COLUMBUS BAR

Lawyers QUARTERLY

SUMMER 2010

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Lawyers Quarterly
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The Columbus Bar Association

...shall promote harmony, good feeling and close relationship among members of the bar; maintain professional honor and dignity; encourage the highest attainment in legal knowledge, and promote generally the professional interests of its members.
CBA Constitution

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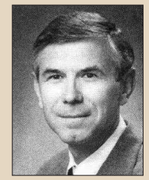
New Leadership And Direction For The CBA



Alex Lagusch

Since November of 1976, the Board of Governors of the Columbus Bar Association has been engaged in a search for a new Executive Director. The Board is pleased to announce the employment of Mr. Alexander Lagusch who will take on the duties of Executive Director on June 13.

There were over three hundred applications from all over the United States and from all types of backgrounds for the position of Executive Director. The applicants were narrowed to sixteen by a Search Committee composed of Duke Thomas, Chairman; John Carnahan, Al Cincione, Jerry Draper, and Jim Pohlman. The Search Committee interviewed sixteen individuals and Alex Lagusch was the unanimous first choice of the Committee and was unanimously approved by the Board of Governors.

Alex brings an extensive and comprehensive experience in association management to the Columbus Bar Association. For over nine years, he was with the staff of the Academy of Medicine of Cleveland and for the past year has been Assistant Executive Director of the Physicians Peer Review Organization of Cuyahogo County.

With the Academy of Medicine, Alex was responsible for over twenty committees and was the Business Manager of the Academy. He was also Director of Finance for a wholly owned subsidiary of the Academy which provided printing, telephone answering service, radio paging, auto leasing, and travel programs for members. Alex worked with the Ethics Committee of the Academy to develop the guidelines for physician advertising and publicity which is presently in use in Cuyahoga County.

The Board of Governors has been concerned about the communication with and between the membership of CBA and communication with the public. The Board believes that Alex can help us to solve this nagging problem. He has had extensive experience with both electronic and printed news media. He can develop news releases and will serve as a spokesman for the Association when appropriate. In Cleveland, he conducted a special radio news program broadcast to physicians. As Director of Public Relations for the Academy of Medicine and for PPRO, he has been involved in all aspects of newsletter publishing. He was responsible for educational programs which encompassed everything from small group encounters to membership-wide continuing education programs.

Alex has been active in both professional organizations and community activities. He is a member of the American Association of Medical Society Executives and was active on the editorial board. For three years, he served as Secretary-Treasurer of the Association of County Medical Society Executives. He has been an active member of the Police Athletic League, Cleveland Consumer Credit Counseling Service and the Lake County Health Board.

Alex's recreational interests include squash, sailing, skiing and gardening.

Jane Lagusch is active in Red Cross and has served on the Lake County Chapter's Board of Directors. She has also served on the Board of Trustees of St. John's Home for Girls in Painesville, Ohio, and has been a member of the vestry of St. Andrew's Episcopal Church in Mentor. Jane and Alex have two sons, Bradley, age 6, and Jeffrey, age 2.

The Board of Governors believes that the Columbus Bar Association needs and the membership deserves a full time, professional Executive Director with experience in association management. The Board feels that we have obtained this type of leadership in Alex Lagusch.

Board of Governors
Columbus Bar Association

Editors' note: This page is taken from a now defunct publication and reprinted without permission of the Board of Governors, past or present. We know the material presented to be true, in most part (golf has replaced squash in the recreational category, and Jane is still active with the Red Cross, but the boys are a lot older now).

A Message from the President

By The Honorable Stephen L. McIntosh

Abraham Lincoln was known to discourage litigation if at all possible and to settled disputes. One day a man came to Lincoln asking him to bring suit for $2.50 against an impoverished debtor. Lincoln tried to dissuade him, but the man was determined to exact his revenge. When he saw that the creditor was not to be put off, Lincoln asked for and got $10.00 as his legal fee. He gave half of this to the defendant, who thereupon willingly confessed to the debtor and paid up the $2.50, thus settling the matter to the entire dissatisfaction of the irate plaintiff.

Civil is defined as polite, but in a way that is cold and formal, relating to citizens, relating to what happens within a state or between different citizens or groups of citizens; to be civilized, courteous, well-mannered, gracious. *Discourse* is defined as serious speech or piece of writing, a serious discussion about something between people or groups; a conversation, discussion, communication, speech, talk, chats. *Rude* is defined as ill mannered, disagreeable or discourteous in manner or action, offensive to accepted standards of decency, lacking refinement or social skills; to be impolite, discourteous, uncouth, offensive, foul, boorish, disrespectful.

Every day I have a front row seat to what one of my law professors called America's second favorite indoor sport, litigation. The mass of humanity that descends on the Franklin County Justice Center each day is tremendous. There are all manner of disputes being decided. The stress upon litigants with much to gain or lose financially, the friends and family impacted by the outcome of a particular case or those facing the loss of their freedom is a reality every day within these walls.

Yet within this environment attorneys are expected to have a civil discourse with each other to discuss the relative merits of their case. While the definition of civil includes the word cold and formal, in our context it connotes the attorney's responsibility to communicate without personal or emotional attacks but rather with a dispassionate level of professionalism. It is the attorney's responsibility to take his or her client's emotions which naturally are wrapped up in the moment and convey those emotions passionately, skillfully and civilly.

Television has unfortunately turned every case into a life and death struggle between attorneys in which anything goes in ones representation of a client. Shows such as Law and Order or The Practice, to name a couple, give the impression that for an attorney to represent the interest of his or her client he or she must personally attack or denigrate the opposing counsel. To do so shows how committed you are as an attorney.

Much of the political discussion which is shown on television is not civil but clearly falls within the rude category. Unfortunately this type of discourse has become acceptable behavior for persons with differing viewpoints or representing different interest. Nonsensical, emotional and irrational arguments are made in an attempt just to get the other side to shut up.

As attorneys we must never allow the enormity of our responsibility to our clients justify the type of offensive exchanges we see on television dramas or political discussions. Despite the situation, the stakes or the stress of the moment we should always be above that type of discourse.

After trials I generally have an opportunity to talk with jurors and will receive feedback about their experience as jurors. It is interesting the number of times comments are made about the trial and how the attorneys presented themselves. Jurors once commented that they thought it inappropriate when the attorneys addressed each other by first name. They thought it poor decorum for a matter of such significance. Several jurors once remarked about a closing argument that started at an extremely high decibel level and then increased. They found it distracting. I have had jurors who have remarked as to how rude it was for an attorney to begin questioning a witness with his back to the witness. Jurors have commented about inappropriate dress, improper etiquette, and rudeness to opposing counsel or witnesses.

This tells me that jurors expect more from us in how we present ourselves in court, despite what they may see on television. Most embrace the awesomeness of the responsibility placed upon them as jurors and have high and sometimes unrealistic expectations regarding the attorneys trying the case. I believe they expect a civil discourse.

Some clients probably view it differently, which gets us back to Abraham Lincoln. Many times clients want their attorney to be the "junk yard dog," or attorneys see a benefit in presenting themselves that way in front of their client. Lincoln could have easily taken a retainer, sued and received judgment on an uncollectable debt. It is idealistic to expect a result like Lincoln's all the time. However, I have had conferences where an attorney has advised his or her client against a scorched earth take no prisoner strategy. I have conducted pretrials, status conferences or meetings with attorneys with the goal of a fair resolution in the midst of a lawsuit with contentious clients or criminal case with difficult parties.

Throughout the halls, courtrooms and conference rooms within the justice center attorneys, your colleagues, are engaging in a civil discourse in representing their clients. They recognize its benefit. Despite all the pressure to do otherwise they step up in professional and respectful ways to enhance the image of who we are and what we do each day.

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Stephen L. McIntosh – *Bulldog to Buckeye*

"I planned on enrolling as a history major, but the line was too long so I chose the shortest line – political science," he said. Fascinated by The Paper Chase, a popular television series that followed the lives of law students at Harvard Law School, McIntosh knew he wanted to go to law school.

By Karen McClain

If you listen carefully to Judge Stephen McIntosh, the incoming President of the Columbus Bar, you can hear just the slightest hint of a southern twang, a carryover from his childhood in Columbia, South Carolina.

"Most people are surprised to hear that I grew up in the south, and they ask me why I don't have a stronger accent," said McIntosh. "I guess by the time I moved to the south to live, I already knew how to talk," he joked.

McIntosh's father was a 33-year career Army man who traveled around the world with family in tow. His brother, just 13 months older, was born in Germany and McIntosh was born in South Carolina. "The first real memory I have is at the age of four. I was with my mother and brother and we were boarding an airplane to join my father in Okinawa, Japan, where he was stationed and where we lived for three years," recalled Judge McIntosh. The family also lived in Massachusetts, Virginia, Maryland, but settled back in Columbia when McIntosh was in third grade.

"My parents were extremely dedicated to us growing up. Although my mother was sick, she never missed a beat caring for my brother and me. She died when I was 15, and by then my father had retired from the military and became both mother and father to us," reflected Judge McIntosh.

"Having lost both my parents by the time I was 25, I developed a deep appreciation for what was important in life," said McIntosh. "There are so many things we can worry about and get upset about, that are just not that important. What is important, is to appreciate people now, while they are with us," he continued.

McIntosh's father never finished high school and his mother had to drop out of college due to the cost, but there was never any question about whether or not he and his brother were going to college.

In 1975, McIntosh enrolled at South Carolina State University. "I planned on enrolling as a history major, but the line was too long so I chose the shortest line – political science," he said. Fascinated by *The Paper Chase*, a popular television series that followed the lives of law students at Harvard Law School, McIntosh knew he wanted to go to law school.

McIntosh sat down with a career counselor who spoke highly of OSU's law school and the package they offered. McIntosh had never been to Ohio and thought it might be a "nice place" to spend the next three years. He took a trial advocacy class and fell in love with litigation and the courtroom. McIntosh also met and fell in love with his future wife of 25 years, Sara, and the "three years in Ohio" morphed into almost three decades.

McIntosh's impressive 27-year career was launched as a assistant city prosecutor in the Columbus City Attorney's Office. After two years and a series of unsolicited job offers, McIntosh went to work at the Secretary of State's office as deputy director for the Uniform Commercial Code Section under Sherrod Brown. "I remember at the time that I had no idea what was involved in being an administrator," noted McIntosh. "Being responsible for everything that goes on in the office and dealing with all the issues no matter how large or small, was a growing experience for me."

Six years later, McIntosh decided to head back to the courtroom and into private practice. He joined the law firm of Crabbe Brown Jones Potts & Schmidt, known today as Crabbe Brown & James. His enjoyed his "bit of everything" practice niche for six years, that included insurance defense litigation, personal injury, criminal, domestic and small business litigation.

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McIntosh was selected by City Attorney Janet Jackson to become the chief prosecutor for the Prosecutor's Division of the City of Columbus. "I developed professionally during the 10 years I was chief prosecutor. I learned to understand and appreciate that people might not always agree with my policies and decisions. It was also gratifying to be associated with such an outstanding staff of attorneys and I always hoped that I contributed in ways to help them become better people and attorneys."

One of his most memorable cases was the prosecution of Charles Spingola, the activist who climbed the statehouse flagpole to burn the gay pride flag. McIntosh was also a special prosecutor for a high-profile case in Cincinnati involving Police Officer Stephen Roach who was indicted for obstructing official business and the negligent homicide of Timothy Thomas.

McIntosh was elected as judge in 2006 and took the bench in 2007 in Franklin County Common Pleas. "Even with the routine, no two days are alike. I thought it would be difficult for me to sit back and not be that advocate but I enjoy trying cases and being available for attorneys. I enjoy all the responsibilities that come with the job; it is a joy to be on the bench."

He believes it is paramount to encourage attorneys to put on the type of case they think they need to present for their client; it is not about rushing through to bring the case to closure. "Being in court is stressful enough for attorneys and their clients, so I believe it is my job as a judge to try not to create additional stress," noted McIntosh. His respect of the membership in and out of the courtroom is notable.

His wife, Dr. Sara McIntosh, a licensed psychiatrist, has helped McIntosh have a better appreciation for the issues surrounding mental illness and drug dependency. "Because of Sara's perspective, I am able to empathize with individuals in the courtroom and can offer appropriate programs," stated McIntosh.

McIntosh is a family man and treasures his children. Oldest son Tyler graduates from Ohio University in June; Phillip is entering his third year at Hampton University in Virginia; and daughter, Lillian, will be entering high school in the fall.

As an active member in the Second Baptist Church, McIntosh serves as a deacon, supports the sick and shut-ins, and participates as a baritone in the Men's Chorus – although he insists he can't sing.

Clearly, McIntosh will be someone who fosters development as President of the Columbus Bar Board. His even-handedness, appreciation for input, and soft-spoken demeanor will serve the organization well in the coming year.

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Head of the Class

After 38 years as an attorney, Rich Simpson is going back to school but this time, he's the Dean

By Aisling Babbitt

Earlier this year, Richard Simpson was named dean of Capital University's Law School and took the helm of that role in June. While he pondered joining a law school faculty upon his eventual retirement, he had not considered actually leading a school until the opportunity arose last Fall.

Prior to joining Capital University, Simpson spent 38 years at Bricker & Eckler, one of Ohio's leading firms, including ten years as managing partner where he provided oversight for the daily business operations of the firm. He is former chair of the firm's public finance group, with a practice focused on municipal bonds, emphasizing general obligation and utility revenue bond and note financings for municipalities, school districts and other political subdivisions. He also provided general corporate representation emphasizing finance.

Simpson served as lead bond counsel for hundreds of municipal bond financings throughout Ohio. He has been a frequent lecturer on bond-related topics for organizations like the Ohio Municipal League, Ohio Prosecuting Attorneys Association, Buckeye Association of School Administrators, and Ohio School Boards Association.

A graduate of Michigan State University and the University of Michigan Law School, Simpson joined Bricker in 1972. He was a law clerk for the firm the summer after his first year of law school and clerked for a larger firm the next summer. After receiving offers from both upon his graduation, he accepted the position at Bricker as he felt he would be more comfortable in a smaller firm. That's ironic, since there were 20 lawyers at the time and Simpson played a key role in growing the firm to more than 150 attorneys today.

"I'm proud that, as the firm as grown over the years, we've been able to maintain the same collegial atmosphere. Bricker has always offered a comfortable and positive working environment," says Simpson.

