of her brother's 2002 suicide.

The U.S. District Court for the Southern District of Indiana granted summary judgment in favor of Glaxo on the grounds of conflict preemption, and the plaintiffs have appealed to the Tenth Circuit, where the action will be argued in January.

Two other significant preemption cases to watch in 2010 are Bryant v. Medtronic Inc., 2009cv02800 U.S. Court of Appeals for the Eighth Circuit in which a district court ruled that the plaintiffs' claims regarding the Sprint Fidelis defibrillator lead were preempted by federal law; and Mason v. SmithKline Beecham Corp., 08-CV2265, U.S. Court of Appeals for the Seventh Circuit, in which a district court found that the plaintiffs' proposed warning posed a direct conflict with federal law based on the FDA's rejection of that warning prior to and after the decedent's suicide.

Both cases were stayed pending the outcome of Levine and will be heard this year in the Eighth Circuit and the Seventh Circuit, respectively.

Individual Tobacco Liability Cases

The tobacco industry is closely monitoring Florida courts, where thousands of individual tobacco liability cases are currently pending.

These so-called Engle progeny cases occurred when the Florida Supreme Court in 2006 overturned a $145 billion verdict in Engle v. R.J. Reynolds Tobacco Co., a large class action accusing the tobacco companies of conspiring to cover up the side effects of smoking. The court declined to revive the class action status of the lawsuit, but did allow up to 700,000 individuals who could have won judgments under the original verdict to bring new cases against the tobacco companies.

More than 70 such trials are currently scheduled in the state of Florida for 2010. There are also pending state and federal appeals over the constitutionality of the Florida Supreme Court's findings regarding the Engle decertification.

Tweaking the CPSIA

Industry leaders can expect a year of legislative debate over confusion regarding implementation of the controversial Consumer Product Safety Improvement Act.

With industry leaders, business owners and legislators increasingly debating how to comply with the sweeping CPSIA, several measures have already been proposed to address the law's effects on manufacturers and consumers.

Criticism is likely to continue into 2010, saying it will largely be driven by the outcry from product manufacturers and importers across a variety of industries that are still struggling to comply with the new rules.

Several bills aimed at modifying the CPSIA had already been introduced but have been defeated. New proposals are likely because the CPSC has repeatedly stated that it cannot do anything unless Congress specifically authorizes it.

Another significant aspect of the CPSIA that will be effective this year is the implementation of a searchable consumer product safety incident database by March 2011 – a project the agency has tentatively deemed "SaferProducts.gov." It remains to be seen how this database will affect future CPSIA enforcement.

Medical Device Safety

Legislation this year is also likely to address medical device safety. Significant product liability legislation is aimed at the ability of plaintiffs to sue over faulty medical devices.

The Supreme Court in Riegel v. Medtronic, 451 F. 3d 104, affirmed (Feb. 2008) held that medical device manufacturers could not be sued under state law if a device had been given pre-market approval by the U.S. Food and Drug Administration, even if the device caused an injury.

Reps. Henry Waxman, D-Calif., and Frank Pallone Jr., D-N.J., reintroduced the Medical Device Safety Act of 2009 in the U.S. House of Representatives to undo the U.S. Supreme Court's decision in Riegel v. Medtronic. Companion legislation was later introduced in the Senate by Senators Edward Kennedy, D-Mass., and Patrick Leahy, D-Vt.

Since the Riegel decision, legislators have split down party lines. Republicans oppose the legislation, arguing it would stifle innovation, while Democrats argue it would allow medical device makers to avoid liability for unsafe products and would cause more unsafe products to enter the market.

Both the Senate and House versions of the legislation have been referred to congressional committees.

eschoenberger@fbtlaw.com

Erika Schoenberger

IS THERE A HOLE IN YOUR HOLD?
Four Common Litigation Hold Oversights

By Marc Fulkert,[1] Jones Day

Although litigation holds are nothing new, Judge Shira Scheindlin's recent Pension Committee decision[2] has spawned a renewed focus on them. In an effort to eradicate lackluster preservation efforts, the Pension Committee decision specifically identifies conduct that will support a finding of "gross negligence" in the preservation context, including the failure to issue a written litigation hold, the failure to identify "key players" and preserve their documents, and the failure to preserve former employees' documents that are in a party's possession, custody, or control.[3]

The Pension Committee decision and others like it illustrate the tragic consequences of failing to preserve relevant documents, but offer little practical guidance on how to implement a proper litigation hold. This article attempts to offer some guidance in this area by exploring four common litigation hold oversights.

"Sent" Email

Each custodian's corpus of discoverable email includes both emails he receives and emails he sends. Unfortunately, "sent" email tends to slip through litigation holds.

Almost every hold notice tells custodians to "preserve email," but few hold notices tell custodians exactly how to preserve their email. Custodians that receive a general instruction to "preserve email" typically retain emails they receive, but often fail to retain the emails they send.

Ignoring "sent" email or simply assuming that every important email a custodian sends will always exist in another relevant custodian's inbox is unlikely to result in a defensible legal hold. The emails custodians send can be just as important as the emails they receive. Further, custodians may send relevant emails to third parties after a preservation obligation arises, and the third party may delete those emails in its usual course of business, resulting in spoliation.

A litigation hold should address exactly how "sent" email will be retained. Depending on the case and the email system at issue, the safest approach may be to retain all of the emails certain custodians send by activating the "journaling" function of the relevant email servers.

Incorporating Human Resources

When instituting a litigation hold, outside counsel will generally consult the client's legal department and information technology (IT) department. While that is a good start, outside counsel should also involve human resources.

Companies are dynamic entities. Employees come and go. If a new employee joins a department subject to a litigation hold, he must be notified of the hold.[4] If an employee subject to a hold resigns or is terminated, his documents must be preserved when he departs.[5]

If a company's human resources department is involved, it can warn counsel before a relevant employee is laid off and it can promptly notify counsel when a relevant employee resigns. Failing to involve human resources increases the risk that counsel will not learn that an employee has left until after he is gone and after his documents have been discarded.

Administrative Assistants

When identifying relevant custodians, counsel should not overlook administrative personnel who may possess documents created, received, or sent by a relevant custodian. Many executives delegate tasks to an administrative assistant, and some executives rely entirely on their assistants to retain copies of various documents.

An assistant's hard drive can be a treasure trove of discoverable information that is no longer in an executive's possession. Accordingly, when identifying and interviewing custodians about their documents, counsel must be sure to ask about any administrative personnel who might possess potentially relevant documents.

Existing Litigation Repositories

Most corporations have been sued more than once. Indeed, some large corporations have been party to thousands of lawsuits. In each lawsuit, the company may have created a repository of documents for review and production. For a host of reasons, these litigation repositories often exist for an extended period of time, often long after the underlying dispute is resolved.

Depending on the circumstances, a repository created for a case filed five years ago may contain documents relevant to a lawsuit filed today. And the documents in the repository may no longer exist at the company. Here is a common example: a company engages an e-discovery vendor to image certain employees' hard drives for a case, the vendor retains the images at its secure facility, and, when those employees leave the company, the company does not retain their data because the vendor already has a copy of the documents within the scope of the hold. Some of the images the vendor has may be relevant to a newly filed suit, but the only copy of the data is with the vendor.

If an attorney does not ask about existing litigation repositories, he may not learn about discoverable information until it is too late. In order to avoid this problem, attorneys should ask their clients about existing litigation repositories and, if an attorney is a member of a firm, consult other attorneys at the firm who have previously worked for the client regarding any repositories of which they are aware.

Properly implementing a litigation hold takes careful planning and a significant amount of effort. Although the four oversights discussed above do not account for every potential "hole" in a litigation hold, avoiding these common mistakes will make a litigation hold more effective and defensible.

---

1. The views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which he is associated.
2. See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, No. 05 Civ. 9016, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).
3. See id. at *7.
4. See Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422, 433 (S.D.N.Y. 2004) (noting the importance of re-issuing a litigation hold memo so new employees are aware of the hold).
5. See Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 629 (D. Colo. 2007) (recognizing that expunging relevant employees' hard drives when they leave the company violates a litigant's obligation to preserve evidence).

Marc Fulkert

The Modern Struggle For Sanity and Success

By David J. Lisko

I am a second year law student at The Ohio State University Moritz College of Law. Just recently, I began sleeping easy at night. I no longer have to live in a constant state of fear over the feelings of rejection and uncertainty that plagued me for the last five months. I have a summer job. Beginning this May I will be working as a summer associate at Zuckerman Spaeder LLP, a litigation law firm in Tampa. I am not in the top ten percent of my class, but I was able to land a summer position by making tremendous effort and capitalizing on the opportunities placed before me. When I played receiver for the Ohio State Buckeyes from 2004-2008, Jim Tressel regularly told us, "[t]here are no lucky people, luck is simply the intersection of hard work and opportunity." I hope and pray that I enjoy my experience this summer and the firm offers me a permanent position post-graduation. If they don't, I will have gained a wealth of experience, a little bit of money to pay down student loans, and I will have a better understanding of the type of law I want to practice for the next forty years.

But hard work doesn't pay off without opportunity. More than 10,000 lawyers lost jobs last year, most of them at the beginning of their careers. Law firms have cancelled summer programs or cut them dramatically. It is impossible to know, at this time, what percentage of second-year law students nationally have found summer associate positions. Nor do we have firm numbers on how many 2010 graduates have job offers. But national reports – from the New York Times to legal blogs – suggest that the numbers may be shockingly low. I know there are second-year students ranked in the top five percent of my class, the 31st ranked law school class in America according to U.S. World & News Report, who do not yet have summer employment plans. And there are top third-year students searching for work as well. I can't describe how devastating this job market has been for the students at Moritz and Capital.

I was inspired to write this article after hearing four female law students discuss how their hair was falling out due to the stresses of law school, mounting student loan debt, and their lack of post-graduation employment. Many students are frustrated by failed interviews, the bull market's promises of hundreds of thousands of dollars post-graduation, and the ominous thought of moving back in with mom and dad. Needless to say, people are freaking out.

Increasing the sense of panic and impending doom is the fact that most law students graduate with a substantial amount of student loan debt. It is not uncommon for law students, who are right out of undergrad, to graduate from law school owing more than $100,000. This debt accrues interest throughout law school and you must begin paying back the loan immediately after hooding. Those student loan payments may be particularly hard to pay back while you are taking a $4,000 Bar/Bri course to prepare you for the state bar exam, in a state in which you may or may not practice law. Besides the financial burden and embarrassment, not having a summer internship at a law firm or government agency deprives students of the opportunity to discover their passion in the law and gain legal experience.

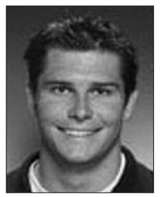
Life is scary for law students today, and that's not simply because of a strict grading curve or the Socratic Method. Unfortunately, law students and lawyers are extremely susceptible to emotional/psychological illness, particularly depression and anxiety. According to OLAP (Ohio Lawyers Assistance Program) Executive Director Scott R. Mote, 21% of lawyers are clinically depressed compared to 6% of the general population. According to Scott R. Mote, the high stress placed on law students and lawyers has historically promoted emotional/psychological illness and led to alcohol abuse and dependency. The additional pressure placed on law students caused by their inability to find summer and post-graduation employment has made things even worse. Depression and substance abuse may be at an all time high among America's law students.

I heard recently that losing your job is comparable to losing a family member. What does that make not being able to find your first job? Lawyers and law firms have maintained a long and storied tradition of a service profession; one that mentors and develops the next generation of lawyers. That role has never been more important than it is today. There has also never been a better time to hire. I recognize that law firms are under economic pressures, but as business decisions are made regarding hiring, please do not forget this tradition and its critical role in our society and democracy.

If you can offer legal employment to law students, please let that be known: even a temporary one. If you can hire one summer intern, please consider hiring two. Think about hiring interns at an hourly rate or part time. If you can't hire a student, play an active role in a law student's life by creating a volunteer position and mentoring the student. You can make an enormous difference in the lives of law students while promoting the ideals of our profession. We want to gain experience, network with practicing lawyers, and create a reputation for ourselves. You can make this happen by employing a law student this summer or post graduation.

Are we, both lawyers and aspiring lawyers in central Ohio, willing to help each other through tough times? If you are, make a difference in the life of someone in your professional community by finding a way to offer them employment. Contact the Moritz College of Law Career Services Department (Pam Lombardi: lombardi.2@osu.edu, (614) 292-8814) or the Capital University Law School Office of Professional Development (Marry Ann Willis: mwillis@law.capital.edu, 614-236-6888). Be the person to springboard a great lawyer's career.

These views are my own and are not those of the Ohio State Moritz College of Law or its student body. I simply write as a witness and advocate for change and assistance.



David J. Lisko

Labor and Employment Law Predictions for the Next Decade

By Matthew D. Austin

A new year always welcomes new predictions. Although predictions frequently do not occur as expected, they are still fun to make. Since this year is also the first year of a new decade, forecasting this year for what will occur in the next ten years should be ten times as much fun! As someone who loves to have fun and practices labor and employment law, here are my predictions for what we will see in the workplace over the next ten years.[1]

Increased Funding for Government Agencies

Employers will notice an increase in government oversight and employees will make more frequent use of government agencies tasked with enforcing regulations. At the end of December, 2009, President Obama signed an Omnibus Spending Bill that significantly boosted funding for the Department of Labor, National Labor Relations Board, Equal Employment Opportunity Commission, Occupational Safety and Health Administration, and the Immigration arm of the Department of Homeland Security. Although that bill covers only fiscal year 2010, the current administration is expected to continually increase its funding year after year in these areas.

The Department of Labor's funding increase will provide the financial support for an increase in personnel, regulatory actions, and enforcement efforts. The National Labor Relations Board received close to a 20% increase in funding to use for enforcement and investigation proceedings. The Board will also hire additional agents to aid in those areas.

The Equal Employment Opportunity Commission has a budget of $367M, which is $23M above last year's amount. These additional funds will be used to help ease the backlog of more than 70,000 pending employment discrimination claims. Within the EEOC, the Civil Rights Division has a $145M budget, $22M above last year, "to reinvigorate the civil rights program at the Department of Justice."

OSHA, along with other health and safety commissions like the Employee Benefits Security Administration, Employment Standards Administration, and Mine Safety and Health Administration, has $121M above last year's budget. According to the government, this increase is intended "to continue a multi-year process of rebuilding OSHA's enforcement capacity and increasing the pace of standard setting."

With respect to OSHA alone, the head of the Department of Labor said in June 2009, "OSHA was going to be back in the enforcement business." In September 2009, the Acting Assistant Secretary of Labor for Occupational Safety and Health said, "We're back in the enforcement business and we're back in the standards-writing business." Anecdotally, my practice can personally vouch for increased OSHA investigations and enforcement. Employers who are inspected should expect OSHA inspectors to issue more citations than before and those citations will increasingly be characterized as serious, repeat, or willful violations of the Act.

Lastly, increased funds for immigration would be used to "modify current authorities to allow the Departments of Homeland Security and Labor to conduct fraud prevention and enforcement programs that focus on industries employing temporary workers using the H-1B, H-2B, and H-2A visa programs." Immigration has moved towards targeting certain industries and not just doing random inspections, and this statement indicates that such a path will continue.

Miscellaneous Additional Expectations for the Workplace

In addition to the large federal government agencies that received all time high dollar amounts for increased investigation and enforcement activities, the workplace itself will see many changes. New breeds of lawsuits will emerge, hiring practices will evolve, employee benefits packages will change from what we have become accustomed to over the past few years, and the culture within each workplace will undoubtedly shift in a new direction. Here are some highlights of what I except to see in the next ten years.

Hiring Practices

Social networking will replace traditional resumes for job searches as employees brand themselves as a way to market their services. Prospective employers will increasingly evaluate an applicant's online activity when making hiring decisions and

Continued on Page 34

"Regular business hours" will have no common meaning because of telecommuting, smartphones, and laptops. Overtime lawsuits will escalate because of the expectation that employees should always be available to employers and customers.

Continued from Page 33

applicants will embrace this change as a passive way interviewing. Employers will try to attract younger workers by positioning themselves as "green." And, a focus on workplace diversity will remain paramount for large companies

Employee Benefits

Employers will increase workplace health programs to include mid-day exercise or yoga classes. Company sponsored health club memberships or on-site work out rooms will increase as an effort to reduce health care costs. There will be a return of company match 401k programs, same-sex partner benefits will become universal, and bus passes will become a common workplace benefit to aid the environment and increased salary perks for employees that walk or bike to work.

Workplace Culture

"Regular business hours" will have no common meaning because of telecommuting, smartphones, and laptops. Overtime lawsuits will escalate because of the expectation that employees should always be available to employers and customers. Telecommuting and video conferencing will become much more mainstream due to the increasing cost and uncertainty of air travel and the decreasing cost of quality technology. Tracking employee productivity through programs that measure computer and telephone usage will increase for both in person employees and telecommuting employees. Coffee shops will start charging rent or a table fee to telecommuters who use them as virtual offices. An assortment of teas will be offered as a healthful alternative along with coffee and soda to employees and clients; and donuts and bagels will be replaced with low-fat, low-calorie fruits and snacks.

Lawsuits

There will be increased government oversight and penalties for misclassifying employees as independent contractors in an effort to recoup unpaid employment taxes, Attorneys will expand venue shopping for the most favorable location to foreign countries because of the increasing globalization of corporations. Bartering for services will increase and the IRS will not be able to catch people who do not report bartered transactions as income. Age discrimination claims by baby boomers will increase as they attempt to remain employed longer to pay off the debt they incurred in the last few years

In summary, the next decade appears to be one where employees will be working from places other than the workplace, employers will focus on healthy measures for people and the environment, government agencies will continue to investigate and to enforce regulations at an unprecedented level, and a new genre of lawsuits will dominate the court rooms.

Happy New Decade!

---

1. There is no need for anyone to save this article for the next ten years just to make sure that what I predicted actually occurred. Even Nostradamus, who made over 6,000 written predictions, was wrong most of the time –save for when he accurately predicted that he would die before the sun came up the following morning.

matt.austin@btlaw.com

Matthew D. Austin,
Barnes & Thornburg

Basic ADAAA

By Lisa M. Critser

As you may be aware, the Americans with Disabilities Amendments Act of 2008 was enacted on September 25, 2008 and became effective on January 1, 2009. The main goals of this legislation are: (1) to "reinstate a broad scope of protection" intended under the Americans with Disabilities Act of 1990 (the ADA) by expanding the definition of the term "disability"; (2) to reject the view that a disability should be determined by reference to the ameliorative effects of mitigating measures as established by the U.S. Supreme Court in Sutton v. United Airlines (1999), 527 U.S. 471, and its progeny; (3) to reject the notions that the ADA requires a "demanding standard" for establishing coverage and requires that an impairment "severely restrict" major life activities as held in Toyota Motor Mfg., Kentucky v. Williams (2002), 534 U.S. 184; and (4) to express Congressional expectation that the regulation defining "substantially limits" as "significantly restricted" be revised by EEOC.