A landmark and a legacy

Besides helping to grow the firm, including its expansion into Cleveland and Cincinnati-Dayton, Simpson was instrumental in moving Bricker's headquarters to the current location of 100 South Third Street. The building, the site of the former United States Courthouse and Post Office Building, is a strong part of the city's history and now an iconic image for Bricker Firm, which uses an architectural detail from the building as the firm's logo. Opened in 1887, the building is an outstanding example of Romanesque Revival architecture with grand arched openings and massive masonry walls.

Simpson was Bricker's Administrative Partner in 1983 when the firm was looking to move to larger quarters. After seeing a newspaper article that the historic building was available as surplus property, he placed a call and put a plan into action to acquire, preserve and renovate the architectural landmark. "It was a complex process with intricate legal and financing issues," he says, but undoubtedly worth all the effort. Today, the building is listed on the National Register of Historic Places. It is owned by the City of Columbus which rents it back to the firm and it stands today as an architectural landmark on Capitol Square.

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Simpson was the unanimous choice of Capital University's faculty-led search committee following a national search that began last summer. The committee specifically cited Simpson's careful consideration of different viewpoints and diverse perspectives, his stellar reputation in the legal community and his collaborative style of consensus building.

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Leading the Charge at Capital

Simpson was the unanimous choice of Capital University's faculty-led search committee following a national search that began last summer. The committee specifically cited Simpson's careful consideration of different viewpoints and diverse perspectives, his stellar reputation in the legal community and his collaborative style of consensus building.

"The environment at Capital is very similar to that of Bricker & Eckler – a true team-oriented, positive workplace. I immediately felt at ease there," says Simpson. "The chance to join the Capital family seemed to offer a new opportunity with a very comfortable feel."

While unusual for someone in this role not to have a background in academia, Simpson feels that to be an advantage in his situation.

"It's not completely against the grain," he says. "Other schools have made similar hires. I think my background appealed to the faculty. Through my role as Bricker's managing partner, I oversaw budgets, personnel, strategic planning. Capital has a wonderful faculty with great scholars. They needed someone who can provide other areas of expertise."

The future of law

Simpson is enthusiastic about his new role. "My first priority is to maintain the current momentum," he says. "Nothing is broken at Capital. I'm so impressed with the school's faculty and staff. They have done so much right. I want to maximize the law school experience for students and help them make the most out of their educational career so we are producing better prepared lawyers."

As Mr. Simpson becomes Dean Simpson, he has words of advice to those considering a career in law. "A law degree is a wise investment. Due to current economic issues, the market may be tighter right now and it may not change immediately but the long-term demand for lawyers is high," Simpson says. "Career prospects are good as the population increases and baby boomers retire. Law is still a great career - it's been great for me!"

Bricker Attorney Simpson biked across the country, coast to coast (Oregon to New Hampshire), in the summer of 2008. He refers to the trek as EFI, "which stands for 'every flipping inch' or something very close to that ... I would not trade the experience for anything ... I have no plans to do it again!"

(from the Lawyers Quarterly, Winter, 2008)

SNAKES ON A STAFF

By Bruce A. Campbell

Teddy Roosevelt bragged about carrying a "big stick," (double entendre his), but Mercury (the god – not the soon-to-be-dumped car brand) had a really big staff with dueling snakes wrapped around it. Named Caduceus, the staff became the symbol of commerce. Later, with ever-increasing aptness, Caduceus also became the brand image of the medical profession. The familiar wings on the staff, it turns out, were not of antique origin but, instead an embellishment ginned up by the U.S. Army Medical Corps in the early 1900's. The wings were later taken up by civvy docs as well.

Lawyers in search of their own ideograph have made their bed with the goddess of Justice, Themas, with her slightly-tilted scales and her cockeyed blindfold. Both staffs and scales have made rich many peddlers of ties, cufflinks, coffee mugs, and office gew-gaws.

The intended pith of this piece, however, is another icon of the medical calling – this one an historical figure rather than an ancient Greek and/or Roman fabrication. The theme here is that a medical touchstone might be pressed into service by lawyer types.

This brings us to Hippocrates of Cos (460 BCE) who was, by virtually all accounts, the stem cell cluster of the scientific approach to medical training, practice and thought in Western Civilization. Among many other accomplishments, he wrote or inspired the Corpus Hippocraticum, a sort of erstwhile PDR. We know him best for one portion of the Corpus, an Oath bearing his name.

What we think we know best about his Oath is wrong. He did not admonish unripe sawbones to "First, do no harm," although that principle can be divined from his text. The other thing we think we know about Dr. Hippocrates' Oath is that all new physicians still take it just as he wrote it. Not so; the Oath now in general use has been scrubbed up with PC soap and is a bit less eleemosynary in tone.

How, you may ask, does an excursion through aspirational standards for medical practitioners connect with a publication called Lawyer's Quarterly? The premise here is simply that within the folds of the doctors' creed are some scraps that can (and perhaps should) inform the norms of the legal profession.

Newly minted doctors swear to do these things:

I will respect the hard-won scientific gains of those physicians in whose steps I walk, and gladly share such knowledge as is mine with those who are to follow.

I will apply, for the benefit of the sick, all measures that are required, avoiding those twin traps of overtreatment and therapeutic nihilism.

I will remember that there is art to medicine as well as science, and that warmth, sympathy, and understanding may outweigh the surgeon's knife or the chemist's drug.

I will not be ashamed to say "I know not," nor will I fail to call in my colleagues when the skills of another are needed for a patient's recovery.

I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know. Most especially must I tread with care in matters of life and death. If it is given me to save a life, all thanks. But it may also be within my power to take a life; this awesome responsibility must be faced with great humbleness and awareness of my own frailty. Above all, I must not play at God.

I will remember that I do not treat a fever chart, a cancerous growth, but a sick human being, whose illness may affect the person's family and economic stability. My responsibility includes these related problems, if I am to care adequately for the sick.

I will prevent disease whenever I can, for prevention is preferable to cure.

I will remember that I remain a member of society, with special obligations to all my fellow human beings, those sound of mind and body as well as the infirm.

New lawyers in Ohio make a sparse and nonspecific pledge prescribed by the Supreme Court:

I will support the Constitution and the laws of the United States and the Constitution and the laws of Ohio, and I will abide by the Ohio Rules of Professional Conduct.

In my capacity as an attorney and officer of the Court, I will conduct myself with dignity and civility and show respect toward judges, court staff, clients, fellow professionals, and all other persons.

I will honestly, faithfully, and competently discharge the duties of an attorney at law.

The voids in our Oath swallow the small bits of substance like merging potholes on a bad patch of road. There is no call to "gladly share knowledge" with colleagues and students. Absent is a warning about applying too much or two little remedy to a given situation. There is mention of civility but none of empathy. While there is a nod to honesty and competency, there is no refreshing endorsement of replacing false bravado with a simple declaration of not knowing.

Then too, the qualities humility and awareness of frailty are not referenced. The notion of approaching ones' client as a whole being, not just a presenting set of legal challenges, is unacknowledged. A prophylactic approach to assisting clients is not discussed, much less emphasized. Finally, there is no call to serve those excluded by circumstance from needed legal services.

To be sure, many of these notions are engrained in the Rules of Professional Conduct (74 pages of small type - no inspirational bon mots) by which the pledgees agree to abide. Would it not be desirable, however, to borrow from our physician friends and insert just a few of these transcendent values into that first act taken by every lawyer? Of course, the mouthing of words will not reform the malefically inclined, but, just maybe, the dim memory of them might occasionally cause some among us to veer off into the right course despite the beguilements of other choices. Anyway, juicing up the Oath certainly would "do no harm."

The modern Hippocratic Oath ends with a wish: "If I do not violate this oath, may I enjoy life and art, respected while I live and remembered with affection thereafter. May I always act so as to preserve the finest traditions of my calling and may I long experience the joy of healing those who seek my help" Pretty good aim, eh what?

One final observation from Hippy is worth repeating. Said he, "Life is short, the art long, opportunity fleeting, experience treacherous, judgment difficult." Damn straight, brother.

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Bruce A. Campbell, Columbus Bar Counsel

TECHNOLOGY AND GLOBALIZATION AND THEIR GROWING IMPACT ON THE MODEL RULES

By Alvin E. Mathews Jr.

Over the past 15 or so years, technological advances and globalization have changed the legal profession in ways not yet reflected in our legal ethics rules. Innovations such as the Internet, email, and more recently smart phones are changing the practice of law by making it easier to communicate throughout this nation and the world. These advances in communication are expanding opportunities for lawyers and their clients in ways never before imagined. In response to these changes both nationally and in the global marketplace, the American Bar Association has created a commission to study whether lawyer ethics rules should be updated.

Through its review of possible changes to the Model Rules of Professional Conduct, the commission is broadly addressing consequences created by technology and globalization. For instance, through the use of technology, U.S. lawyers, who are regulated by states, increasingly work across state, and even international borders. Another such consequence is that technological advancement has led to enhancement of business opportunities in other national and global markets. Still another consequence is that, through rapidly changing technology, unexpected ethical issues that may impact the client-lawyer relationship are constantly emerging.

A few of the preliminary issues involved in the commission's study include:

Social Networking Sites by Lawyers and Law Firms

Lawyers and law firms are embracing social media in many forms. Many lawyers use blogs, Twitter feeds, social networking websites and other resources as marketing and communication devices. Thus, the commission is studying, among other things, whether the Model Rules and existing disciplinary enforcement mechanisms can adequately address this technological phenomenon. The commission's review might necessarily include an assessment of whether lawyers should have a professional obligation to understand and to use new technologies and applications reasonably and in a way that will not compromise client service.

Legal Process Outsourcing

From solo practitioners to large law firms, the legal profession is increasingly embracing outsourcing to assist in providing legal services to clients. Such delegation of legal tasks to third parties whether locally or off-shore includes legal tasks such as research, drafting, and document review, as well as certain nonlegal tasks. The practice of outsourcing raises professional questions for lawyers including adherence to duties of competent representation of clients, maintaining confidentiality, charging clients proper fees and expenses, and supervision responsibilities of legal and nonlegal tasks, among others. Also included in the emerging issues stemming from globalization are conflicts that arise out of the differences between the ethical and regulatory standards in foreign countries and the United States. This, of course, raises the question of how the problem of different ethical standards might be addressed by possible modifications to the Model Rules.

Virtual law firms

Law practices conducted remotely or over the Internet are emerging with increased frequency. In theory, the lawyers who participate in such arrangements can meet their obligations of competence. Yet, the commission will undoubtedly study whether existing ethical and multijurisdictional practice rules adequately address this up-and-coming law practice paradigm. Additionally, as technological advances may create a jurisdictional nexus for regulators to apply ethical and disciplinary rules in states or even countries in which lawyers do not expect or wish to practice, the commission might also tackle whether the lawyer disciplinary enforcement rules must be adjusted to address the virtual practice of law.

As the commission completes its work and makes recommendations to modify the ethical rules, it is important to remember that each state, such as Ohio, under the auspices of the Supreme Court, must adopt its own legal ethics standards that govern how its lawyers must adapt to changes in technology while practicing within the confines of Ohio. Moreover, as technology is so far-reaching, lawyers must also give attention to the broader regulatory changes that might occur in the many places where they and their clients seek to do business.

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Alvin E. Mathews Jr.,
Bricker & Eckler

And Some Like It Hot - *not so much!*

By A. Alysha Clous

Sometimes, the "Ethics Hotline" feels more like the "Ethics Hot Seat" when questions worthy of the Bar exam or a 3L Professional Responsibility final roll in. One popular subject our callers seem to enjoy confounding me with is conflict of interest.

Twenty-two pages of our Rules of Professional Conduct are devoted to Rules 1.7 and 1.8 and a whopping 76 Advisory Opinions have been issued by the Board of Commissioners on Grievances and Discipline on the subject. However, relatively few ethics cases are ultimately decided on conflict issues. A sparse four cases cite the conflict rules since the new Rules were adopted February 1, 2007.

So, clearly, most attorneys understand enough about these rules to avoid the ultimate hot seat, but there are many sticky situations that give rise to questions. Below is a summary of Rules 1.7 and 1.8. A review of these Rules and of the Advisory Opinions may answer many questions.

Rule 1.7: Conflict of Interest: Current Clients. The rule defines a conflict as a representation of a client that will be directly adverse to another current client or a representation that will create a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interest.

After defining a conflict, Rule 1.7(b) explains how a client or clients can waive the conflict. In order to accept or continue the representation, all three of the following must apply: (1) the lawyer will be able to provide competent and diligent representation to each affected client; (2) each affected client gives informed consent, confirmed in writing; (3) the representation is not precluded by division (c) of this rule.

The following conflicts found in Rule 1.7(c) cannot be waived by the client: (1) the representation is prohibited by law; (2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

Rule 1.8: Current Clients: Specific Rules
(a) Business Relationships. If a lawyer enters into a business transaction with a client, the terms must be fair and reasonable to the client and must be in writing. The client must be advised, in writing, of the opportunity to obtain counsel and give informed consent, also in writing.
(b) Information Relating to Representation. Information relating to representation may not be used to the disadvantage of the client unless the client gives informed consent.
(c) Gifts from Clients. A lawyer shall not solicit any substantial gift from a client nor prepare on behalf of a client an instrument giving the lawyer, the lawyer's partner, associate, paralegal, law clerk, "of counsel" attorney or employee of the lawyer's firm, or person related to the lawyer any gift unless the lawyer or recipient of the gift is related to the client.
(d) Literary or Media Rights. Prior to the conclusion of representation, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights based in substantial part on information relating to the representation.
(e) Financial Assistance to Client. A lawyer shall not provide financial assistance to a client, except that a lawyer may advance court costs and expenses of litigation (repayment contingent on the outcome of the matter) and may pay court costs and expenses of litigation on behalf of indigent clients.
(f) Compensation from a Third Party. The attorney's fee may not be paid by a third party unless the client gives informed consent; there is no interference with the lawyer's independence or the client-lawyer relationship, and; client's information is appropriately protected. Additional rules apply to compensation received from an insurer to represent an insured.
(g) Settlement for Multiple Parties. A lawyer who represents two or more clients shall not participate in making an aggregate settlement unless the settlement or agreement is subject to court approval or each client gives informed consent in writing.
(h) Settling Malpractice Claims. A lawyer shall not make an agreement prospectively limiting the lawyer's liability for malpractice or requiring arbitration unless the client is independently represented in making the agreement. A lawyer is also prohibited from settling a claim or potential claim unless the settlement is fair, the client is advised in writing of the option for counsel and the client gives informed consent.
(i) Proprietary Interest in the Cause of Action. A proprietary interest is not allowed except to acquire a lien authorized by law to secure the lawyer's fee or a contract with a client for a reasonable contingency fee in a civil matter.
(j) Sexual activity. A lawyer shall not solicit or engage in sexual activity with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced. And no amount of written consent will cure this one, folks.