In enacting the ADAAA, Congress made significant changes to the definition of disability. Their intent is to make it easier to meet the definition of disability. It is important to note, however, that the language of the basic three-part definition of disability remains the same. Disability is still defined as (1) a physical or mental impairment that substantially limits a major life activity; or (2) a record of such an impairment; or (3) being regarded as having such an impairment. What changed are the meanings of the terms included in that definition.

First, the term "substantially limits" has been redefined to create a lower standard. "Substantially limits" is no longer defined as "significantly restricts" or "severely restricts" as found in EEOC regulations and as held by the U.S. Supreme Court. The ADAAA states that "substantially limits" shall be interpreted consistently with the findings and purposes of the ADAAA, which specifically reject those definitions. It also states impairment does not need to substantially limit more than one major life activity to be considered a disability.

Second, the ameliorative effects of mitigating measures (i.e. medications, prosthetics, hearing aids, assistive technology, etc.) can no longer be used in determining whether an individual is substantially limited by impairment. A person who uses mitigating measures has a disability if his impairment would substantially limit a major life activity without the benefit of those mitigating measures. The exceptions to this new rule are ordinary eyeglasses or contact lenses. These mitigating measures shall be considered according to the ADAAA.

Third, the ADAAA expressly allows an impairment that is episodic or in remission to be a disability if the impairment would substantially limit a major life activity when active.

Fourth, the definition of major life activity has been expanded to include "major bodily functions." Under the ADAAA, major bodily functions include the immune system, normal cell growth, digestive, bowel and bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions. In addition, the ADAAA makes clear that the list of major life activities found in the statute is not exhaustive. Other activities and major bodily functions can be found to be major life activities.

Finally, the "regarded as" prong of the definition of disability has been revised creating a much broader standard. Under the new standard, an individual meets the definition of being regarded as having a disability if he establishes that he was subject to an action prohibited by the ADA based on an actual or perceived impairment. The standard no longer requires a showing that an employer perceived the individual to be substantially limited in a major life activity. However, an individual is not entitled to reasonable accommodation if only regarded as disabled.

An exception to this new standard was also created by the ADAAA. The "regarded as" definition of disability does not apply to impairments that are transitory and minor in nature. A transitory impairment is defined as having an actual or expected duration of six months or less.

It is important to note that the changes made by the ADAAA to the definition of disability under the ADA also apply to the Rehabilitation Act of 1973.

In addition to changing the definition of disability, the ADAAA made some other statutory changes. An employer cannot use qualification standards, employment tests or other selection criteria based on uncorrected vision unless the standard, test or selection criteria is shown to be job-related and consistent with business necessity. Also, the ADAAA clearly states there is no cause of action based on the lack of a disability.

With respect to retroactivity, courts considering the issue, including the Sixth Circuit, have found that the ADAAA does not apply retroactively to govern conduct occurring before its effective date.

Since the ADAAA became effective, the EEOC has approved a Notice of Proposed Rulemaking, which was published in the Federal Register on September 23, 2009. The NPRM, proposes changes to the ADA regulation and the Interpretive Guidance (Appendix) that was published with the original ADA regulation. Furthermore, the NPRM, along with the accompanying Questions and Answers, both of which are available on the EEOC website, provide more in-depth explanations and examples of the changes and issues created by the ADAAA.

lmcritser@gmail.com

Lisa M. Critser

Better Than Ever

BASIC LEGAL RESEARCH ON THE INTERNET

By Ken Kozlowski

You know that old saying "you can't see the forest for the trees?" Sometimes it gets that way with researching subjects on the Internet. There are so many new sites and next best things that the old tried and true sites that have been toiling away for a decade or more are lost in the shuffle. That's what we're going to take a look in this article - an overview of basic sites that will provide good starting points for your research of federal and state matters. The best news? All of them are free of charge.

Our first stop will be the Feds. GPO Access (www.gpoaccess.gov/index.html) is probably the granddaddy of the sites that provide serious access to government information. As more and more materials are being published online only with no hardcopy counterparts, access to this site becomes paramount. Even among such hardcopy resources like the Federal Register, Code of Federal Regulations, and Congressional Record, the online counterparts have become the favorites of legal researchers for their ease of use and search capabilities. Congressional bills, session laws, and the United States Code are also mainstays of the site. Of course, even GPO Access can be replaced, as is the case now with FDsys, or the Federal Digital System (www.gpo.gov/fdsys/). The migration from GPO Access to FDsys will be complete sometime in 2010. There are a number of collections already available on the new site.

Next up is a site that has changed its appearance a few times over the 13 years or so that I have been using it, Administrative Decisions & Other Actions - By Agency (www.lib.virginia.edu/govdocs/fed_decisions_agency.html). This page is part of the University of Virginia's Government Information Resources section, and it offers department by department links to sometimes arcane administrative decisions and information on how to pry other data out of agencies' hands via FOIA requests.

Two other sites that have recently (by that I mean in that past six years or so) made their mark on the federal legislation side of things are GovTrack (www.govtrack.us/) and OpenCongress (www.opencongress.org/). GovTrack has only been around since 2004, but offers a great way to keep track of the progress of federal legislation via e-mail or RSS feeds. OpenCongress was launched in 2007, and although it does provide access to the same types of materials as GovTrack, its mission is to merge official government data with news and blog coverage, social networking, and public participation tools to "give you the real story behind what's happening in the Congress."

Another site that is a relative newcomer to providing federal information is Justia (www.justia.com/). Justia's offerings date back a few years ago, and two of them are worth mentioning here: a U.S. Regulation Tracker (http://regulations.justia.com/) and Federal District Court Filings (http://dockets.justia.com/). The former allows one to search the Federal Register dating back to 2005, browse by government agency, and set up RSS feeds for items of interest. As of February 3, 2010, there were over 155,000 items in the database. The docket searcher's time frame goes back to the beginning of 2004 and can be searched by party name, lawsuit type, jurisdiction, and date.

Speaking of court dockets, an old standby that dates back to the days before graphical browsers is PACER (http://pacer.psc.uscourts.gov/). Public Access to Court Electronic Records has been around since the days of the 1200 baud dial-up connection. Users of the site must register for access, and there is a fee of 8 cents per page for documents that are accessed, printed, or downloaded. There is a cap of $2.40 for each document no matter what length, and users who do not accrue at least $10 in a calendar year will have their charges wiped clean. This is a great place to start researching for party names when the court is not known by using the site's U.S. Party/Case Index, a national index for U.S. district, bankruptcy, and appellate courts.

Along with GPO Access and PACER, the Library of Congress's THOMAS (http://thomas.loc.gov/) has also been around for some time, launching in 1995 during the start of the 104th Congress. Some of its offerings mirror what can be found at GPO Access: Bills, Resolutions Activity in Congress, Congressional Record, Schedules, Calendars, Committee Information, Presidential Nominations, and Treaties. THOMAS has made some changes in its offerings for the 2nd Session of the 111th Congress that can be found here (http://thomas.loc.gov/home/whatsnew.html).

Moving to the state and local side of things, the first stop is the Legal Information Institute's State Resources pages (www.law.cornell.edu/states/listing.html). This page is, in essence, what the LII is all about. A simple interface filled with links that lead to even more relevant links. Users will find all 50 states, the District of Columbia, Guam, Northern Marianas, Puerto Rico, and the U.S. Virgin Islands. A favorite site of mine is the LLRX Court Rules, Forms, and Dockets page (www.llrx.com/courtrules). LLRX has a number of great resources to offer, but none are better than this database that offers links to over 1,400 sources for state and federal court rules, forms and dockets. The database can be searched by keyword or browsed by court type, resource type, jurisdiction, or state.

If it's research and statistical information you're after, the National Center for State Courts (www.ncsconline.org/D_KIS/info_court_web_sites.html) offers various resources, news, research, and reports dealing with the workings of state courts. The page noted above points to state court web sites, state of the judiciary messages, court related organizations, and state court structure charts. Some of you may remember the next site as "Piper Info." Now known as State & Local Government on the Net (http://www.statelocalgov.net/), it offers a plethora of links for each state. As of February 3, this site offered over 11,400 links to various state and local resources. If administrative codes are what you are after, the best site with links specific to that material is the Administrative Codes and Registers page offered by the National Association of Secretaries of State at http://tinyurl.com/b9454y. A lot of states now offer a "register" which will inform as to new or proposed rules similar to the Federal Register.

That about does it. If you have resources not mentioned here, feel free to email me concerning them.

kozlowsk@sconet.state.oh.us

Ken Kozlowski, Director, Supreme Court of Ohio Law Library

Why (*and how to*) join the Twitterverse?

Remember, Twitter is like being at the biggest cocktail party, and virtually anyone can overhear your conversation. This means that you need to think through what kind of presence you want on Twitter, and then try to stick to that as closely as possible.

By Pamela Walker Makowski

When I graduated from law school in 1981, I remember just mastering a mag card machine and feeling like I was really ahead of the curve when it came to technology. I actually thought, wow, I finally figured out how to use the new-fangled typewriter which can save time as long as I keep these cards together, in the correct order, and without bending any of them.

In the mid 1980s I remember being fascinated by a fax machine. How did that information pass through a phone line and then print itself onto the paper? And why does the client think that just because I received the information faster that I can read and process it instantly?