The full text of the Rules (with very helpful comments) and the Ohio Supreme Court's Board of Commissioners on Grievances and Discipline Advisory Opinions are available in pdf format at the Ohio Supreme Court's website.

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1. Incidentally, this article is not an invitation for readers to stay awake at night, dreaming up scenarios to torture me with. Real life is convoluted enough.
2. Toledo Bar Assn. v. Baker, 2009-Ohio-2371, 122 Ohio St.3d 45, 907 N.E.2d 1172; Akron Bar Assn. v. Wittbord, 2009-Ohio-3549, 122 Ohio St 3d 394, 911 N.E. 2d 901; Allen County Bar Assn. V. Bartels, 2010-Ohio-1046, 124 Ohio St.3d 527; Columbus Bar Assn. v. Kiesling, 2010-Ohio-1555, 125 Ohio St.3d 36.

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CIVIL JURY TRIALS

FRANKLIN COUNTY COMMON PLEAS COURT

By Belinda S. Barnes and Monica L. Waller

Verdict: $196,500. Medical Malpractice. Plaintiff Lori Dimitroff, age 42, suffered a common bile duct injury during a laproscopic cholecystectomy performed in January 2006 by Bryan Grischow, M.D. Plaintiff alleged that Dr. Grischow failed to properly identify Plaintiff's cystic duct but instead clipped and removed a portion of Plaintiff's common bile duct. Plaintiff subsequently underwent a Roux-en-Y procedure to repair the injury and suffered several strictures and an incisional hernia. Defendant claimed that a common bile duct injury is a known risk and complication of a laproscopic cholecystectomy. Medical Bills: $70,000. Lost Wages: None. Plaintiff's Experts: Paul Priebe, M.D. and Willard Stawski, M.D. Defendant's Experts: Jeffrey Peters, M.D. and Lawrence Way, M.D. Last Settlement Demand: $95,000. Last Offer: None. Length of Trial: 9 days. Plaintiff's Counsel: Michael J. Rourke and Timothy M. Mahler. Defendant's Counsel: Gerald J. Todaro and Patrick F. Smith. Judge Beatty. Case Caption: *Lori Dimitroff v. Bryan Grischow, D.O., et al.* Case No. 07 CV 103 (2010).

Verdict: $35,000. Fraudulent Concealment in a Home Purchase. Plaintiffs Vincent and Anna Vitullo purchased a home from Defendants Rocco and Lisa Faiello. Plaintiffs alleged that the sellers and the real estate agents for the sellers were aware of a water intrusion problem in a crawl space underneath a home addition built by the seller and failed to disclose the problem. The buyers were not aware the crawl space even existed until a neighbor told them. The jury found the seller liable and awarded the buyers $35,000. The jury found in favor of the real estate agents on the claims asserted against them. Plaintiff's Expert: J & D Basement Defendant's Expert: None. Last Settlement Demand: $95,000. Last Settlement Offer: $10,000. Length of Trial: 5 days. Plaintiff's Counsel: Brian Garvine. Defendants' Counsel: Steven Rowe and Erica Probst (for the sellers) and Michael Valentine (for the real estate agents). Judge Reece. Case Caption: *Vincent Vitullo, et al. v. Rocco Faiello, et al.* Case No. 05 CV 14209 (2007).

Verdict: $16,000 (Reduced to $3,500 for Set-Off). Auto Accident. On October 25, 2005, Plaintiff Paula Archambeau was headed northbound on I-270 and was rear-ended by Michelle Scott when she stopped for traffic. She claimed injuries to her low back, neck and shoulders. Plaintiff was insured by Encompass Insurance with UM/UIM limits of $500,000. She sued Ms. Scott's estate for negligence and Encompass for UM/UIM coverage. Plaintiff entered into a settlement with Ms. Scott's estate for $12,500 and proceeded to trial against Encompass. Defendant's position was that only $2,643 in medical bills were related to the accident and that Plaintiff was fully compensated by the settlement with the co-Defendant. Medical Bills: $31,179.50 (reduced to $12,927.33. Lost Wages: $100. Plaintiff's Expert: H. Thomas Reynolds, M.D. (physical medicine and rehabilitation). Defendant's Expert: Gerald Steiman, M.D (neurology); Last Settlement Demand: None. Last Settlement Offer: None. Length of Trial: 2 days. Plaintiff's Counsel: Stanley Dritz and D. Chadd McKitrick. Defendant's Counsel: Edwin Hollern (Encompass). Magistrate Judge Petrucci. Case Caption: *Paula Archambeau v. Michelle Scott, et al.*, Case No. 07 CVC 14167 (2009).

Verdict: $7,700.00 Auto Accident. On June 1, 2004, Plaintiff Susan Oakes was driving eastbound on West Henderson Road stopped at the intersection with North High Street when she was rear-ended by a vehicle driven by Defendant Derrick Dorsey. Plaintiff claimed injuries to her neck, mid-back and low back. She sued Mr. Dorsey and her insurance carrier, State Farm, on a UM/UIM claim. Defendants claimed that Plaintiff had pre-existing conditions of cervical disk degeneration and thoracic and lumbar sprains and failed to mitigate her damages. Medical Bills: Approximately $24,000. Lost Wages: None. Plaintiff's Experts: Kenneth Osborn, D.C. and William Fitz, M.D. Defendant's Expert: Gerald Steiman, M.D; Last Settlement Demand: $46,000. Last Settlement Offer: $6,511. Length of Trial: 3 days. Plaintiff's Counsel: Jay Hurlbert. Defendant's Counsel: Michael Kelley (Dorsey) and Jason Founds (State Farm). Magistrate Judge Lippe. Case Caption: *Susan Oakes v. Derrick Dorsey, et al.* Case No. 06 CVC 7003 (2009).

Verdict: $130.00 (Reduced to $65.00 by Plaintiff's Comparative Negligence). Auto Accident. On May 5, 2004 Defendant Tyler Griffin was attempting to turn left onto Livingston Avenue from the parking lot of Monroe Muffler Brake Shop. He claimed that the traffic stopped to let him out due to a red light. As Mr. Griffin crossed the center turn lane, the left front of his vehicle was struck by a vehicle driven by 19-year-old Plaintiff Jeremy Barger. Mr. Barger claimed that Mr. Griffin pulled out in front of him. Mr. Griffin claimed that Mr. Barger had just changed lanes and was speeding. Plaintiff did not claim injuries at the scene of the accident but was taken to Grant Medical Center later that day. He complained of right thigh and low back pain but left the hospital without treatment. He returned two days later and was diagnosed with a right knee contusion and low back pain. Plaintiff received chiropractic treatment and was ultimately referred to Edwin H. Season, III, M.D. Plaintiff claimed that he could not work as a result of his injuries. The jury found that Plaintiff was 50% responsible for the accident. Medical Bills: $2,160.20. Lost Wages: Not Itemized. Plaintiff's Expert: Edwin H. Season, III, M.D. Defendant's Expert: Walter Hauser, M.D; Last Settlement Demand: $35,000. Last Settlement Offer: $2,500. Length of Trial: 2 days. Plaintiff's Counsel: Emmanuel Olawale. Defendant's Counsel: Belinda Barnes. Judge Bessey (Travis). Case Caption: *Jeremy M. Barger v. Tyler M. Griffin, et al.* Case No. 08 CVC 6651 (2009).

Verdict: Defense Verdict. Medical Malpractice. On May 12, 2006, Kelly Peterson (then 34-years-old), was brought to the emergency room at Grant Hospital following an automobile accident. She was diagnosed with a right ankle fracture which was surgically repaired the same day. She remained at Grant for further observation after surgery. On May 15, 2006 Ms. Peterson fainted on her way to the bathroom and a code was called. After several additional codes the same day, Ms. Peterson died at approximately 2:30 p.m. An autopsy revealed evidence of pulmonary embolis and multiple liver lacerations. Plaintiff contended the liver lacerations were caused by the motor vehicle accident and Mrs. Peterson bled to death and that Grant Hospital and the attending physicians were negligent in failing to follow hospital protocols that required an abdominal ultrasound to be repeated within six to eight hours of the initial test if the initial ultrasound was negative. Plaintiff also contended that Ms. Peterson's attending physicians (Drs. Suh and Hockenberry) failed to properly diagnose the liver lacerations prior to the code. The defense position was that the liver lacerations were caused by the four rounds of CPR which brought her back three times and that she died as a result of the pulmonary embolis from which she could not be resuscitated a fourth time. Plaintiff reached a confidential settlement with Grant Hospital prior to trial. Medical Bills: Negligible. Lost Wages: Approximately $1,000,000 at present-day value. Plaintiff's Experts: Wendy Marshall, M.D. (trauma); Andrew Rosenthal, M.D. (trauma); Michael Kaufman, M.D. (pathology); John Burke, Ph.D. (economist). Defendant's Experts: Matthew C. Exline, M.D. (pulmonology, critical care and sleep medicine); Fred A. Luchette, M.D. (surgery); Mark Wurster, M.D. (hematology), Gregory Davis, D.O. (internal medicine); and Catherine Graham, M.D. (surgery and emergency medicine). Last Settlement Demand: $1,000,000. Last Settlement Offer: none. Length of Trial: 9 days. Plaintiff's Counsel: Thomas Mester and Jonathan Mester (Cleveland). Defendant's Counsel: Gary W. Hammond (for Defendant Hockenberry); Gerald J. Todaro (for Defendant Suh). Judge Reece; Case Caption: *Brian Peterson v. Jason Loudermilk, et al.* Case No. 06 CV 12-16506 (2009)

Verdict: Defense Verdict. Medical Malpractice. A forty-two year old female who was four months pregnant went to see Defendant for a prenatal examination. At the examination, she specifically pointed out an abnormality in the lateral quadrant of her left breast and requested that the physician evaluate it. The Defendant felt it to be a swollen milk duct, secondary to pregnancy and indicated that he would assess it in the first postpartum visit. The Plaintiff made no further reference to the issue, and she did not return for her postpartum visit. Three and a half months after delivery, she was diagnosed with invasive, lobular carcinoma. The Plaintiff subsequently underwent a radical mastectomy on the left side and an elective mastectomy on the right side. She subsequently experienced failed reconstructive surgery and subsequently was compelled to undergo a hysterectomy. Medical Bills: $300,000. Lost Wages: Variously reported. Plaintiff's Experts: Raymond Weiss, M.D. and Gilad Gross, M.D. Defendant's Experts: Robert Cody, M.D. and Christopher L. Marlowe, M.D. Defense counsel reported that the last settlement demand was $900,000 before trial and $500,000 during trial and that there was no settlement offer. Plaintiff's counsel disputes this report of the settlement negotiations. Length of Trial: 6 days. Plaintiff's Counsel: Walter Wolske and Sarah Wolske. Defendant's Counsel: Thomas A. Dillon. Judge Pfeiffer. Case Caption: *Teresa Beemer vs. Gerald Girardi, M.D.* Case No. 07CVA-05-6375 (2009).

Verdict: Defense Verdict. Premises Liability. In February 2003, Plaintiff Charles Freiburger fell approximately 17 feet from an elevated driving deck at the driving range of Four Seasons Golf Center. Plaintiff claimed a closed head injury and soft tissue injuries to his neck and back requiring treatment. Plaintiff sued Four Seasons Golf Center and the City of Whitehall. Whitehall owned the land used by the golf course. Plaintiff alleged that Defendant Four Seasons created a hazard and provided insufficient safety mechanisms. Plaintiff further alleged that defendants failed to warn of the risk of falling from the deck and failed to provide proper instructions on use of the deck. Both defendants filed motions for summary judgment which the trial court granted. Plaintiff appealed the summary decisions and the Court of Appeals reversed and remanded the case back for trial. At trial Defendant Whitehall was dismissed and the jury returned a unanimous verdict in favor of Defendant Four Seasons. Medical Bills: $ 18,368.00 . Lost Wages: $ 50,000-$100,000. Plaintiff's Expert: Robert A. Bornstein, Ph.D.; George L. Smith, Ph.D., P.E. Defendant's Expert: Richard A. Nockowitz, M.D.; Last Settlement Demand: $ 300,000. Last Settlement Offer: $ 5,000. Length of Trial: 3 days. Plaintiff's Counsel: Alfred J. Weisbrod of Dayton. Defendant's Counsel: Kevin P. Foley and Mary L. Pisciotta. Judge Reece; Case Caption: *Charles Dan Freiburger v. Four Seasons Golf Center, LLC, et al.* Case No. 05 CV 001302 (2008).

Verdict: Defense Verdict. Auto Accident. On February 28, 2004, 41-year-old Plaintiff Angela Greenlee-Phillips was rear-ended by a vehicle driven by Defendant Lindsey Henson. She claimed injuries to her neck, back and right shoulder. She sued Ms. Henson for negligence and Geico, her insurer, on a claim for uninsured/underinsured motorist coverage. The claim against Geico was dismissed before trial. Medical Bills: $24,379.00. Lost Wages: Unknown. Plaintiff's Expert: James Sides, M.D. Defendant's Expert: Martin Gottesman, M.D; Last Settlement Demand: $100,000. Last Settlement Offer: $7,200. Length of Trial: 2 days. Plaintiff's Counsel: Peter B. Rodocker and Nicholas English. Defendant's Counsel: Timothy Ryan (Lindsey Henson) and William L. Peters (Geico). Judge Brown. Case Caption: *Angela Greenlee-Phillips v. Lindsey Henson, et al.*, Case No. 06 CVC 2585 (2008).

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IT'S A NEW DAY AT THE DOMESTIC RELATIONS COURT

By Heather G. Sowald

Ohio law students who were recently surveyed overwhelmingly indicated that they had no desire to practice family law. Why? They replied that it is an area of practice with low monetary reward, high stress, and generally unsatisfied clients.

So, for those of you who, like me, do practice family law and are stressed and only sporadically paid by your clients, here is some of what is new at the Franklin County Court of Domestic Relations and Juvenile Court.

Current Court Composition

We are very fortunate to currently have an excellent bench, comprising five judges who handle both a domestic relations docket and a juvenile docket. The judges are Administrative Judge Dana Preisse, Judge Jim Mason, Judge Beth Gill, Judge Kim Browne, and Judge Chris Geer.

In 2009, the Court heard 1,957 Civil Protection Orders, a dramatic increase from 880 in 2000; 5,043 domestic relations cases, which was about the same number as a decade ago; 17,145 juvenile cases, up from 14,339 in 1999; and 4,638 juvenile traffic cases.