As we enter 2010, it is amazing how much technology is an everyday part of my life. My phone just reminded me that I have a client coming in 30 minutes, the fax machine is all abuzz, and my VOIP phone, when ignored, sends me email phone messages (which then show up on my cell phone – how cool!). It seems that with all of this technology around us, life should be easier, faster, even automatic. However, we spend countless hours updating software, dealing with glitches, returning dropped calls and watching as the to-do list grows longer and longer because of all of the ways technology bombards us.

So why would you want to run out and join the Twitterverse? Maybe you don't, but before you reject the notion out of hand, think about it.

I am by no means an expert on Twitter. I have the support staff of the Columbus Bar to thank for giving me the push to explore it. Once they knew I was blogging, updating my website regularly and hanging out on Facebook, they assured me that Twitter was not a big deal. Twitter is, quite simply, a blog post with only 140 characters. The difference between Twitter and a blog is that it is easier to read, being so short, and you can review multiple bloggers (the people you are following) at a time. With software like TweetDeck, you can even catalog those you are following. I have categories for legal, news, local items, and certain people who I want to follow separately. However, there is a lot of thinking you have to put into this before you sign up for Twitter.

Remember, Twitter is like being at the biggest cocktail party, and virtually anyone can overhear your conversation. This means that you need to think through what kind of presence you want on Twitter, and then try to stick to that as closely as possible. I decided, for example, that I would have a rule to only share information that would be useful to others, particularly in the family law area. Once in a while I have sent out a Twitter asking silly things like why is the highway closed down – praying that someone is listening. Usually no one is. Then I remember that the people following me are from all over the country and probably have no idea what I am talking about. Lesson learned! Stick to the rule.

So then the question becomes, what is useful to others? When I first started, I just sent out family law things, including links to interesting web sites and, of course, to my own blog. Eventually I developed followers and I was following interesting people, so I had the ability to re-tweet interesting information that was already being provided to me. I also tweet out family activities. I figure that any client types who are following me might be interested in knowing about fun family events for their children. Since I have a number of lawyers following me, I also tweet out legal articles. The beauty of Twitter is that you can send out a link to a web site, so you can refer people to the information rather than reinventing it. Just remember, everyone is listening in.

After you have formulated your rule, or even while formulating your rule, go ahead and sign up for Twitter, but promise yourself to just follow for a while. Follow local members of the Bar. Follow your favorite charity or sports group. Follow, read and think about what you want your presence on Twitter to look like. Play with the tools, like TweetDeck and HootSuite. Google "twitter" and find great tips. Learn about the difference between Direct Tweets and general tweeting, so you don't accidentally send out your personal phone number to everyone who is following you. Learn about settings. Do you really want to be bothered every time someone decides to follow you? How about every time someone un-follows you? For some places to start learning, you can go to http://lawyerist.com/why-lawyers-must-join-the-twitter-news-revolution/ or http://lawyerist.com/join-the-twitterverse-in-5-steps/.

Now you know how to join the Twitterverse. But don't forget the first question: Why? I think that most lawyers are naturally curious, and this is a great way to learn things quickly. Most local new outlets start twittering out their stories in the mid-afternoon, which can be fun to follow. You might get useful tips from others. I certainly have. Will you get clients? I don't know, but I know a number of my clients are following me, so I assume there is some value to Twitter. I have links to my Twitter feed anywhere it has been offered to me because I think it can be useful. If you don't want to do it professionally, then pick a username that no one will recognize so that you can at least join in the fun. And don't forget to follow your local bar members. You can follow me @pammakowski. If you don't know what that means, you have some more reading to do.

pamela.makowski@gmail.com

Pamela Walker Makowski

Some Unsolicited Text Message Advertisements May Violate

FEDERAL TELEMARKETING LAWS

By Lisa A. Wafer

If your cellular telephone accepts text messages, you have probably received more than a few annoying, unsolicited commercial text messages in recent times. If your telephone number is on the National Do-Not-Call Registry, you may have even more cause to be perturbed. You also may have grounds for legal action.

The federal Telephone Consumer Protection Act and the corresponding regulations issued by the Federal Communications Commission prohibit certain telephone advertising practices. Together they prohibit the transmission of unwanted or "junk" fax advertisements and other types of live agent, automated and prerecorded voice telemarketing calls, mandate certain disclosures and procedures, and provide a private right of action and statutory remedies to aggrieved consumers.

The TCPA

Section 227(b)(1) of the TCPA provides, in pertinent part:

"It shall be unlawful for any person *** (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice *** (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call; ***."

For a cellular telephone user who receives a text message advertisement, the question becomes whether a text message is a call for purposes of §227(b)(1) of the TCPA. In a recent decision by the United States Court of Appeals for the Ninth Circuit, in Satterfield v. Simon & Schuster, Inc., the appeals court answered the question in the affirmative, ruling that a short message service (SMS) text message advertisement sent to a cellular telephone is a call governed by the TCPA and its regulations.

In Satterfield, after receiving one SMS text message promoting the Steven King novel Cell, the plaintiff brought a class action under the TCPA against the defendant publisher. The district court granted summary judgment in favor of the defendant upon finding that the defendant had not used an automatic telephone dialing system (ATDS) to send the text message and that the plaintiff had consented to receiving the message.

In reversing the district court, the Ninth Circuit found that there were issues of material fact regarding whether the defendant used an ATDS to send its text message. The appeals court also ruled that the plaintiff had not expressly consented to receive the defendant's text message. Relying on previous reports and orders of the FCC, the Ninth Circuit also ruled that a text message advertisement qualifies as a call governed by the TCPA.

Thus, under the holding in Satterfield, a person receiving an unsolicited text message on his or her cellular telephone may have a claim under the TCPA if the text message advertisement was sent from equipment qualifying as an automatic telephone dialing system.

The FCC Regulations

Section 64.1200(c) of TCPA regulations provides, in pertinent part:

"No person or entity shall initiate any telephone solicitation, *** to: *** (2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government. ***"

Thus far, no court has considered the issue of whether a text message advertisement constitutes a telephone solicitation under the TCPA regulations. However this term is defined rather broadly in Section 227(a)(4) of the TCPA, and the definition twice mentions "call or message." Therefore, a compelling argument may be made that a text message advertisement sent to a cellular telephone is a telephone solicitation under this regulation.

Regulation §64.1200(c) raises other issues that neither the TCPA nor its regulations resolves: Who qualifies as a residential telephone subscriber? Many if not most people use their cellular telephones at home, work and elsewhere. Does this make them residential telephone subscribers? And who is the subscriber? It might be the person whose name appears on the cellular telephone bills, or the person who uses the cellular telephone.

No court has addressed these issues yet. However, a common sense argument may be made that a person who pays for his or her own cellular telephone service and uses the cellular telephone at his or her home, is a residential telephone customer. There is nothing in the TCPA or its regulations that prohibits such an argument, and the National Do-Not-Call Registry permits the registration of cellular telephone numbers.

Remedies Under the TCPA

A plaintiff may sue and recover his or her actual damages from a telemarketing agent and the person on whose behalf a call is made or, in the absence of actual damages, minimum statutory damages of $500. A plaintiff may recover treble damages if the caller's violation is shown to be either willful or knowing. Recently, the Ohio Supreme Court defined both of these terms in a manner that is favorable to plaintiffs.

A plaintiff may assert claims based upon a single text message sent in violation of the TCPA. However, a plaintiff must have received at least two text messages from the same sender within any 12-month period to assert claims over violations of the FCC Regulations.

The TCPA allows for injunctive relief and does not preempt state telemarketing laws. The statute also authorizes state attorneys general to pursue relief against TCPA violators in federal court only.

Cellular telephone users may register their cellular telephone numbers with the National Do-Not-Call Registry at www.donotcall.gov. Initially the law provided that telephone numbers were to remain on the Registry for five years. In 2008, the law was modified so that telephone numbers are to remain on the Registry indefinitely.

lwafer@ferronlaw.com

Lisa A. Wafer,
Ferron & Associates

A Snapshot of the Gun Control Act

By Derek Andrew DeBrosse

Firearm regulations can have wide ranging implications on vast areas of the law. As attorneys, it is essential that we understand how firearm laws can affect our client's rights and liberties. In my experience there are two commonly raised issues that may have devastating consequences when a client is facing a conviction or plea to a criminal charge. Although firearm laws affect a multitude of disciplines, let's focus on the Gun Control Act as it relates to criminal defense.

MISDEMEANOR CRIMES

Domestic violence is an unfortunate fact of life in today's society. Numerous laws and regulations exist not only to protect the victim, but also to punish the guilty. It is also a sad fact that unscrupulous family members or significant others can abuse the system and deprive an innocent party of his or her right to keep and bear arms. Any time a claim of domestic violence is raised, firearms rights are jeopardized.

The Lautenberg Amendment (named after the law's sponsor Senator Frank Lautenberg) states that no person shall possess any firearm if they have been convicted of a misdemeanor crime of domestic violence in any court. This provision has been the subject of a great deal of litigation.

Much of that litigation deals with the definition of misdemeanor crime of domestic violence. The Supreme Court of the United States has held that a domestic relationship need not be a defining element of the offense in order for the disqualification to attach. In other words, a generic offense under Ohio law (such as assault) may be a disqualifying offense as long as a domestic relationship is present.

A gun owner wrongfully accused of domestic violence faces an uphill battle to protect his or her firearm rights. It is imperative that the attorney ascertain the client's goals with regards to their firearm rights as soon as possible. Doing so will help the attorney to prioritize the client's needs and decide how to approach the client's defense. This area of the law is ever-changing as is evident in the 7th Circuit which has recently addressed the constitutionality of the Lautenberg Amendment in light of D.C. v. Heller where the United States Supreme Court held the Second Amendment protected an individual right as opposed to a collective right. The 7th circuit essentially set the stage for the determination of whether the Lautenberg Amendment is constitutional when applying strict scrutiny as the standard of review; an issue explicitly left to the lower courts in the Heller decision.

An attorney whose client is facing a possible misdemeanor offense of domestic violence should thoroughly evaluate all possible options. In particular the attorney should be fluent regarding the effect of a plea bargain on the client's Second Amendment rights if such a resolution appears possible.

FELONS IN POSSESSION

Criminal penalties in Ohio sometimes last well beyond the termination of a prison sentence or probation. If convicted of a crime punishable by imprisonment of more than one year, a convict may also lose his or her right to keep and bear arms. This is commonly referred to as the felon in possession disqualifier.

The Gun Control Act excludes convictions from this disqualifier if the conviction has been expunged, set aside, pardoned or if the convict has had his or her civil rights restored by court order. Regardless of these exceptions, what is commonly known as the unless clause may keep the disqualifier intact. The Gun Control Act states, " ... unless such ... restoration ... expressly provides that the person may not ... possess ... firearms." It is up to each State to determine if their convicted felons may be trusted with firearms.

With regards to rights restoration specifically, even if a convict successfully restores his or her rights at the state level, the federal government often declines to recognize that restoration. Under the ban-for-one, ban-for-all rule, if a state restoration restricts a convicted felon's right to own firearms in any manner the felon is considered not to have been truly restored to his or her firearm rights. In Caron v U.S., 542 U.S. 308 (1998), the defendant was restored under Massachusetts law, which permitted him to possess long guns but not handguns. Because the defendant was prohibited from owning a handgun, the Court reasoned that he had not been fully restored to his rights on the state level and, therefore, was not exempt from the federal disability imposed by the Gun Control Act.

In Ohio, certain felons cannot be restored to their right to possess a category of somewhat unusual weaponry that includes, among other things, automatic weapons, suppressors, and explosives. The federal government contends that this provision triggers the unless clause. It is therefore illegal for an ex-felon to possess a firearm if he or she has had a rights restoration under R.C. 2923.14. It is important to note that certain felons may have other options besides a rights restoration petition.

As attorneys we must be aware of our responsibility to protect all of our clients' liberties – including their Second Amendment rights. The diligent lawyer must understand the potential consequences of a conviction or plea on a client's firearm rights, and should explain those risks to the client before committing to an often irreversible plea.

derek@debrosselaw.com

Derek Andrew DeBrosse,
Law Office of Derek A. DeBrosse

Legal Remedies for Domestic Violence and Stalking Victims

Three acts can instigate a criminal prosecution for domestic violence: knowingly causing or attempting to cause harm to a family or household member; recklessly causing serious physical harm to a family or household member; by threat of force, knowingly causing a family or household member to believe the offender will cause imminent physical harm.

By Harry F. Panitch

Domestic violence is an issue that deserves public attention and concern. Endemic in our society, it is found in all socio-economic groups. The law now provides strong remedies for its victims. These remedies deserve to be disseminated to the general public, since knowledge of legal remedies will empower victims and raise awareness of the problem in the wider population.

There are three critical legal remedies available to victims of domestic violence.

Three acts can instigate a criminal prosecution for domestic violence: knowingly causing or attempting to cause harm to a family or household member; recklessly causing serious physical harm to a family or household member; by threat of force, knowingly causing a family or household member to believe the offender will cause imminent physical harm.

Criminal prosecution does have limitations in the scope of protection provided for the victim. First time offenders are likely to avoid incarceration and may be placed on probation. The victim must reside with or have resided with the offender within five years of the date of the offense. The resulting temporary restraining order which prohibits contact between the offender and the victim expires when the offender pleads or is found guilty of domestic violence.

A Civil Protection Order

This is the most widely used remedy for domestic violence victims who live with or have lived with the offender within five years of the date of the offense. A CPO may be granted to a wide range of household members who are related to the offender or the victim. The main category of victim who seeks a CPO is a spouse, former spouse, or a person who has cohabited with the offender within the five year time limit. The critical acts that justify the granting of a CPO are either attempting to cause or recklessly causing injury, or placing the victim by threat of force in fear of imminent physical harm.

A court can issue a CPO with far reaching terms that include: (a) an order prohibiting the offender from abusing the victim or; (b) entering the school or place of employment of the victim; (c) prohibiting the offender from being anywhere in the vicinity of the victim; (d) eviction of the offender from the household; (e) temporary determination of custody of any children; (f) ordering the offender to provide financial support to the victim.

The penalties for violating a CPO may include criminal prosecution of the offender and a contempt of court action. A CPO may last for up to five years.

Stalking Civil Protection Orders

This is a powerful remedy for anybody who is being threatened or harassed by any other person. The offender does not have to be a family or household member of the victim, nor is there a requirement that the victim and the offender live or have lived together. The most important ground for the issuance of a Stalking CPO is the offender's engaging in menacing by stalking. Menacing by stalking means that the offender has by a pattern of conduct (defined as two or more instances closely related in time) knowingly caused the victim to fear that the offender will physically harm the victim or cause mental distress. A Stalking CPO may include terms that prohibit the offender from entering the victim's school or workplace, and from being in the physical proximity of the victim. A Stalking CPO can last for up to five years.

Courts often encourage the victim and the offender to enter into a voluntary agreement known as a "consent agreement" which may include any of the terms that the court can include in a CPO. This is one reason why the victim should absolutely be represented by an attorney. The attorney can negotiate directly with the offender rather than the victim attempting to do so. If the victim attempts to negotiate directly with the offender, especially in situations where there has been domestic violence, the offender may well use psychologically manipulative and intimidating tactics. The results may be disastrous for the victim and may cause the victim to abandon pursuit of the CPO.

harrypanitch@gmail.com

Harry F. Panitch

Raising the Stakes

By Andrew C. Clark

Last November a majority of Ohioans voted to amend the Ohio Constitution to allow the construction and operation of four casinos within the Buckeye State. The location of three casinos was specified in the Amendment for Columbus, Cincinnati, Toledo and Cleveland, with Cleveland being the only city to have multiple prospective sites. The approval of these casinos marks the end to nearly twenty years of voter rejection.

Ohio began its calculated and deliberate journey into legalized gaming on May 8, 1973 when 64% of the voters approved of the Ohio Lottery.[1] The first lottery tickets were sold in August 1974 and by 2008 the Ohio Lottery was ranked 10th in the nation in gross sales at $194.92 per person.[2] Between 1990 and 2008, Ohioans appear to have been satisfied with the Daily Pick 3, the occasional PowerBall ticket, and scratch off tickets for the holiday gift exchange as evidenced by voter rejection of four ballot initiatives totaling more than eight casinos and at least that many Riverboat establishments.

During that period, Ohio stood witness as four neighboring states entered into the gaming market. In 1993, the Indiana approved Riverboat Gambling and today has gaming establishments in ten different counties.[3] Michigan voters approved casinos in 1996 and today there are 22 casinos in Michigan including 19 Indian Casinos.[4] Pennsylvania came on board in 2004 by approving slot machine gambling at race tracks and is currently working to expand into table games as quickly as possible.[5] West Virginia approved its table game and slot machine initiative in 2007 which allows for gaming at race tracks.[6]

Ohioans rejected gaming proposals in 1990 (Lorain County, 37.7% approval), 1996 (Statewide Riverboats, 38.1% approval), 2006 (Cuyahoga County, 43.4% approval), and 2008 (Wilmington, Ohio, 37.6% approval) which allowed bordering states to entice Ohio's residents and tourist dollars into forgetting about Ohio for the weekend while enjoying their 24/7 atmosphere.[7] The 2009 ballot initiative was met with approving optimism from 53% of the voters and, as a result, the residents of Ohio may soon be saving gas on their weekend getaways.

Currently, there is a push to present voters on May 4 with proposed amendments to the November 3, 2009 amendment regarding the location of the Columbus casino and the prudence of allowing a casino in Columbus, as well as the casino licensing fees and casino tax structure. Aside from the typical moral and socioeconomic discussions about whether a casino is good or bad for a given community, there are several points of interest on the gaming horizon for the State of Ohio and its residents. First, Ohioans should be aware of two federal laws which impact the areas of sports betting and Indian casinos. Second, it is important to understand that legalized gaming requires an intense regulatory framework and licensing structure that can impact your ability to work in, play at, and supply gaming devices to casinos within the state.

The Indian Gaming Regulatory Act[8] was enacted in 1988 after the U.S. Supreme Court announced that a state which allows certain gambling contests to be conducted in any capacity must also allow them to be played on Indian reservations.[9] Ohio does not currently have any federally recognized Indian reservations nor is any land currently held in trust by the United States for the benefit of any tribe or individual. Therefore, as discussed by University of Dayton School of Law professor Blake A. Watson, it does not appear that any Indian casinos are in Ohio's immediate future.[10]

The Professional and Amateur Sports Protection Act[11] was enacted in 1992 with the purpose of outlawing sports betting in all states except those which already permitted such forms of betting. Four states are currently permitted to offer sports betting: Nevada, Oregon, Delaware, and Montana.[12] As a result of PASPA, Ohio will be foreclosed from offering sports betting unless and until PASPA is found to be unconstitutional. One such case seeking relief from PASPA hails from New Jersey, *iMEGA v. Holder*, 09cv01301-GEB-TJB (D.N.J.). This case presents constitutional challenges to PASPA ranging from the violation of the Commerce Clause and Equal Protection to vagueness and sovereign immunity.[13] This lawsuit is being followed closely by a number of states including Iowa where a bill legalizing sports betting in Iowa was unanimously approved by a Senate Subcommittee on February 3, 2010.[14]

The Ohio Constitution (as amended) requires the creation of the Ohio casino control commission which will license and regulate casino operators, management companies, key

Continued on Page 42

Currently, there is a push to present voters on May 4 with proposed amendments to the November 3, 2009 amendment regarding the location of the Columbus casino and the prudence of allowing a casino in Columbus, as well as the casino licensing fees and casino tax structure.