There are seven domestic relations magistrates, twelve general juvenile magistrates, and six magistrates who handle the cases which are filed by unmarried persons arguing custody/parenting issues.

Recently, Administrative Magistrate Don Martin retired from the bench after 27 years as a court magistrate. Don was a judicial officer who was experienced, wise, and dedicated. We will miss him at the court. We are equally fortunate that Magistrate Chip Jones, who was the next senior magistrate with the court, has now become the Administrative Magistrate. Magistrate Jones has worked in this area for decades and was a great choice to replace Don Martin.

Juvenile Court Magistrate Bill Sieloff has switched to the domestic court, to take over Magistrate Jones's docket. The judges have hired Laney Hawkins to replace Magistrate Sieloff, whose docket consisted of never-marrieds' custody and parenting cases.

Rocket Docket

The Columbus Bar appointed a task force which made recommendations last year to the court. One of those recommendations was for the judges and magistrates to stagger pre-trials throughout the day, instead of setting them all in the early morning.

Judge Preisse commenced that practice when she took the bench, and Judge Gill has also implemented that schedule. The remaining judges will do so effective June 1, 2010, when our court institutes a new "rocket docket" rule.

The judges will be setting each pre-trial at a certain time and date either one or two days each week, and each pre-trial will be set for a fifteen (15) minute time slot. Motion hearings will be set on a separate date, and given a minimum half-hour time slot.

The new rocket docket rules, Local Court Rule 3 and 4, for divorce cases mandates that a schedule of the case will be issued when an Answer is filed. The case management order will have deadlines for discovery, pre-trials, and motions to be completed. The rule itself cites the case schedule for all events, listed as to the number of days after the initial filing by which each event is to occur. For instance, lay witnesses are to be initially disclosed within 45 days of the filing of the divorce complaint in cases without children, or 60 days if there are children. An initial exchange of all trial exhibits between the parties is to occur almost two months before the trial date.

The case management orders will also include dates by which experts' and Guardian-ad-Litem reports are to be completed and issued.

In post-decree matters and juvenile cases, the case management order will be issued at the time of the first scheduled hearing.

The Notices which will appear on the Case Management Orders will state the following:

"Failure to comply with this order may lead to imposition of sanctions, including the exclusion of testimony or evidence at trial.

All counsel of record and parties, except minor children, shall be present for ALL scheduled hearings unless excused in advance. Failure to appear for any scheduled hearing may result in a default judgment being entered against you, and/or a dismissal of your pending complaint or motions.

Sanctions: The magistrate shall have the power "to impose sanctions on attorneys, parties, or both."

Failure to comply with the scheduling orders may also result in a finding of contempt.

The new Rule advises that the parties must strictly adhere to the requirements of the schedule, unless modified by the Court or written agreement of the parties. I suspect there will be many of those written agreements between the parties until attorneys become used to the new system.

Technology

Two of the judges' courtrooms, 65 and 66, and one magistrate's courtroom, 36, now have a Smart Board installed on the walls. A smart board is a whiteboard, with a gooseneck-like projector attached above it. It is more interactive than a PowerPoint presentation. The information to be presented is created on a cd-rom, and the cd-rom is inserted into a hard-drive connected to the Smart Board.

There are special electronic "pens" in various colors which can be used to "write" on the screen itself to modify the data projected on the screen. The screens and the notes ìwrittenî on them can be saved and printed off as exhibits.

The screens can also be used as a movie projector, such as recently when a webinar was projected for an audience to view.

What is staying the same

As the saying goes, "We're all for progress, it's just change that we don't like," there will be discomfort as we practitioners have to learn a new way of managing cases in our domestic relations court. However, while it may bring us more discomfort, it will relieve some of our clients' stress when they know that their case is on track and on schedule, with an end in sight. And, that can only be good for us practitioners, because that will be one fewer complaint to be heard from our unhappy clients.

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REPRESENTING YOURSELF:
A FOOL FOR A CLIENT

By The Honorable Patrick E. Sheeran

Over the years, I have had different reasons for not wanting a defendant in a criminal case to represent himself. As a trial prosecutor, I did not want to endure the humiliation of losing a case in that circumstance. As a felony trial judge, I am painfully aware of the probable consequences of self-representation, so, although mindful of the right to do so, I try with every fiber of my being to dissuade an accused from representing himself.[1]

I specifically recall the two cases that have caused me to approach self-representation with this attitude. The first case took place many years ago, in my early days as a trial prosecutor. The defendant was accused of robbery, where he removed an item from a shelf of a fairly large retail store, similar in size to Kohl's. He made no effort to stop and pay for the item, but purposefully walked towards an exit, where he was confronted by a security guard. He pushed the guard out of his way and attempted to leave. Due to the intervention of other store employees, he was unsuccessful and was held for the police. The act of theft, coupled with the use of force, caused the grand jury to return a robbery indictment.

The defendant absolutely insisted on representing himself. The trial judge, whose name I do not recall, earnestly tried to talk the accused out of his choice. However, the trial judge's wise advice went unheeded, and so the trial commenced.

While the voir dire and opening statements were of some slight interest – the Defendant's voir dire and opening statement were very, very short – it was the cross examination of the State's first witness that caused me to recall this case so vividly over the years. The first witness was the pushed security guard, who, on direct examination, fully brought out the details of the event.

Upon finishing the direct examination, I returned to counsel table. The defendant stood up, walked directly towards the witness, and asked: "How did you know it was me? I was wearing a mask."

Outside of who the foreman might be, all suspense in the trial immediately disappeared. The jurors looked at each other, looked at me, and all of us tried hard not to laugh. Ultimately, the jury was out no longer than fifteen minutes; twelve of which were probably devoted to the selection of the forewoman or foreman.

Fast forward over twenty years. I became a trial judge, and now and then the occasional defendant would request the right to represent himself. After speaking quite earnestly about the folly of doing this, I would invariably mention the above story, which seldom failed to amuse the accused, and therefore ultimately led to the acceptance, if not necessarily the appreciation, of his attorney's professional help.

But "seldom" is not "always." One defendant who insisted upon representing himself in a very serious case promised me that he would never ask so stupid a question, and, in fact, that he was a veteran at self-representation. I inquired as to what his record of self-representation consisted, and he proudly stated that he had two victories and only one defeat. I asked what cases he had won. "Traffic cases: speeding tickets, Judge," he responded. "And what did you lose?" I asked. "Aggravated robbery, Judge" came the reply.

Any attempt to distinguish those cases fell on deaf ears. And so, after an hour of inquiry, explanation and cajolery, I was satisfied that (a) the defendant understood the consequences of proceeding on his own; (b) he was willing to give up his right to counsel; and (c) full employment in his village could not occur until he returned there and re-established himself in the former position to which he was so eminently qualified. He was, therefore, entitled to represent himself.

The basic facts of the case were that an armed robbery took place at a Rally's in northeast Columbus. The robber demanded money from a thoroughly frightened clerk, who gave him the contents of the register, as well as the fast food that the robber had ordered. Throughout the entire encounter, the clerk, although terrified, was unfailingly polite. It is a proven business maxim that politeness tends to bring customers back. It may also work to prevent one from being shot.

Later that afternoon, the robber was caught, the money recovered from his car, and a host of other incriminating evidence was found by the police.

The first witness called by the prosecution was that frightened, but polite, clerk. Clearly nervous, he told his story to the jurors and, as expected, the prosecution brought out in rich detail each part of the incident. The defendant then rose to cross-examine. He started out satisfactorily, but five questions into his work brought the following question:

Q. At any time did I show you the keys that were placed on the counter? (T. Vol. VI, at 35).

And, later on:

Q. And do you recall as to whether or not the gun was in my hand when I walked in the store? (Id., at 37)

When a person chooses to represent himself in a felony case, he is at once both the foolish client and the foolish counsel.

But the low point came when the Defendant chose to ask a question that did not involve any statement given to the police; one that was only known to the perpetrator and the witness:

Q. Do you recall at any time stating "take the money, it's not worth dying for"?

A. Yes, sir, I did. (Id., at 42).

A further note to any accused who wants to represent himself is that when you do, you of necessity must speak out loud. That fast food clerk, so terrified of the robber, could not make a photographic identification because he never looked at the robber's face.

On redirect examination, the first two questions asked of the clerk were these:

Q. Sir, you said on direct that you had the opportunity to listen to the man who robbed you, his voice.

A. (indicates affirmatively)

Q. You heard the Defendant...his voice. Are they comparable?

A. Yes, definitely… (Id., at 48).

As in the previous case, there was no doubt as to the ultimate outcome of the case. The defendant in that case now has a good many years to contemplate the folly of his representing himself. In fairness, not everyone who represents himself in a felony case meets such an end. But they constitute the exception that proves the rule. When a person chooses to represent himself in a felony case, he is at once both the foolish client and the foolish counsel. With that start, the outcome – and the errors involved in getting there – are most predictable.

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1. For whatever reason, I have never had a female defendant who wished to represent herself in a felony case. I will let the experts debate whether this superior awareness is innate or learned.

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The Honorable Patrick E. Sheeran,
Franklin County Common Pleas Court

Notes from the Federal Court

By The Honorable Mark R. Abel

Sixth Circuit Judicial Conference

The 70th, biggest and best yet, Sixth Circuit Judicial Conference was held this May in Columbus. Over 900 attendees were treated to a blockbuster lineup of speakers. Retiring Supreme Court Justice John Paul Stevens reminisced for an hour about his 35 years on the Court. Chief Justice John Roberts was the speaker at the Sixth Circuit banquet. He related the accomplishments of Ohioan William Howard Taft, the only person to have served as both President and, at the end of his career, Chief Justice of the United States. Attorney General Eric Holder spoke about his lawyers' commitment to vigorous criminal prosecution within the bounds of the law. Solicitor General Elena Kagan (as I write, President Obama is announcing his nomination of Elena Kagan to the United States Supreme Court), Paul Clement, who has argued more Supreme Court cases than any other appellate litigator, and UC Irvine and constitutional law expert Dean Erwin Chemerinsky analyzed Supreme Court trends and decisions. This term the Court heard just over 80 cases out of the more than 8,000 seeking review. By early May the Court had decided only 37 cases.

Justice Stevens displayed his usual genial good humor and quiet competence. He recalled growing up in Chicago, where his family owned the Stevens Hotel, then the largest hotel in the world. One vivid childhood memory was the 1932 World Series game when, as Stevens recalled, Babe Ruth, responding to razzing by the Cubs, pointed to center field, stepped up to the plate and hammered the ball over the center field scoreboard. After telling that story at last year's conference, a young lawyer came up to him and said that the home run was hit to the left field. He knew that because his grandfather had been sitting in the left field bleachers when the ball landed a few seats away from him. Justice Steven concluded that a senior citizen's memory may not be as good as he thinks it is. He later repeated the story to Jeffrey Toobin, telling him that maybe his memory of events was not entirely reliable. Toobin repeated the story in a good New Yorker article about Stevens. (http://www.newyorker.com/reporting/2010/03/22/100322fa_fact_toobin?currentPage=all)

After reading Toobin's article, the thought came to Stevens that Babe Ruth had hit not one, but two home runs that day. So he assigned his law clerk the task of researching where the "called shot" homer landed. Sure enough, she reported back that – just as he had remembered – the famous homer was to center field. Based on the keen intellect the Justice displayed during his presentation, it would be a mistake to mistrust Stevens' memory.

Discussing the important influences over his career, Stevens said that Justice Wiley Rutledge, for whom he clerked during the 1947-48 term, has had a lifelong impact. Like Rutledge, Stevens prepares the first draft of each decision, then asks his law clerks to help round it into final shape. His service during WWII in military intelligence was life shaping. He is proud of his military service and believes it informs his judicial decision. He continues to believe that the American flag is a powerful symbol and dissented from the Supreme Court decision that flag burning is protected as First Amendment speech.

Another experience that informs his judging is Stevens's service as minority counsel for a subcommittee of the House of Representatives Judiciary Committee. He believes that it is helpful to the Supreme Court to have members with experience of the legislative process. Experience as a litigator is also valuable.

Justices he admires include Brandeis, Cardozo, Potter Stewart and Byron White. Although labeled a "liberal," Stevens insists that he is a legal conservative. He believes his readings of statutes respect legislative judgments and implement legislative intent. Similarly, Stevens sees his constitutional decisions as applying its language faithfully to contemporary disputes. By implication, often when he winds up in dissent, he views the "conservative" majority's construction as "activist."

Despite the 90-year-old Justice's recent decision to retire, Stevens remains vigorous. A college tennis player, he continues to play singles three times a week, play some golf, and produce a high volume of decisions. He did say that had the Supreme Court continued to decide the 150-160 cases a term it did during his early years as a Justice, he would have retired 10 years ago. Stevens said he hadn't had time to think about what he might do in retirement because he was concentrating on doing the work necessary to finish his decisions on the case from this term.

Southern District of Ohio meeting at the Judicial Conference

While Justice Stevens, the Chief Justice and other luminaries made for heady listening at the Sixth Circuit Judicial Conference, the session I enjoyed the most was the well-attended meeting of Southern District of Ohio lawyers and judges.

Chief Judge Susan Dlott recalled Judge Carl Rubin meeting with lawyers for candid discussions about practice in federal court and his District-wide "Tell It to the Judge" programs. She invited litigators to speak candidly about what judges could do to better perform their duties. Topics discussed included page limits on briefs, delays in deciding motions, settlement in fee shifting cases, judges' participation in settlement discussions, and voir dire of individual jurors for bias.

Although S.D. Ohio Civ. Rule 7.2(a)(3) permits briefs exceeding 20 pages so long as counsel includes "a combined table of contents and a succinct, clear and accurate summary, not to exceed five (5) pages, indicating the main sections of the memorandum, the principal arguments and citations to primary authority made in each section, as well as the pages on which each section and any sub-sections may be found," many judges require counsel to seek leave of court to file a brief in excess of 20 pages. A plaintiff's counsel in employment cases expressed concern about the length of defendant's briefs supporting summary judgment. He believed the costs of responding to lengthy briefs was prohibitive. He also suggested that because plaintiffs have the burden of proof, they should get to file the last brief. The judges responding to the concern supported strictly enforcing the 20 page brief limit.

A business litigator was frustrated by delays in deciding motions to remand, for change of venue, and the like filed early in a case. He said that a decision, even a notational entry that the motion is denied with a written opinion to follow, was better than no decision. The judges who responded said that if an undecided motion is holding up a case and imposing a hardship, counsel should call the judge's law clerk or bailiff. Motions can drop through the cracks, and a call to chambers would not be held against the attorney who made the call. Judges were unanimous in responding that they would not make notational orders because the drafting a written decision is an important part of the decision-making process.

Fee shifting cases are a concern because in many cases a defendant's potential exposure to paying plaintiff's attorney fees can quickly make it risky to litigate further. In some cases, a plaintiff's attorney fees are much greater than any likely damages award. Judge Michael Barrett said that he holds early case management conferences in fee shifting cases to discuss settlement. Judge Greg Frost said that he has recently begun referring all fee shifting cases to the Court's mediator, Bob Kaiser, for an early mediation.

A lawyer who represents both plaintiffs and defendants in fee shifting cases said that the Columbus magistrate judges' practice of requiring plaintiffs' counsel to quarterly report the number of hours of legal services and the rates charged for those services to defense counsel was helpful. He thought that a local rule with that requirement might lead to earlier settlements in fee shifting cases. The consensus was that judges ought to encourage early settlement in fee shifting cases.

Judge Barrett raised the question of when should a judge participate in a settlement conference. Everyone agreed that the judge in a case to be tried to the court should not participate in settlement discussions. Litigators also said they and their clients were uncomfortable with a judge participating in settlement discussions when a case-dispositive motion had been filed and was yet to be decided. Everyone agreed that Bob Kaiser, the Court's mediator, was a good alternative. Kaiser makes no communication to the judge other than a docket entry saying that the mediation is concluded or that the case is settled.

Another question discussed was when counsel may question individual jurors to determine possible bias. The judges who responded recognized the importance in particular cases of making sure that jurors can decide a case impartially. Given the right circumstances, they would permit counsel to question jurors individually about bias. But they cautioned that counsel should not raise the question for the first time during voir dire. It should be presented before trial, so the judge can carefully consider the question and lay down guidelines for the voir dire.

During the discussion, most judges indicated that they give counsel an opportunity to participate in the voir dire. Judge Barrett said that he believes counsel's participation in voir dire is perhaps the most important part of the trial. The judges participating in the discussion generally felt that questions by counsel designed to eliminate biased jurors and make an informed decision about peremptory challenges were fair game, but that argument masquerading as questions was not.

Magistrate Judge Deavers

Chief Judge Dlott introduced our newest Magistrate Judge, Elizabeth Preston Deavers, who took office March 15. In 1989, Judge Deavers graduated from the Ohio State University with a bachelors degree in political science. She earned her J.D. in 1994 from Capital University Law School. She was Editor-In-Chief of the Law Review and Order of the Curia.

After law school, Judge Deavers joined Bricker & Eckler, as a litigator. From 1997 to 2000, she served as a law clerk to District Judge Edmund A. Sargus, Jr. She returned to Bricker & Eckler following her term clerkship. Deavers's practice included complex commercial litigation, ERISA, False Claims Act proceedings, asset-based health care financing, occupational safety and health law, workers' compensation defense, civil rights litigation and class actions. She returned to the Court as Judge Sargus's career law clerk in 2002.

I have enjoyed working with Beth Preston Deavers over the years and am very happy that we are now across the hall neighbors on the second floor of the courthouse. She is the first magistrate judge appointed in Columbus in over 22 years. So Chief Magistrate Judge Terry Kemp is happily no longer the "junior" magistrate judge here.

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

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

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.

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.

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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.

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Editor's note: If this story seems familiar it's because we mistakenly published it in the Spring issue, attributed to the wrong author. We belatedly give credit where credit is due.

Bradley B. Wrightsel, Wrightsel & Wrightsel

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.

What's the Use?

OHIO SUPREME COURT CLARIFIES LIMITATIONS ON THE INFORMATION OBTAINED VIA THREAT

By Matthew D. Whitman

Labor and employment professionals should review the Ohio Supreme Court's recent *State v. Jackson*[1] decision. Released March 2, 2010, Jackson defines and clarifies the broad protections of Ohio's public employees under *Garrity v. New Jersey*.[2] Garrity provides that when a public employee is forced, via threat of removal from his or her position, to provide a statement during an internal investigation, any information provided in that statement may not be used, either directly or derivatively, against the employee in a subsequent criminal investigation or trial. In *Jackson, the Appellee, following a Garrity Warning*,[3] provided his superiors with information that included the name of a previously-unknown witness. The officer who conducted the Garrity interrogation appeared before the grand jury, but did not disclose any substantive information from the interview. His testimony did not mention any substantive information revealed during the Garrity interrogation; he merely acknowledged that the interrogation occurred. The text of the Garrity interrogation was also provided to the trial prosecutor on the Jackson case, who was not the same person as the indicting prosecutor. The Ohio Supreme Court had to determine whether or not the testimony of the interviewing officer and the viewing of the interview by the trial prosecutor constituted derivative use of Mr. Jackson's Garrity statements.

Given these facts, the Supreme Court ruled the state violated *Garrity*; the state's actions made derivative use of the Garrity statements given by Mr. Jackson by presenting the officer who conducted the Garrity interrogation to the grand jury and by letting the trial prosecutor read the Garrity statements prior to trial. The court ruled the appropriate remedy in a case where the state fails to prove it did not make derivative use of Garrity statements in obtaining an indictment is the dismissal of the indictment. Towards the end of the majority opinion, the Jackson court stated the following: "a public employer can ensure that it does not violate the defendant's right against self-incrimination only by refraining from providing a compelled statement to the prosecutor when a criminal proceeding ensues." (Emphasis mine)

Public employers should heed this statement. One would understandably be hesitant to disobey a public official's request for what oftentimes is going to be a highly relevant document. The Ohio Supreme Court was clear, though. The only way to properly respect employees' constitutional rights is to refuse any requests by prosecutors for statements employees make when given the choice of either answering the employer's question or facing the termination of their employment. While both *Garrity* and *Jackson* involved law enforcement officers faced with this chilling choice, the Court in *Garrity* was clear that the decision applies to all public-sector employees. For police departments concerned about efficiency when the same officer is assigned to both the criminal investigation and the internal investigation, Jackson recommends waiting until the conclusion of criminal proceedings before conducting any internal investigation. Whether or not this is a viable option in smaller departments, which often assign the same officer to conduct both investigations, is yet to be seen. Regardless, public employers must take great precaution in documents they turn over to prosecutors. The remedy for a Garrity violation can be as extreme as dismissal of an indictment (which we now know happens when one person is involved in both the Garrity interrogation and the grand jury proceeding).

Public employees should similarly educate themselves on the Jackson ruling. They should know their employer is entitled to present them with a hard choice: answer questions to our internal investigation, or risk your job. In these depressed economic times, one must assume the majority of employees will choose the former. The choice in and of itself is not a violation of the employee's constitutional rights. Once the public employer presents the choice, however, the employee's rights under the Fifth and Fourteenth Amendments of the U.S. Constitution activate. The employer need not inform the employee beforehand that any statements they make cannot be used against the employee in any subsequent criminal proceedings.

Employees should be comfortable knowing that, when they make responses to Garrity questions, such responses will not come back to haunt them in a criminal setting. Prosecutors are forbidden from using or making derivative use of the statements made during a Garrity interrogation. We now know that "derivative use" will be viewed broadly; the officer who testified before the grand jury did not mention the substance of the Garrity interrogation, he only acknowledged its existence. Also, the trial prosecutor had knowledge of the contents of the statement, but there was no proof he relied on its substance in any sort of strategy formulation. Clearly, the Ohio Supreme Court adopted a very broad interpretation of an employee's Garrity rights.

If any public employee experiences a Garrity interrogation, Jackson proves that Ohio courts will read the employee's rights expansively and any possible taint during the criminal prosecution process will likely violate an employee's constitutional rights. Professionals on both the employer and employee side should take the time to review *Jackson* with their clients/staff to prevent any violation

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1. Slip Opinion No. 2010-Ohio-621.
2. 385 U.S. 493 (1967).
3. The warning read: "This questioning concerns administrative matters relating to the official business of the Canton Police Department. During the course of this questioning, if you disclose information which indicates that you may be guilty of criminal conduct, neither your self-incriminating statements nor the fruits of any self-incriminating statements you make will be used against you in any criminal legal proceedings. Since this is an administrative matter and any self-incriminating information you may disclose will not be used against you in a court of law, you are required to answer my questions fully and truthfully….If you refuse to answer all my questions, this in itself is a violation of the rules and procedures of the department, and you will be subject to separate disciplinary action."

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Matthew D. Whitman

Patent Preparation and Prosecution

It is almost never advisable for an inventor to prepare and file an application because of the complex legal and administrative obstacles that must be navigated in order to draft and submit an acceptable, and effective, application.

By Ashley A. Aminian

Most everybody knows that if you want to protect an invention, you need to get a patent. But what if a client came to you asking how? Would you know what to say? If the answer is no, you're in good company. It's been my experience that the majority of people – laymen and attorneys alike – are largely unfamiliar with the long and often tortuous path between an inventor's "eureka!" moment and the issuance of a United States patent. Here, I will attempt to demystify at least a few key steps of the patent process.

In order to obtain a patent, a formal document called a "patent application" must first be filed with the United States Patent and Trademark Office. A patent application can be prepared and filed by an inventor or a patent attorney. It is almost never advisable for an inventor to prepare and file an application because of the complex legal and administrative obstacles that must be navigated in order to draft and submit an acceptable, and effective, application. Most often, a patent attorney is enlisted to take care of preparation and filing.

The most common variety of patent application is for a "utility patent" and contains a detailed description of the invention, any drawings that are required for understanding the invention, and a set of numbered paragraphs called "claims" that define, in concise terms, the exact boundaries of the invention. The purpose of the detailed description and drawings is to allow a reader to understand the invention. The claims of the application, on the other hand, define the legal scope of what the inventor seeks to protect with a patent.

In order to competently prepare an application, a patent attorney will obtain as much information about the invention as possible from the inventor. Depending upon the complexity of the invention, it will then typically take the patent attorney between several days and several weeks to prepare a draft of the application. After the inventor and attorney are both satisfied with the state of the application, it is ready to be filed.

Once a patent application is filed with the Patent Office it enters the "prosecution phase" of the patent process. This is where things slow down. The application is first assigned to an appropriate technology department, or "art unit," at the Patent Office where it typically waits in a queue for one to two years (and sometimes much longer, depending on the backlog of applications pending in the particular art unit). The application is then assigned to a patent examiner within the art unit who will review and "examine" the application for compliance with patent statutes and Patent Office rules. One of the important functions performed by the examiner is to search the Patent Office's database of issued patents and pending applications to find technologies that predate the invention being examined. Such technologies are referred to as "prior art" and can be used to reject the inventor's patent application.

After a patent application has been examined, the first substantial communication issued by the Patent Office is generally an "office action," in which the examiner is likely to make one or more rejections of some or all of the claims in the patent application, with an explanation of the legal basis for the rejections. For example, the examiner may assert that the invention lacks novelty or is obvious in view of certain prior art found in his search. The patent attorney normally reviews the office action, consults with the client regarding the bases for any rejections, and prepares an "office action response" which may contain arguments in support of the application and amendments to the claims. The Patent Office typically provides a 3 month period from the mailing date of the office action to file such a response, although the deadline can be extended for a fee.

A cycle of office action and response may continue for several iterations during the prosecution phase until either the patent is granted or receives a final rejection. Following a final rejection, the inventor has several options including filing an appeal to the Board of Patent Appeals and Interferences. Ultimately, if the patent application is not allowed and the rejection is not appealed or continued, the application will be abandoned and the prosecution phase comes to an end.

If the prosecution phase is successful, a "notice of allowance" is issued by the Patent Office and the inventor is invited to pay an issue fee. Upon payment of the issue fee, the patent will be granted.

All in all, the prosecution phase for a patent application typically lasts between 18-36 months from filing to patent grant. It is a slow process, to be sure (one might liken dealing with the Patent Office to dealing with the Internal Revenue Service if it had 95% fewer employees), but it is a process that can ultimately yield one of a business's most valuable assets.

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Intellectual Property

CLIENT EMERGENCY CALL:

OUR DATA HAS BEEN STOLEN!

Important Steps Before That Call

By Benita Kahn

Receiving a call that your client's company is the common point of purchase[1] or discovering that the database where your client's employee information is maintained has been hacked starts the beginning of a long journey. Most articles focus on the journey that starts with this call. This article, however, will focus instead on what should be in place before that call is ever received – a well prepared incident response plan. This plan will lay out the step by step process to be followed on this data breach journey. Having a plan in place will provide your client's company the advantage of considering each step included in the plan as it is executed after the event, rather than reacting and creating while in the midst of a public relations crisis.

Many companies have incident response plans in place that have been created by their Information Technology group. However, often those plans are technology-specific and can miss some of the more practical steps that should be considered. An important first step is to create a simple escalation process. When creating this process, the company should consider use of an already familiar means for employees to report their suspicion of a data breach. For example, consider whether the company has a help desk that might be trained to take these types of employee calls as well.

Whatever group is selected to provide intake for the initial internal call, the individuals in that group should be trained to know what additional information should be obtained, how to conduct an initial evaluation of the severity of the risk involved and who receives the escalation of this information. Regardless of the severity, there must be a means to quickly pass on the information to those who will be making decisions about the event.

This leads to the next step in the escalation process for suspected data breaches, which is consideration of the formation of a committee in advance that includes all the possible stakeholders for such an event. This could include possible "owners" of the information, legal (in house and outside counsel), public relations, information technology, risk management. It is important to designate one of these individuals as the person to receive the call from the initial intake, to further evaluate who the necessary stakeholders are for the specific event and to determine the means by which these individuals will be contacted. For example, if employee information has been stolen, HR would be the "owner" of the information, but if customer information is stolen that might involve a different set of "owners."

This committee will then need to quickly start making decisions on such issues as: i) next steps for further investigation, including a determination of what type of data was stolen (e.g. paper or electronic, specific personal information taken) and whether outside forensic assistance is required, ii) if a breach has occurred, the means to end the outflow of stolen data; iii) how to control communication about the investigation, iv) whether third party contracts impose notice, forensic or other obligations in the face of a data breach, v) whether individuals must be notified and how; vi) if the secret service should be contacted; vii) how to ensure that business can continue as usual in the face of correcting for the data breach, and viii) how to immediately begin limiting the company's liability exposure.