Continued from Page 41

employees, gaming related vendors, and all gaming authorized by Section 6(C)(4).[15] It is extremely important for Ohio's attorneys and Ohioans in general, to be aware of the licensing system that is being created to regulate the Ohio gaming industry and to identify licensing issues for Ohio's businesses and workforce. Ohioans must be proactive in seeking and maintaining licensure compliance to ensure that Ohio receives the benefit of a strong gaming industry instead of just being the home of four casinos. The introduction of gaming in Ohio presents an opportunity for individuals and businesses to become active in the gaming industry as producers, suppliers, and operators of gaming devices, but the law will require more than a simple vendor's license and will likely be unforgiving of those who are not in compliance.

---

1. www.sos.state.oh.us
2. www.ohiolottery.com
3. http://www.in.gov/igc/
4. http://www.michigan.gov/mgcb
5. http://www.pgcb.state.pa.us/
6. http://www.wvlottery.com/
7. www.sos.state.oh.us
8. See 25 U.S.C. ß2701 et seq.
9. See California v. Cabazon Band of Mission Indians (1988), 480 U.S. 202
10. Indian Gambling in Ohio: A Non-Issue for Issue Six, Watson, Blake A., September 22, 2008, http://daytonos.com/pdf/IndianGamblinginOhio-1.pdf
11. See 28 U.S.C. ß3701 et seq.
12. www.americangaming.org.
13. . Id.
14. Iowa Legislative Panel Backs Sports Betting, Glover, Mike, February 3, 2010 (AP), Sioux City Journal.
15. Ohio Constitution, Article XV, Section 6 (C)(4)

andrewclark606@gmail.com

Andrew C. Clark,
The Clark Law Office

IN DEFENSE OF GRUMPY

Just what, after all, is the problem with a mournful countenance? Precisely when did unperky become unacceptable?

By Bruce Campbell

Those of us not burdened with a surplus of endorphins choose to ration our zest for important moments and not fritter it away with random spurts of sparkle to no specific purpose. When we watch *The Seven Dwarfs*, we feel an immediate kinship with Grumpy and find Happy highly irritating. Although it takes (or so it is claimed) more muscles to glower than to glow, we mirth misers are entirely willing to pay the price to remain sour.

Please note that I am not referring here to those among us who suffer from true clinical depression, nor am I in any way making light of actual mental health issues. The folks I am talking about here are curmudgeonly by choice.

We are a misunderstood subculture constantly under assault by the militantly jovial. Without provocation, self-appointed disciples of buoyancy portray those of us who are determinedly doleful as aberrations of nature – like people born with hair on their tongues. Worse, they mount campaigns to "save" us by happiness interventions.

Just what, after all, is the problem with a mournful countenance? In some cultures (monkish communities, for example) it is considered a virtue to be baleful. Precisely when did unperky become unacceptable? If you look closely at the state things, there is precious little evidence to support unbridled sanguinity or, as Alan Greenspan, in the context of the stock market, called it, "irrational exuberance." Al, as it turns out, knew whereof he spoke.

If someone attempting to take my picture tells me to "smile," I reply, "I am smiling, damn it!" When asked how I am, I habitually respond, "no worse." It is an honest statement, but it seems to offend some folks. They apparently want to hear nothing less than, "happier than Conan O'Brien before Leno stole his show." They seem irate that I have not done my part to inflate their emotional soufflé.

A lawyer I am forced to call from time to time has a voice mail message that ends with a highly-energized beseechment to, "have a simply wonderful day!" Is there no limit to foolishness? Only with difficulty do I resist the urge to put a retaliatory, counter-jubilant message on his recorder – something like, "Your house mortgage is under water, and your 401K now contains Monopoly money. Just how wonderful is that, pal?"

While I am on this rant, why is it that in order to get local TV news, we are forced to endure Twinklehim and Twinkleher co-anchors. "We have this developing story: The earth just opened up and swallowed Clintonville – but, that sure won't like put a damper on the big Buckeye game tomorrow, will it Kaitlyn?" "No way, Noah." Is there no place in local broadcasting for people whose on-air demeanor bears some reasonable relationship to the gravity of the events being reported? Stupid question, I suppose.

Throughout history, the morose and dispirited have, I dare to suggest, contributed more to social justice, culture and the advancement of knowledge than the giddy and the beamish. Compare: Lincoln to "Happy Cal" Coolidge; Tchaikovsky to Barry Manilow; Picasso to Peter Max; or Dostoyevsky to Dave Barry. Actually, I am being unfair on that last one; Dave, cheerful though he may be, has contributed as much or more than Fyodor to the development of western thought – especially in the important field of snot jokes.

By now, some readers are probably holding up copies of *The Joy Diet: 10 Daily Practices for a Happier Life* as a shield between themselves and this anathema I am spewing. I understand the impulse, but I hope these folks will not feel the need to inflict these writings on me in some vain hope of converting me to ebullience. As hard as it may be for the chronically bubbly to believe, screeds of that sort serve only to further drive folks like me into deeper grouchiness.

The Brotherhood of the Sullen is creating a fund to purchase air time for public service announcements aimed at counterbalancing efforts to jolly us up (by chemical means or otherwise). The Brotherhood hopes to alert the public to the dangers posed by criminally effervescent elements in our society. Contributions are welcome. Our spokesperson will be Joe Btfsplk from Al Capp's Li'l Abner. The campaign theme will be, "Dare to be Dour."

(A slightly up-dated version of an article first published in the April 2002 edition of BARbriefs)

bruce@cbalaw.org

Bruce Campbell,
Columbus Bar Counsel

COLD CASH UP FRONT

By Jacob Stein

When I ask law students what they would like to do when they graduate, most say that at some time in their career they would like to try a case in federal court. They will be disappointed. They are more likely to appear in federal court as a defendant rather than as a lawyer.

There is yet another disappointment in store for them. They will never get a cash fee up front. The client who pays cold cash up front demonstrates the sincerest form of flattery known to the legal profession.

These days, an associate in a law firm who brought in cash up front would be met with a series of pointed questions: Are you involving us in money-laundering statutes? Where did the client get the money? Why didn't he pay by certified check? Don't you know that the Criminal Code has 10 different reporting statutes concerning cash? The associate would be brought before a committee and grilled for three hours and then told to return the money and get a receipt and make a memorandum of the event and have the memorandum reviewed by a senior partner.

That was not always the case. Twenty-five years ago the criminal bar dearly loved to get cash in hand. The lawyer who got a good cash fee before noon walked with a spring to his step. He was open, friendly, optimistic, and generous. He lent money to his peers as needed. He invited those in his circle to lunch uptown. It may have been to Hammel's on 10th Street or to Harvey's on Connecticut Avenue, next to the Mayflower. Harvey's was special. The seafood was excellent. In addition, J. Edgar Hoover was on display at his won table, with his back to the wall.

Cash up front is entirely different from payment by check. The promised check may not be in the mail. Even if sent, it may bounce or be returned marked "Payment Stopped."

Robert I. Miller was a colorful member of the Fifth Street criminal bar in the good old days. He had a quick turnover, cash-up-front criminal practice. He carried around a big bankroll and did all his business in big bills.

In a proceeding before Judge David A. Pine in the United States District Court (I place the time in the 1950s), Mr. Miller cited a case during argument. The judge had reason to believe Mr. Miller never read the case.

Judge Pine: "Mr. Miller, do you have the case handy? If so, please hand the book up."

Miller, with a Toscanini-like gesture, handed the book up. He identified the page by placing a 100-dollar bill in the book as a marker. Judge Pine announced he was taking the matter under advisement. Judge Pine kept the book and the money for several months. He then had the clerk send the book back with a note attached to the 100-dollar bill. The note said, "Motion denied – order to follow."

Mr. Miller's career was interrupted when he was indicted and tried for first-degree murder. He shot and killed a leading psychiatrist who was having a love affair with Mr. Miller's wife. The jury acquitted Miller. He immediately returned to his all-cash practice with more clients than he could handle. There were giants in the land in those days.

The up-front cash fee that I recall most vividly involved an impressive-looking gentleman who wished me to do a few things that at the time struck me as clerical. In looking back I see that what he involved me in was not that at all.

The cash part went like this. I was asked what my fee would be. I gave a number, and then I was apprehensive that I had asked too much. The gentleman said that he would not only pay me the $300 fee, but he would add another $200 to demonstrate his faith in my competence. He put his hand in his pocket and drew out the wad. He removed the wide rubber band and counted out in 50-dollar bills the $500. I got more than I thought I should have received, plus a bonus. And all up front.

I asked if he wanted a receipt. He said, "Receipt? What for?" I should have known better. Big butter-and-egg men who deal in cash don't want to be bothered with receipts.

When he left the office, I put the money on my desk and counted it again. I pocketed the money and took a walk to calm down.

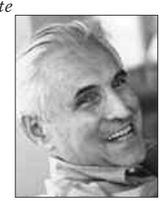
I walked from my office at Seventh and F streets to Pennsylvania Avenue and turned right. Within a few blocks I was in the Benjamin Franklin bookstore (long since gone), asking the price of the 1929 Merriam Webster Unabridged, India Paper, New International Dictionary of the English Language With a Reference History of the World. I had seen it in the window, and I hoped some day to buy it. Now was the day. Cash is not to be thrown away on necessities.

The proprietor said it was in mint condition and rare. I needed no sales talk. I knew all about it. I was there to buy – and to pay cash. The price was announced, $35. I extracted a 50-dollar bill from the roll. The book was taken from the window and placed on the counter. It was mine. Although the book weighed 10 pounds, I walked out and resumed my stroll, with the Unabridged under my arm.

I still have the dictionary. It defines "cash" as "ready money, paid immediately." This won't do. The full flavor comes in the slang definitions: cold cash, hard cash, spot cash, big bucks, bread, do-re-mi, gravy, moolah, folding lettuce, mazuma, green bucks, and the beautiful green.

If you had happened to walk past me as I strolled the avenur, you would have heard me singing to myself:

As I walk along the Bois Boolong
With an independent air,
You can hear the girls declare
"He must be a millionaire."
You can hear them sigh and wish to die,
You can see them wink the other eye
At the man who broke the bank at Monte Carlo.



Jacob Stein

TAXES – CERTAIN BUT POSTPONABLE

401(k)s and Other Pre-Tax Savings are the Key

By Elbert R. Nester, J.D.

As one of life's two certainties, taxes become even more certain with rising budget deficits. Even so, 401ks and other pre-tax savings plans allow us to delay those taxes – often for many years – and that delay can have a tremendous value to us as investors.

To better understand this, economists point out that our pre-tax savings are like interest free-loans, so the longer the "loan" (funds held in the retirement plan account) remains outstanding, the better: These funds are tax-deductible when deposited into the program; our accounts grow tax-free within the plan; and our money is taxed only when and as we draw down the account. Moreover, we are generally deferring taxes from the higher tax brackets during our most productive years to the lower tax brackets during our slow-down years. That's a great trade-off!

Risk management —
How it applies to our earned income

In general, attorneys counsel clients to foresee and avoid potential risks of loss. Likewise, in our practice, we help clients foresee and manage a very specific risk -- unnecessary losses due to income taxes.

Fundamentally, under our tax system we only need to pay taxes on that portion of our income which is necessary to fund our personal living expenses. We can shelter our remaining income by taking advantage of a variety of pre-tax savings programs. This means all excess income should be analyzed and, if possible, put into an allowable pre-tax savings program. Otherwise, we may be paying unnecessary income taxes on our excess income.

Remember: Donations can be made to Uncle Sam in the form of tax payments or we can legally and ethically lower the amount of taxes we pay with deposits going into a well-crafted pre-tax savings plan.

Be a Millionaire — in 10, 20 or 30 years

Many of our clients tell us the best financial advice they ever received was to get started with a systematic savings program and stick with it. Simply said, the concept is: **Spend Less – Save More.**

This chart illustrates how much it costs in terms of reduced take-home pay for attorneys at three different stages of their careers (ages 35, 45 and 55) to amass $1.0 Million by age 65:

Legal Galaxy	Reduction in Take-Home Pay (26 pays/year)	Annual Pre-Tax Savings	Age-65 Pot 'O Gold (8% return compounded monthly)
Nova Star (age 35)	$ 214.98	$8,052	$1,000,000
Nova Star (age 45)	$ 517.32	$20,373	$1,000,000
Super Star (age 55)	$1,545.73	$65,593	$1,000,000

Know your catch-up options

As if 2008 wasn't bad enough, the financial press seems to enjoy telling us about the past 10 years being a "lost decade" for investments. Despite those gloomy views, **be encouraged:** There are government-subsidized programs to help you get back on track!

Since the IRS offers so many different types of pre-tax plans, take care in selecting the program which best suits your needs. Try to avoid features which you won't use or don't need -- as they will wind up costing you money. **Here are a few of the available tools:**

SIMPLE-IRAs: We could easily save $12,000 to $15,000 per year with a SIMPLE-IRA program. Depending on where we are in our career, that may be more than adequate, as illustrated in the chart above for the 35 year-old attorney.

401(k)s: Depending on our needs, this type of program can be configured for us to save anywhere from $20,000 to $50,000 or more per year. With such a wide range of deposits, there is a risk of the program not being crafted for the attorney's specific situation. The key is to know your objective so the program can be engineered to produce exactly that result with the least possible cost. Otherwise, your tax savings could be reduced due to unnecessary expenses.

Pension Plans: These are no longer just for old-line industrial companies. When crafted for attorneys, today's pension plans are as different as a Ferrari is to a Model T Ford. As shown in the above chart, the 55-year-old attorney who deposits $65,593 per year in a Pension Plan for 10 years has a $1,000,000 accumulation in 10 years – **thanks to tax savings in excess of $254,000.**

Spend Less — Save More:
A smart move even for those who never intend to retire

Whether or not we wish to slow down in our practice, systematically boosting retirement savings is a smart move. In many of the cases we analyze, by maximizing their pre-tax savings, attorneys significantly minimize losses due to income taxes, leaving more money for themselves, their families and their worthy causes.

bertnester@advisorspension.com

Elbert R. Nester, J.D.
Advisors Pension Services

U.S. Authors & Tax Stories

By Janyce C. Katz

During the last few days of January the world lost three major U.S. authors, J.D.Salinger, Howard Zinn and Louis Auchincloss.

Jerome David Salinger's 1951 book, *Catcher in the Rye*, depicted the adolescent Holden Caulfield's struggle to reconcile childhood innocence with adult reality and is his best known work. Literary critics have discussed Salinger's novel together with books considered to be defining the American experience. Under that view of U.S. literature, the authors of certain "great American books" struggled with the concept of America as a new Paradise, where the evils of the old European civilization could be shed and a New American Adam, to paraphrase R.W.B. Lewis, could emerge. Unlike earlier literary heroes such as Huckleberry Finn, who lit out for the western wilderness when civilization got to them, Cauldfield, had to accept both the good and the bad that comes with a complex world.

Recently, a much older, Cauldfield showed up in *60 Years Later, Coming Through the Rye*. This Cauldfield was brought back to life in a book advertised in Europe as a sequel to Salinger's *Catcher in the Rye*. Salinger challenged its publication in the U.S. In July, 2009, a federal judge enjoined the publication of the new book and held that book author Fredrick Colting, writing under the pen name J.D. California, had borrowed liberally from the original book, violated Salinger's copyright and created a piece of work that did not amount to a critique or commentary on the original book. *Salinger v. Colting* has been appealed to the Second Circuit with the New York Times, AP, Gannet Co. Inc. and the Tribune coming in on the side of Mr. Colting.

While literary critics and authors have described the newly discovered wilderness that became the U.S. as a blank slate upon which a better civilization was being created, Howard Zinn, a trained historian, pointed to some of the ravages the formation of our country placed upon those usually forgotten by history – the servants, the Indians, minority groups. Zinn elaborated on their history, often finding that the Law as well as our history books, forgot them or dealt poorly with them. He added their histories to the general story of the country.

Perhaps best known for *A People's History of the United States*, Zinn followed in the footsteps of Charles and Mary Beard, who stressed the economic interest theory of law and those oral historians, such as the individuals in the Federal Writers Project of the New Deal whom the government paid to document the diversity of the American experience. Zinn's histories add to those histories that depict the U.S. as the proverbial "city on the hill" leading the other nations forward. As Holden Cauldfeld discovered, Zinn's histories show the world as complex, with imperfection attached to even the most wonderful events and people.

Auchincloss's books examine the upper class WASP world in which he lived and ignored those folks who populated Zinn's histories, except when they served tea, cleaned the house or as they threatened his world. Many of Auchincloss's books and stories feature on high-powered lawyers, Wall Street executives and New York's upper class.

Because of his writing style, Auchincloss has been called a successor to Henry James and Edith Wharton. The lead story in his 1997 collection of short stories, *The Atonement*, featured a Harvard-trained lawyer who was lured into an investment firm because "lawyers were only the 'ladies' maids' of investment bankers and received, deservedly, only a minor share of the profits."

In one sentence in *The Atonement*, Auchincloss described a recent change in the practice of law in the large New York firms. "It was the beginning of the era of corporate mergers and acquisitions, a practice at first disdained by the more venerable firms, as it involved the institution of lawsuits for purposes of harassment and legal maneuvers amounting to deception, but rapidly adopted by all when the profits proved irresistible."

In his 1974 autobiography, *A Writer's Capital*, Louis Stanton Auchincloss described how his initial dislike for the practice of law transformed into a deep, lifelong passion. As a boy, he watched his father, a partner in Stetson Jennings & Russel, go daily to Wall Street. His father loved his firm and the practice of law, except when it led him to a nervous breakdown. But, Auchincloss deduced from observing his father that men were "poor slaves, doomed to go downtown and do dull, soul-breaking things to support their families." (He decided that women had it much better, being like Cleopatra on the barge, staying home, reading when they wanted, doing what they liked and in full control of the household.)

Auchincloss dabbled in short story writing during his years at Yale, becoming editor of Yale's literary journal. When his failure to publish his first book convinced him that he could not write and if he continued to try to write he would embarrass his family, he dropped out of Yale and went straight to the University of Virginia's law school, fulfilling the dream of his parents.

To his surprise, once in law school, he discovered that he loved the law. The language of Judge Cardoza captivated him. Suddenly, writing fiction and law briefs didn't seem to be so different from each other.