Notification obligations become a significant part of an incident response plan. Forty-six states have now enacted laws that require notifications when a data breach involves what is defined in the statutes as personal information. The incident response plan should prepare for these notification requirements. Generally, "personal information" is defined as first name or initial and last name combined with a social security number, or driver's license number or financial account number (e.g. credit or debit card, bank account, investment account number). In most states, the notice laws only apply to unauthorized access to electronic personal information,[2] but fortunately exclude notification if the electronic personal information is encrypted.[3] Some states allow an evaluation of risk of harm before notice is required, so this will need to be considered by the committee that is formed. Several states require notification of affected individuals within 45 days, which is very quick when your client is in the midst of a crisis. Unfortunately, the information that must be included in a notice letter to affected individuals is not the same for every state. It is recommended that draft letters be prepared in advance and be part of the incident response plan.

In addition to notifying individuals whose information was stolen, a dozen states[4] require notification of state officials such as the Attorney General or consumer protection department and many state laws require notification of the three major consumer reporting agencies (Experian, Trans Union and Equifax). All of the necessary contact information should be included in an incident response plan.

Continued on Page 28

Fraudsters

Continued from Page 27

In addition to the states, if healthcare information is involved in the data breach, then the regulations enacted by Health and Human Services for protected health information (PHI) and by the Federal Trade Commission for personal health record information (PHR) must also be considered. Both regulations have specific requirements and very short fuses for notification (60 days from discovery of the breach, which is defined as when the company should have known of the breach). While encryption is a "safe harbor" for these notice obligations, the regulations of these federal agencies require a specific type of encryption.[5] Prepared draft notices and address information for the notices should also be a part of a complete incident response plan if the company retains either PHI or PHR information.

When reviewing the list of considerations for the incident response committee and the various notice of breach laws, it is easy to see that making decisions on all of these issues in the middle of a crisis can easily lead to more mistakes. Having a written information response plan, training people with roles in the plan and updating the plan regularly will help your client reduce, and hopefully eliminate, additional mistakes in the face of the discovery of a data breach.

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1. This means that counterfeit credit card numbers have been tracked back to a common legitimate use at your client's company.
2. Alaska, Arkansas (medical information), Delaware (medical information), Hawaii, Indiana (if computerized data is transferred to paper, including microfilm), Maryland, Massachusetts, North Carolina, South Carolina, Utah, and Wisconsin apply their notice laws to paper data breaches as well.
3. However, in several states notice is still required if the encryption key is also stolen.
4. Hawaii, Louisiana, Maine, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, New York, North Carolina, South Carolina, Virginia.
5. So far, two specific examples of encryption have been deemed to meet the requirements: (1) for data at rest, encryption consistent with National Institute of Standards and Technology Special (NIST) Publication 800-111 and; (2) for data in transit, encryption that complies with Federal Information Processing Standard 140-2.

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The Fraudster!

Devastating to Small Businesses How to minimize the risk

By Courtney Sparks White, J.D., LL.M., ASA, AVA, and Mike Stevenson, CPA, CFE

The Fraud Scheme

Whitney, a bookkeeper for a small trucking company, embezzled $550,000 from her employer. She spent a great deal of the illegal cash on a new Mercedes, luxury vacations and jewelry. Of course, she had to have a new house to store all her finery.

Surprisingly, it wasn't her excessive lifestyle that made her employer suspicious. The owner was going over the trucking company's budget and noticed Whitney's salary was listed at $38,000 a year. But the owner was sure he had set her salary at $35,000. The owner pulled Whitney's personnel file and discovered that someone had altered her pay record. It was obvious to him that no one but Whitney would have been motivated to falsely increase her salary. Investigating further, he noticed suspicious-looking wire transfers from the company's bank account.

Not unlike many small companies with limited accounting controls, Whitney could post entries, authorize wire transfers and reconcile the checking account. Her scheme was simple. After wiring money from the company bank account to her own, Whitney would charge the funds transferred to one or more expense accounts, reconcile the bank account and simply tear up the evidence.

Top-ranked fraud schemes

According to the Association of Certified Fraud Examiners (ACFE) 2008 Report to the Nation, check/wire tampering and fraudulent billing were the most common small business fraud schemes. The ACFE Report also identified small businesses (< 100 employees) with the highest median fraud losses of any category, including large organizations, at $200,000 per loss.

Fraudsters often display behavioral traits that serve as an indication of possible illegal behavior. According to the ACFE Report, 39% of perpetrators are living beyond their apparent means and 34% are experiencing financial difficulties at the time of the fraud.

What to do when Fraud is Discovered

The owner of the trucking company has contacted a forensic accountant to investigate the fraud. What should the forensic accountant tell the owner of the trucking company? (These considerations are not necessarily listed in order of timing or importance – all are important and will overlap. Obviously, each fraud assignment is unique and considerations not on this list will be added.)

Contact Legal Counsel

Urge the employer to immediately contact legal counsel to discuss the situation.

How to deal with the suspect? Do you terminate immediately, place the employee on administrative leave without pay or say nothing until evidence is developed?

Know the employer's rights: The employer has the right to conduct a fraud investigation and seek to recover losses. Generally, an employee has a fiduciary responsibility to comply with the employer's investigation of their possible fraudulent acts. Failure to do so can lead to termination of employment.

Know the employee's rights: A complex series of laws dealing with employee rights in the workplace means these rules must be followed and the employer must treat all employees consistently. An inconsistent track record can later be used against the employer.

Act Quickly to Minimize the Financial Loss

The 2008 ACFE Report to the Nation identified that nearly half of the fraud cases were discovered by a tip and 20% were discovered by accident – as was the case here. The ACFE Report also identified the median length of time a fraud scheme went undetected – 24 months. Thus, the financial impact may be material and will probably be greater than first suspected.

Move quickly to stop the damage.

Work with the Owner to Prepare an Action Plan

The approach should take the following steps:

Secure data. Fraud deals with "intent" and proving intent generally requires circumstantial evidence. Data should include anything the employee touched in her role at the company.

Examine documents. This includes original documents such as bank statements, wire transfer requests, printed copies of ledgers and deposit slips.

Interview coworkers. Use the documentary evidence to guide the interview.

Interview the suspect. Legal counsel can help with this part of the action plan.

Prepare a written report summarizing the fraudulent scheme, what data you have secured, documents you have examined, and descriptions of all interviews held. This written documentation will be helpful for your legal counsel and your forensic accountant.

Contact the Insurer

The employer's insurance company should be contacted immediately. The fidelity or employee theft premiums may have been paid, but many employers fail to actually put the insurer "on Notice" of a potential loss, thus voiding coverage in some cases. Most policies have 30-60 day notice provisions, although proof of claim is not required to be filed until months after notification.

Tip of the Iceberg

Fraud is like an iceberg – what you see generally represents a small part of the whole. Fraud is a cost of business hidden from view. Only when discovered and investigated is the "true" cost known, and then sometimes too late to avoid catastrophic losses.

Eliminating fraud may not be entirely possible, but with reasonable measures, its impact can be limited. Here are a few ways small business owners can prevent or detect fraud:

Prescreen employee applicants. Restrict bank account access.

Perform regular bank reconciliations. Have someone other than the person reconciling the bank account receive and open the bank statement.

Secure inventory and supplies.

Give employees and third parties a way to report fraud.

And require mandatory vacations.

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"Apartment Available - Perfect for a Single [Lawsuit]"

HOW TO AVOID LEGAL ISSUES IN ADS – FOR RENT

By Jeffrey A. Willis

"Perfect for a single person" or "ideal for empty-nesters" are phrases that may be helpful in illustrating the small size of an available apartment, but the use of such language in a rental advertisement can lead to significant and costly legal issues even for a well-intentioned landlord. Under applicable fair housing laws, if a rental advertisement can be reasonably construed by an ordinary reader to create a preference against certain protected classes of individuals, the intent not to discriminate of a person or entity who publishes the advertisement is insufficient to shield potential liability for discrimination. As such, it is important to carefully scrutinize the language and images in rental advertisements.

The Fair Housing Act prohibits printing or publishing an advertisement for the rental of a dwelling that discriminates against potential tenants on the basis of race, color, religion, sex, handicap, familial status, or national origin.11 Section 804(c) of the Fair Housing Act (642 U.S.C. ß 3604(c)).

In order for there to be a violation of the Fair Housing Act, there must be a showing that either the individual or entity printing or publishing the advertisement actually intended to discriminate; or an "ordinary reader" would find a discriminatory preference in the advertisement.22 See United States v. Hunter, 459 F.2d 205, 215 (4th Cir.); Housing Opportunities Made Equal v. The Cincinnati Enquirer, 943 F.2d 644, 646 (6th Cir. 1991); Spann v. Colonial Village, Inc., 899 F.2d 24 (D.C. Cir. 1990).

Language or images subjected to an "ordinary reader" analysis are interpreted naturally as such language and images would be interpreted by a typical reader.

Certain advertising language is clearly discriminatory, such as "adults only," "no blacks," and "gays prohibited." Other more subtle and less insinuating words and images, however, also can be discriminatory if an average reader could reasonably infer that such language or images create a preference against certain protected classes of individuals. For example, a federal court held that an advertisement listing an apartment for rent in "a private white home" indicated a racial preference.33 United States v. Hunter, 459 F.2d 205 (4th Cir. 1972).

Another federal court found that a rental company's use of only white models in its rental advertisements may create a preference against minority applicants as an ordinary reader may think "these apartments are not for me or my kind."44 Saunders v. General Services Corp., 659 F. Supp. 1042, 1058 (E.D. Va. 1987).

Examples of other language that an ordinary reader may infer to create an impermissible preference include: "catholic church nearby;" "perfect for physically fit;" and "Hispanic area."

To Avoid Legal Issues?

Basic steps can be taken to help prevent discriminatory rental advertisements which include, but are not limited to, the following:

Review all advertising language and images before the advertisement is disseminated to the public on print, radio, television, text, email, or the internet.

Develop a nondiscrimination policy that includes measures to prevent discriminatory advertisements.

Educate employees and enforce the nondiscrimination policy.

Incorporate an equal housing opportunity logo and statement as provided for under HUD regulations.

Hire counsel to create the nondiscrimination policy and review all advertisement language.

And attend fair housing training or obtain information (e.g. a list of words or phrases to avoid) at a local fair housing agency.

In sum, when creating an advertisement, private landlords or property management companies should be diligent and take proactive steps to ensure that no advertisement language creates a preference against certain protected classes of individuals.

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Basic Legal Research Part 2

Science Direct (http://www.sciencedirect.com/) offers a substantial number of the world's scientific, medical and technical information online, including over 2,500 peer-reviewed journals and hundreds of book series, handbooks and reference works. Searching is free, as are most abstracts, but full texts of articles (of which there are about 9 million) will probably cost you some coin.

By Ken Kozlowski

In the last issue, we took a look at basic legal research on the Internet in the areas of state and federal resources. This time, we're going to explore a few legal portals and some places to find periodical literature.

Portals

Legal portals used to have the monopoly on legal information. Not anymore. This category of website is more than likely a dying breed as search algorithms get better and better allowing users to enter one or two terms into a box and find their result among the first three entries (see Google).

First stop on our tour is Findlaw (http://www.findlaw.com). I can't really remember the web without Findlaw. The site underwent some changes a few years back, and is now actually two discrete sites: one for the general public, and one for legal professionals (http://lp.findlaw.com/). Findlaw still has a lot to offer to both novice and seasoned researchers, if only for quick access to legal news, blog postings, and case research. Next up is Jurist (http://jurist.law.pitt.edu). It surprised me, but the notes for Jurist indicate that it has been around since 1997 in its present form. Wow, sometimes you just feel old. I always considered this site to be a relative newcomer in the portal community. It offers legal news and a real-time legal research service that is powered by volunteers led by law professor Bernard Hibbitts at the University of Pittsburgh School of Law.

Moving on, let's take a look at Law.com (http://law.com). American Lawyer Media is the purveyor of this site. It is a nicely designed portal that offers a lot of info without seeming to be too cluttered. Information is provided for lawyers and firms of all sizes, and in-house counsel. Blogs and RSS feeds are also part of the equation, and there are links to legal news covering all geographic areas of the country. One of my favorite sites of all time is the Legal Information Institute (http://www.law.cornell.edu). Since before the beginning of the World Wide Web, the Legal Information Institute (at Cornell University Law School) has been there. They have been disseminating United States Supreme Court opinions via email since the days when Archie, Jughead, Gopher, and even Veronica (for those of you who have no clue to what I'm speaking of, look for definitions at NetLingo -http://www.netlingo.com/) were terms that the Internet cognoscenti were using. Nowadays, they still offer a ton of great information on their vast number of pages, and those Supreme Court decisions are still being emailed within a few hours of being handed down by the Court.

Last stop on our portal parade is WashLaw (http://www.washlaw.edu/). Just as with the LII, WashLaw has been providing access to legal information since before there was a WWW. WashLaw, however, has made the leap and updated their design a few times while still remaining one of the few useful legal portals left on the web. You'll still find links to enormous amounts of information and other sites, which is what they do best.

Periodicals are a resource just made for Internet exploration. Who wants to keep hard copies of these things around anymore? Current Law Journal Content (http://lawlib.wlu.edu/CLJC/) is a great service from Washington & Lee Law School that can be used to display all the tables of contents for issues added during a user selected date range. You can also search for words in article citations (author/title/abstract/journal-name fields), link to tables of contents for any one of the 1538 (as of May 6, 2010) individual law journals, and subscribe to an RSS feed of contents for all, selected, or an individual law journal. About half of the content on Current Law Journal Content comes from the Tarlton Law Library's Contents Pages from Law Reviews and Other Scholarly Journals (http://tarlton.law.utexas.edu/tallons/content_search.html).

Tarlton, located at the University of Texas School of Law, offers a keyword-searchable database of tables of contents from more than 750 law reviews (the database lists journal issues received over the past three months) and other scholarly publications related to the law published in the United States and abroad. The database is updated daily.

The Social Science Research Network (http://www.ssrn.com/) eLibrary consists of two parts: an Abstract Database containing abstracts of over 277,000 scholarly working papers and forthcoming papers and an Electronic Paper Collection currently containing over 228,000 downloadable full text documents in PDF format. The eLibrary also includes the research papers of a number of fee-based publications. Users can also sign up for email and RSS notification of recently added documents to whichever library is of interest (financial, legal, marketing, negotiations, etc.).

The areas of medicine and other sciences, while not strictly legal, often come into play when litigating. Our first stop for periodicals in this genre has to be PubMed (http://www.ncbi.nlm.nih.gov/sites/entrez). PubMed is the interface now used by the National Library of Medicine to access its Medline database. Medline covers the fields of medicine,

Continued on Page 34

Continued from Page 33

nursing, dentistry, veterinary medicine, the health care system, and the preclinical sciences and contains bibliographic citations and author abstracts from thousands of biomedical journals published in the United States and 80 other countries. The database contains over 19 million citations dating back to the mid-1950s. Science Direct (www.sciencedirect.com/) offers a substantial number of the world's scientific, medical and technical information online, including over 2,500 peer-reviewed journals and hundreds of book series, handbooks and reference works. Searching is free, as are most abstracts, but full texts of articles (of which there are about 9 million) will probably cost you some coin.

HighWire
(www.highwire.stanford.edu/lists/freeart.dtl) bills itself as the largest archive of free full-text science on Earth. As of March 17, 2010, they were assisting in the online publication of 1,999,354 free full-text articles and 6,237,561 total articles. They offer pointers to 22 sites with free trial periods, and 45 completely free sites. They also report that 286 sites have free back issues, and 1,209 sites have pay per view.

Last up on our voyage is the Directory of Open Access Journals (www.doaj.org/). This service covers free, full text, quality controlled scientific and scholarly journals. There are now 4,998 journals in the directory. Currently, 2,053 journals are searchable at article level, and 390,737 articles are included in the DOAJ service. Not bad for free.

That concludes part 2 of our trip down memory lane. As you can see, a number of these sites can still help with research on the Internet, and some are still at the top of their game. Thanks for your time. Next issue, look for some more legal (and not so legal) research pointers.

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

MANAGING THE CLIENT WHO HAS *NOTHING* TO WEAR

By Aaron L. Granger

Getting ready for "pajama day" in first grade was an exhausting exercise. My daughter proclaimed that the drawer full of pajamas did not contain any "good ones." Her tone, facial expression, and body language were eerily familiar. My mind frantically combed through dust covered boxes of faded memories in search of the proper frame of reference for my daughter's defiant stance. Although familiar, the moment failed to invoke the feelings that typically coincide with déjà vu. I must have appeared disinterested to my daughter's dilemma as I stood there, unresponsive, searching my inner core for an answer to a question that was never asked. Then it hit me. I've seen this movie before and it doesn't end well. The DNA did not fall far from the tree. This scene is actually my wife, standing in front of the closet saying "I have nothing to wear."

"I have nothing to wear" is a relationship booby trap. It ambushes the listener because it inherently demands a response. It operates more like a request for admissions because if no response is given, it's deemed admitted as true. The phrase is not meant to be taken literally. So don't run over to the closet and ask rhetorically, "Did someone break into the house and steal only *your* clothes?" Trust me, it won't be appreciated for its comic value. Through trial and error I have developed several canned responses to help navigate this relationship minefield. I must warn you that none of these responses is entirely full proof. It takes exceptional communication to match the right response with the appropriate situation because the phrase means different things to different people at different times. So to maximize your success you not only have to listen to what is being said, but you must also take into account what you are not being told.

There are times when my wife has visualized how she wants to look for a specific occasion and nothing in the closet gives her that exact look. In that situation, going through her closet and pulling out five other dresses that I thought she looked phenomenal in before is more annoying than helpful. On a rare occasion the phrase is meant as an expression of her displeasure with some minor aspect of her otherwise perfect physique and my magnanimous suggestion that she simply buy something new does very little to abate her displeasure. At times she uses the phrase to engage me in conversation about her personal style and genuinely seeks a male perspective. In that situation, just listening and nodding supportively to avoid saying something stupid can be received as being disinterested and aloof. Conversely, supportive listening is entirely appropriate when the phrase "I have nothing to wear" is simply being used as prologue for general venting.

Unfortunately, the person using the phrase knows exactly what it means, but the listener rarely does. Responding before collecting additional information increases the chance that your response will prove disastrous. In a healthy and trusting relationship you have to be willing to dig a little deeper to discover what is not being said. The same is true for clients who don't tell you everything.

Qualcomm Incorporated v. Broadcom Corp., is a perfect reminder of the importance of client communication and the ethical obligations lawyers have in gathering information. Recently, U.S. Magistrate Judge Barbara Major from the Southern District of California lifted sanctions previously levied against attorneys hired by Qualcomm concluding that there was insufficient evidence that the attorneys engaged in "bad faith" when they failed to produce thousands of pages of emails in discovery. Magistrate Major found that Qualcomm employees notified their lawyers that it would not search individual computers of deponents for information requested by the other side because the information would likely be duplicative of information already collected and produced. None of the lawyers for Qualcomm challenged the client's approach to gathering the information. The Magistrate also found that the discovery failures where exacerbated by the "incredible lack of candor" on the part of Qualcomm even when questioned by their own lawyers.

Getting the information you need from your client can be more of an art than a science. Some attorneys subject their clients to a blistering cross-examination during initial information gathering. In some cases, attorneys do that to evaluate if they want to take the case. Some attorneys employ a velvet glove approach to collecting information by emphasizing the importance of trust and confidentiality, even if that leaves the client feeling vulnerable or exposed. The approach you choose is not as important as helping the client understand that you have to capture the universe of information necessary to comply with your ethical obligations and to provide the best possible representation.

When clients say they have nothing to wear, you may need to dig a little deeper to match your response to the appropriate situation. In the long run, you will build a better relationship with the client. Being properly informed will lead to better results. Personally, the only feeling better than getting a good result for a client is seeing the smile on my daughters face in her brand new pair of pink pajamas.

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Investing in Futures

To ensure coordination of the training and billable components of this program, each new associate is assigned a "knowledge coach" who ensures that the associate receives the full benefit of this program.

By Michael K. Yarbrough

At a time in which many national law firms either rescinded or postponed first-year associate offers, Frost Brown Todd chose to find a creative solution. The firm hired the full group of first-year attorneys, but reduced their billable hour expectation dramatically. The program features enhanced business training and also partners incoming associates with clients who have specific project needs after the new attorneys have completed a basic training program.

Here's the way the program operates. Associates' billable hour requirements are reduced from 1800 hours to 1000 hours. Each new associate initially participates in an extensive training curriculum. This is a structured program run internally that focuses on skills needed for new attorneys regardless of their practice areas. This culminates in an assignment for a specific project at a client's place of business. The project and terms of placement are agreed to in advance by the firm and the client in order to ensure the project contributes to the associate's understanding of the business and is valuable for the client. The time is not charged to the client for this project but instead is an investment on the part of the firm in the client relationship and the new attorney's future. This placement has allowed first-year associates to spend a significant amount of time learning how companies do business and how these companies prefer to work with their outside counsel. The expectation is that this training component of the first-year program would be 1000 hours.

Katy Klingelhafer's placement at Konecranes is but one example of the client placement program in action. With domestic headquarters in Springfield, Ohio, Konecranes is a world leader in the overhead crane industry. For several months, Katy – a first-year associate in the litigation department of Frost Brown Todd's Columbus office – has worked one day a week in the Konecranes legal department. Working closely along side a team of in-house legal professionals and at the direction of Bernie D'Ambrosi, Senior Legal Counsel, Region Americas, Katy has had the chance to work on a variety of transactional and litigation projects. She has also had an invaluable opportunity to learn how the attorney-client working relationship is viewed from both a law firm and a client perspective. In addition to performing substantive projects for Konecranes, Katy has had the chance to attend a mediation, meet with Human Resources and production professionals, and sit in on weekly and quarterly meetings of various components of the legal department. There can be no doubt that these opportunities will inure to the benefit of Katy, Frost Brown Todd and Konecranes in the long run, making this program a rare "win-win-win" success.

As Mr. D'Ambrosi has commented: "From Konecranes' perspective, Frost Brown & Todd has made a unique investment in its relationship with our company. By committing the time and resources necessary to create a "Client Specialist" familiar with our organization, Frost Brown & Todd will be uniquely qualified to represent our organization's interests in a wide variety of matters on a go-forward basis. Katy was an excellent choice for this project."

To ensure coordination of the training and billable components of this program, each new associate is assigned a "knowledge coach" who ensures that the associate receives the full benefit of this program. These knowledge coaches are some of the firm's most productive and successful lawyers with a track record of superior commitment to training. This role is not traditional mentoring, but rather is an internal quality control to ensure that the new associate is getting the breadth and depth of experiences to facilitate training and development. Building better lawyers faster is the goal.

To date, almost every new attorney has been placed in an assignment with a client in most of the markets in which the firm operates. The response has been overwhelmingly positive from both clients and new attorneys. And the firm is sure that as a result, relationships with the clients have been solidified, and the training that new attorneys receive will pay dividends for these clients and attorneys for years to come.

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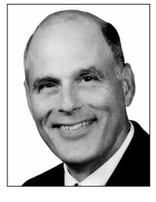

Michael K. Yarbrough, Frost Brown Todd

EIGHTY-SIX YEARS AND COUNTING . . .

By Harold R. Kemp Kemp Schaeffer and Rowe

Steven Rowe, Michael Schaeffer and Harold Kemp
Suzette Doak, Kathy Taynor (seated) and Nancy Smith

Ours is a law firm blessed with three legal assistants who have now logged a total of over 86 years of dedicated service for the firm. In this day and age, it is a real tribute to have this type of employee loyalty and longevity. These ladies should be cloned for their work ethic and dedication.

Nancy Smith achieved the 30-year marker on July 22, 2009. On May 5, 2010, Kathy Taynor gained the 30-year distinction. Suzette Doak won the 25-year marker on February 18, 2010.

The common thread with these women must result from how they were raised; in terms of values, respect and appreciation. These three have seen an incredible transition in the practice of law since they commenced their careers.

Nancy arrived at the firm in 1979. She works primarily for Harold Kemp and Jackie Kemp, and she stays young by working six days a week, arriving prompty each morning at seven. When not at work, she can be found volunteering for the West High School Alumni Association.

Nancy reminisces as follows:

My Mother told me "remember that the lawyer is the boss." Not everyone can be a boss.

At the beginning of my career, things were pretty simple. The equipment consisted of a typewriter, reel-to-reel Dictaphone and an adding machine. A phone with push buttons. No voice mail.

In my working career, we became super automated and the practice became a lot easier.

I am especially fond of the memories we have over all of these years with clients. They still remember me and I have now met their children and grandchildren.

I still find it hard to understand some of the decisions we receive from the court. Some just do not make sense.

I will work until I can't walk or the car won't start.

Kathy works primarily for Michael Schaeffer and is very comfortable dealing with multi-million dollar transactions. On May 5, she was the first of our employees to earn the distinction of working for our firm full-time for thirty years.

All cases are treated equally by Kathy; she just hunkers down and plows through the work with unyielding dedication. Kathy enjoys keeping up with her husband, her son and daughter-in-law, as well as her daughter who recently became engaged and achieved a degree in pharmacy.

Kathy recalls . . .

When I started working for the firm, I really enjoyed the co-workers and Michael Schaeffer.

The most dramatic change has been to go from an electric typewriter to computers, emailing of documents, and the internet. How incredible!

I believe that I have been fairly compensated. This was very important to me in raising a family. Sometimes I wish that it was "30 years and out."

I like to assist in the winning of large cases, successful bank attachments and working with honest caring attorneys.

I have seen the laws change so dramatically from protecting the creditors to protecting the debtors.

I would advise anyone to gain more education; become a paralegal with a better understanding. Take pride in your work. Proof read everything!

Never burn bridges. Stay friends with former employees and maintain contact with them.

Work for an employer where it can remain constant; even though you might get married, have children, attend graduations and weddings as I have.

Gain a good perspective on life – work to live instead of live to work!

Suzette works primarily for Steve Rowe, together with two other lawyers in the office. She has taken a "hands-on" approach to the practice, together with maintaining impeccable employment loyalty. Suzette is involved with her church, her husband and her very beautiful daughter at Dublin Coffman High School.

Suzette remembers . . .

I worked as a legal secretary for five years in Weirton, West Virginia, before coming to Columbus. I interviewed with Steve Rowe and was appreciative of his time and effort to really train me properly.

The concerns that I had after the first day quickly went away and now, it's 25 years later.

Technology has been phenomenal. Only when you have worked in an environment without these modern marvels can this be understood.

I really appreciate the relationships I have developed, both with employees and with clients. This is the most important thing. I have endearing respect for the partners as they have for me. We need to keep praising each other. Associates with a "know it all" attitude need to learn an understanding of respect. Everyone needs to hear "thank-you."

The firm has been very understanding when family issues arise and time off is needed.

Young people entering the workplace should determine the reputation of the employer; this is important.

Our firm – partners and staff – could not let this significant milestone pass without paying tribute to these three fine ladies. We owe a debt of gratitude for 86 years of employment. May it continue on into the future.

* Harold, Michael and Steve met as law clerks in March, 1973, and commenced operation as Kemp Schaeffer Rowe in April, 1977.

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THE OTHER DEPRESSION

There is a curious sociological fact about those of us who grew up during the Depression. Almost universally, we say: "I knew I was poor because that's what my parents told me, but I didn't feel poor." As we looked at other families, we all seemed to be in the same condition; no one seemed to have more and many had less.

By Lloyd E. Fisher Jr.

Having achieved permanent "geezer" status several years ago, I have an AARP-guaranteed right to tell tales of the other Depression.

The story begins in a two-day period in October 1929, when the Dow-Jones Average dropped 25% (sound familiar?). From then until 1932 there were a few market recoveries but by 1932 the market had dropped almost 90%. The Dow did not return to its 1929 level until 1954.

Federal aid was minimal since President Herbert Hoover believed that economic stimulus programs should be developed and financed at state and local levels. Congress enacted the Smoot-Hawley Tariff Act that was designed to protect domestic industry and business but employment continued to decline. "Hoovervilles" – tents and shanties occupied by the unemployed sprang up at the fringes of many cities.

Franklin Roosevelt easily defeated Hoover in the 1932 election and, in his 1933 inaugural address, made the famous statement: "We have nothing to fear except fear itself." In addition to the economic problems, 1933 brought a severe drought to many parts of the country. Families fled from Middle America toward California and the refugees were nicknamed "Okies."

By the autumn of 1933, almost 25% of the American work force was unemployed. Recovery was sporadic until American industry began to gear up for World War II.

During the remainder of the 1930s, the administration introduced a flurry of legislation and directives that included: the WPA. (public works); TVA. (rural electrification); FDIC (banking) and CCC (youths employed in conservation and park projects). There were even federal arts programs that produced written records of current and prior history; over 100,000 photographs and 200,000 works of art, including murals in many Ohio post offices and public buildings.