"What was a case," he wrote in his autobiography, "but a short story? What was the law, but language? Was there any reason that a judge should not be a great writer?" To him, the art of writing a decision was similar to writing a sonnet. A writing had to be "informative, philosophic, succinct."

He wrote some fiction but focused on law, becoming managing editor of *Law Review*. He worked for Sullivan & Cromwell from 1941 to 1951, with time out for service in World War II, in positions more removed from danger than had been the experiences of either Zinn or Salinger in the same war.

Just after the war, he finished his first book and, to his delight the book, *The Indifferent Children*, was published in 1947. Becoming somewhat successful at writing and publishing, he quit Sullivan & Cromwell to devote himself to writing. He then decided he missed his beloved law and returned to its practice, becoming a partner at Hawkins Delafield & Wood, retiring from the firm in 1987. He managed to write about one book a year.

Had Zinn, Salinger and Auchincloss not died so close together, this review would have focused on an interesting book that is one in series of books edited by Paul Caron of the University of Cincinnati School of Law. *Tax Stories*, republished by the Thompson Reuters/Foundation Press in 2009 makes famous cases in federal tax law into stories that pull the reader easily into their importance. The series now has 29 different books teaching, as Auchincloss pointed out, that law cases of all kinds are but "stories." I only looked at one book in the series but found it interesting and would like to read the others. Caron sees these books useful tools for law students. I suspect that they could be of great use to those of us practicing law as well.

jkatz@ag.state.oh.us

Janyce C Katz,
Assistant Attorney General,
Executive Agencies

The Roads Traveled

Land Rover Kruger Park

White Shark Coast of Cape Town

By Robert Joseph Krummen

In view of the current economic climate, it is understandable that lawyers today feel a profound sense of pressure to not only put in long hours, but also to forgo personal, family, and/or vacation time in light of ever increasing client needs and busy litigation schedules. But as most of us hopefully realize, over the long term, such choices are hardly sustainable. In truth, conscientiously setting aside vacation time is an important part of personal and professional balance.

Often, for many attorneys these breaks involve a trip to one's favorite beach, to another city for shopping and the arts, or to the mountains for some time on the slopes. Undoubtedly, these "usual" destinations are great places to unwind. And, sometimes, time to relax is what we really need.

However, travel presents more than just the chance to relax. In some cases, travel provides the opportunity to broaden one's experience, to widen one's understanding of the world, and to enrich the experiences of those we encounter on our travels.

After completing a judicial clerkship and before continuing private practice, I set out on my adventure of a lifetime (to date). For a three-week period, in August and September 2009, I traveled with friends and family to two remote continents – South America and Africa. First Peru, where over the course of 10 days we learned about the modern Peruvian and Andean people and their advanced Inca ancestors. We hiked the Inca trail, traversed parts of the Andes – including a mountain pass at 15,580 feet (1,075 feet higher than the tallest mountain in the continental United States) and we visited the astonishing ruins at Machu Picchu.

After Peru, we traveled to Southern Africa, visiting the Republic of South Africa, Zimbabwe and Zambia. There, we went on a safari (with cameras, not guns) in Kruger National Park, seeing lions, elephants, leopards, hippo, rhinos, etc. We also had the opportunity to meet with many of the native people of the surrounding Mpumalanga area. After Kruger, we flew to the Zimbabwe/Zambia border to see Victoria Falls (one of the seven natural wonders of the world) and we went white-water rafting in the Zambezi River. Finally, leaving Zimbabwe, we flew to Cape Town where we visited the Cape of Good Hope (the southwestern tip of Africa) and went cage diving with great white sharks.

Each place we visited was impressive, and I have so many incredible pictures and stories. But my greatest memories are of the people I met along the way. I learned much from all of them. Despite in many instances extreme poverty, it was extraordinarily heartening to meet so many welcoming people and gracious hosts – in particular, the hardworking Andean village people and the ever-smiling people of Mpumalanga stand out. Moreover, I have hope that these individuals may have learned something from us. (In some instances, in both the Peru and Africa, my fellow travelers and I were the only Americans and Brits they had ever met.) So many people along the way were interested in learning about America, and about our country's law and foreign policies. In our own small way, we acted as ambassadors for our country and our professions. There's no price that can be put on such experiences.

Not just for balance, but also for enrichment and personal growth, I recommend that every attorney (actually everyone) consider, plan, (save for) and take a non-usual adventure.

rjkrummen@vorys.com

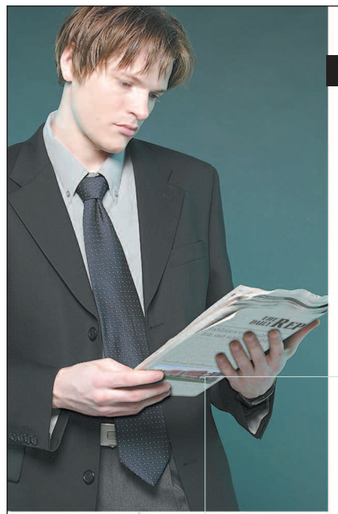
Robert Joseph Krummen,
Vorys Sater Seymour and Pease

Victoria Falls, Zambia

Machu Picchu in Peru

Kruger National Park, South Africa

Brothers Paul and
Rob at Machu Picchu



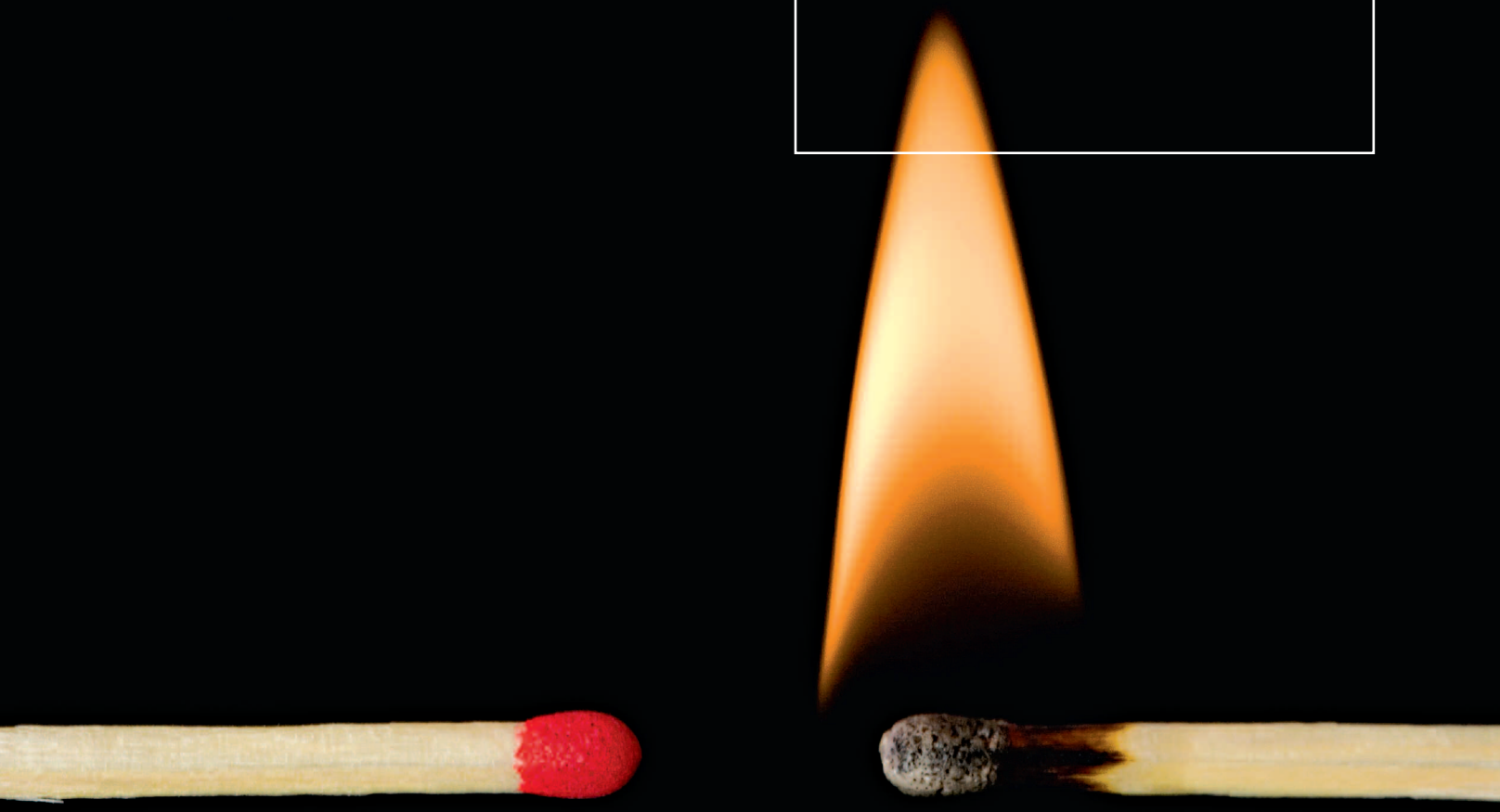
Classified Marketplace

Fired up.

Hard work. Sound judgment. Intellectual curiosity. In a good lawyer, these qualities are all essential. But they're not enough. At Barnes & Thornburg, we expect passion, too. Our value-oriented approach to client service demands lawyers who insist on going the extra mile. You can't teach that kind of passion. But when you come to us for advice, you can certainly expect it.

BARNES & THORNBURG LLP

btlaw.com



ATLANTA CHICAGO DELAWARE INDIANA MICHIGAN MINNEAPOLIS OHIO WASHINGTON, D.C.