Popular culture tried to lift the spirits of a depressed population with songs that included "Brother Can You Spare a Dime" and "I've Gotta Right to Sing the Blues." Steinbeck's "Of Mice and Men" told the story of the Okies, and the Depression in the South was the background for Harper Lee's "To Kill a Mocking Bird."

All of us who were children in the '30s have personal stories of the Depression. My father was out of work for months, doing whatever odd jobs he could find. We celebrated when he finally got a job as a clerk in a local grocery. He worked six days a week for a salary of $15 a week. But there were fringe benefits – he could bring home some of the tired fruits and vegetables that remained after the store closed on Saturday.

Every family member did what they could to help. As a teenager, I sold cartons of cottage cheese from a basket on my bicycle and my mother baked rolls and pastries to generate a little cash. Her best customer was her sister who had a good job in the county auditor's office. During one of the cold winters in the 1930s, my grandmother used grocery string to knit a coat for my mother.

Much of Depression entertainment was do-it-yourself: card games and library books. Families gathered around that newest piece of technology – the radio – for favorite programs. Occasionally there was a spare nickel or a dime for a movie. I still have the sarcasm I learned in the 30s while sitting in the town park listening to my mother make snide remarks about the neighbors.

There is a curious sociological fact about those of us who grew up during the Depression. Almost universally, we say: "I knew I was poor because that's what my parents told me, but I didn't feel poor." As we looked at other families, we all seemed to be in the same condition; no one seemed to have more and many had less. The few who were not struggling were careful not to flaunt their good fortune.

A few years ago, if I tried to regale family gatherings with my fascinating tales of the 1930s, my children would roll their eyes and mutter "Here come the Depression stories." Now they are living a few of their own.

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

Defamation

By Jacob A. Stein

A friend was in the office sounding me out about a lawsuit against his boss. His bully of a boss had called him a liar in front of some important people. Didn't I think this was an actionable case of defamation?

At any given time there are people who wish to fight back against a boss or a neighbor or a business associate because of something nasty the person said or wrote. The victim wants to sue for defamation. (A word about terminology: *defamation* is the general term that includes both libel and slander. Libel written slander spoken.)

As he spoke I had in mind the cautionary proverb that a person who sues because somebody calls him a liar may find that a jury believes he *is* in fact a liar.

I asked what his boss's salary was. It was a good salary, but not enough for the boss to pay a substantial judgment – and the expense of defamation litigation requires a substantial judgment to justify the time and expense on a contingent-fee basis. Working people can't afford to pay by the hour for defamation litigation. It's too expensive. Defamation law is unsettled, and unsettled law triggers pleadings, motion, and papers.

No, a lawsuit wasn't the solution to my friend's problem. I spoke of how one wise lawyer dealt with a similar situation. He sent a letter to the slanderer stating that the matter was under careful investigation. He had better watch what he said. He may be sued. Most of the time, the defamer defamed no more.

Rarely does a really good defamation case walk in the door. Here are the criteria. The defamatory statement must be demonstrably false and made with the intent to injure. The defamatory statement must have caused a provable loss of income in addition to claims of injury to reputation. And finally, the defendant must have lots of money to pay a judgment.

The facts provided by the clients who want to sue often meet two of the requirements, but rarely all three. Few potential plaintiffs can prove a loss of income caused by the defamation. The friends of the defamed person do not believe the lies, and his enemies already believe them. A proximate cause issue.

Some defamation cases are brought not because the case is a good one but because something must be done to show indignation. This is especially true when the dispute has political overtones. Politicians commence defamation suits to express outrage, thereby demonstrating their own purity. Just as the alleged libel may be believed by some because it has appeared in print, a denial coupled with a lawsuit may similarly convince some that the libel is untrue. The litigants, once out of public eye, may give occasional press interviews denouncing the other, but the lawsuit goes on the docket, probably never to be tried. Occasionally the plaintiff's cheerleaders convince the plaintiff to go to trial. The trial can prove a disaster. General William Westmoreland's case against CBS is one example.

One the the gib-name plaintiffs in a defamation suit that never went to trial was General Douglas MacArthur. In 1943 the general sued the *Washington Time-Herald* and its columnist Drew Pearson for libel. The paper accused the general of proposing 19-gun salutes for friends and "pulling wires" to further his ambition. The general wanted $750,000 as fair compensation for injury to his reputation. The case was never tried.

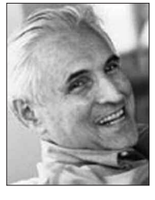
While it was pending, there was a knock on the door of Pearson's Georgetown residence – fate had sent Pearson a perfect defense, in the form of a beautiful Eurasian woman. She had bolted from the Chastleton Apartments at 16th and R streets, N.W., where she had been sequestered by the general. She placed in Pearson's hands a collection of General MacArthur's love letters to her. Shortly thereafter the general was made aware that Drew Pearson possessed some interesting documents the general might not want to see in print. MacArthur dropped his lawsuit, and the letters were never published.

In 1957 General Harry Vaughan, President Truman's military aide from 1945 to 1953, was provoked into filing a defamation suit against the *Saturday Evening Post*. At the time, the *Post* was trying to boost circulation with sensation articles. The November 3, 1956, article about Vaughan identified people who were sent to jail because of Drew Pearson's local newspaper columns. Next to it was a picture of General Vaughan testifying at a public hearing. The caption read, "Many Pearson charges against Harry Vaughan were later confirmed by testimony before Senate Committee." Vaughan and others read the caption and the photograph as charging Vaughan with dishonesty.

Fed up with Pearson and with the *Post*, Vaughan decided not only to file suit but also to risk a trial. The *Post* wished the jury to believe that Vaughan was mixed up with five-percenters and was a tool of lobbyists. At trial, Vaughan was questioned at length about instances that the *Post* hoped would show him as a corrupt influence-peddler. Unimpressed by the *Post's* defense, the jury returned a $10,000 verdict for Vaughan for damage to his reputation. It did not, however, award punitive damages.

The verdict was a disappointment to Vaughan's lawyers, but not to Vaughan. It gave him bragging privileges. He was a man who saw it through to a difficult but exculpatory end.

Two Plaintiffs who commenced defamation suits discovered that the defamation suit can take a bad turn. Although they were plaintiffs in the civil suit, they ended up as defendants in criminal prosecutions, and both were convicted. Their names? Alger Hiss and Oscar Wilde.



Jacob A. Stein

Top Tips for Positive Profiling

We've spoken to focus groups of consumers and to attorneys who are experiencing success in soliciting new business from the site, and we want to share some tips for success with you. Here's what you need to know about creating a successful and enticing profile on ColumbusLawyerFinder.com.

By Paula Coulter

For a growing number of Columbus Bar members the online lawyer referral service has become a major force in a marketing plan for growing a practice. It's no wonder. The Pew Research Center's Internet and American Life Project report that consumers are increasingly searching for information online – and legal information is no exception. A sampling of statistics will give you a compelling reason to consider an online presence for your practice: 74% of adults use the internet; and about three out of five consumers turn to the internet for information when faced with a problem. These statistics contribute to the success of ColumbusLawyerFinder.com. For many of the lawyers featured on the CLF site, this has become a lively source of customer referrals.

Are you considering giving it a try and wondering what your profile should look like? Wouldn't you like to know what is important to the online consumer?

We've spoken to focus groups of consumers and to attorneys who are experiencing success in soliciting new business from the site, and we want to share some tips for success with you. Here's what you need to know about creating a successful and enticing profile on ColumbusLawyerFinder.com.

Tip #1
Your profile on ColumbusLawyer Finder.com should have a "social-network-y" feel. It's not Martindale-Hubbell. The CLF site is not aimed at attorneys; its target is the consumer. And it's a different audience, so your content should have a different tone. Perhaps not "folksy," but certainly not "stiff." Potential clients want to feel like they know you. So, who *are* you outside of the office? Are you a marathon runner? A hockey player? A musician? A Buckeye fan? What you do outside of the office may be the tipping point because the searcher identifies with you. In focus groups the consumers assumed that everyone appearing on the bar website would be competent in respective practice areas.

Use the "Get To Know Me" section of the site to talk about your personal interests. What made you choose your particular areas of practice; your charitable, community or service club activities. Focus groups of consumers have told us they are more than a little nervous when making that first call to a lawyer, especially if they have never used the services of an attorney before. They are more comfortable reaching out when feeling they know a little about you and have an "ice-breaker" to start the conversation.

Tip #2
ColumbusLawyerFinder.com profiles feature up to three photos in each attorney profile. Take the time to find the right images to visually tell potential clients about yourself (we would not recommend three pictures of you in different suits).

Photo #1 should be your professional head shot. It's probably the same photo you use on your firm website or the one in the Columbus Bar Directory – you looking your "buttoned-down" best.

Photo #2 could be a picture that best reflects your personality/passion. This can be an image of your family, your pets, your softball team or another snapshot that best illustrates a "day in the life," for you.

Photo #3 could be an image that gives consumers a peek into activities/events that inspire you. Maybe it's church, a morning run, cooking, classic cars, volunteering, fly-fishing, gardening, etc. Remember that one picture says a thousand words. Choose photos that tell a good story about who you are.

Tip #3
Have you noticed the number of pets featured in attorney profiles on CLF? Take a look at several profiles in any category, and you're likely to see photos of the family dog or cat. Guess why. It works.

CLF attorneys tell us time and again that these photos get the attention of consumers. Yes, it's hard to believe that your new client may have called you instead of the next guy or gal because your dog looks like a dog they had as a child, but it happens more than you would believe.

Tip#4
Don't get hung up on your experience level if you are a relative newbie. Your CLF profile will indicate the number of years you have been practicing. If you fall in the category one to five years' experience, you may think this might limit the number of leads you'll get from the site. Think again. Some consumers would rather hire someone closer to their own age because they think you will be able to relate better to them.

For some consumers, your office location can be important. They would rather find someone close to home. Others may place value on specialization, and choose an attorney who limits his or her practice to a particular area of law. You would be surprised what draws a consumer to your profile. Don't let your concern about length of time in practice keep you from listing your profile. CLF has been an effective marketing tool for a full range of attorneys at all experience levels.

Tip #5
Let us help you to create your profile. We will scan and upload photos, proofread your text, make suggestions for content, etc. There is no need to go it alone when you have a friend at your neighborhood bar. We are happy to lend a hand. And remember whatever you do is not written in stone. You can fine tune it as you gain experience about what works for your practice.

Tip #6
Link to your website. If you've invested in creating a website for your firm, be sure to link to it from your profile. It serves to provide more information about you to the potential client, and a professional-looking website adds credibility to your online presence.

Tip #7
Keep your profile "fresh." Take the time to log on and update your profile from time to time. Update your information to keep it current and accurate, and make sure to use current photos whenever possible. Logon with your user name and password, and you can make changes and update your information as often as you want, whenever you like.

You can also choose to change the category where your profile is listed. Want to build your probate practice? It only takes a click of the mouse to change you primary area of law listing to the "Probate, Wills & Estate Law" category.

For inspiration, take a look at a few attorney profiles from each area of law featured on the site. As you explore the site, note which profiles are compelling to you, and why. Use this information to make your profile stand out from the crowd.

For more information on ColumbusLawyerFinder.com, call the Columbus Bar at 614.221.4112 or send an email to *paula@cbalaw.org*.

Paula Coulter, Columbus Bar Services

CELL PHONES & CIVIL LIABILITY

CELL PHONES AND THE EVOLUTION OF COMMUNICATION

By Dale K. Perdue

The first non-experimental use of a mobile phone in the United States is thought to have occurred in St. Louis in 1946. Impractical at best, early cell phones were bulky, expensive, and difficult to use. It was not until 1983 that the first commercial cellular network in the United States was launched in Chicago. By the mid to late 1980s, cellular phones were used increasingly in motor vehicles, but there were large voids in cellular service. Over the course of the next decade, cell phones became smaller, lighter and more affordable. Their popularity and use expanded exponentially, as did cellular service, and they evolved from an expensive business accessory to a virtual social necessity for adults and teens alike.

In the mid-90s, SMS (short message service) was introduced, allowing cell phone users to send short "text messages" between mobile devices. However, it was not until about 2000 that texting experienced dramatic growth among cell phone users. During the first few years, texting reached a tipping point and almost instantly created an entirely new (and pervasive) culture of communication among teens and young adults. In June 2009, there were over 276 million wireless subscribers in the United States. These users generated over 135 billion text messages per month and over 1.3 trillion text messages annually.[1] Today, texting is arguably the dominant means of interpersonal communication for teens, parents of teens, adults under 30 and anyone who wants to be connected to these groups.

The National Highway Transportation Safety Administration estimates that in 2005 approximately 10 percent of drivers in a typical daylight moment were using some type of cell phone.[2] According to the National Safety Council, there are approximately 636,000 motor vehicle crashes a year attributable to cell phone use, accounting for nearly 25 percent of all motor vehicle crashes annually![3] This and other factors led to NHTSA's conclusion that "cell phones are the contemporary icon of driver distraction."[4]

Research Studies

Common sense suggests that talking on a cell phone while operating a motor vehicle is distracting. But the pertinent enquiry in terms of safety and legal liability is how distracting. Numerous credible studies over the past 15 years have provided reliable data on the distractibility of cell phone use.

The first scientific study that sought to quantify distractibility and establish a relationship between cell phone use and motor vehicle collisions was published in *The New England Journal of Medicine* in 1997.[5] This study concluded that "[t]he risk of a collision when using a cellular telephone was four times higher than the risk when a cellular phone was not being used."[6] Moreover, the use of a hands free device did not present a safety advantage, suggesting that the risk was a function of impaired attention and not dexterity.[7] Furthermore, the researchers found that "the relative risk is similar to the hazard associated with a blood alcohol level at the legal limit."[8]

In 2000, researchers in the UK conducted a study to benchmark the risk of driving while talking on a cell phone against the known risks of driving while impaired by alcohol.[9] They used a driving simulator under controlled conditions and protocols. The subjects drove a simulated course (1) with no phones and no alcohol consumption, (2) talking on hand-held cell phones, (3) talking on hands-free cell phones, and (4) while impaired by alcohol at the legal limit (80mg/100ml in the UK). Here is what the researchers found:

> Results from this study showed a clear trend for significantly poorer driving performance (speed control, warning detection and response) when using a hand-held phone in comparison to other conditions. The best performance was for normal driving without phone conversations. Hands-free was better than hand-held. Driving performance under the influence of alcohol was significantly worse than normal driving, yet tended to be better than driving while using a phone. Drivers also reported [subjectively] that it was easier to drive drunk than to drive while using a phone.[10]

That cell phone use and alcohol consumption create similar driving impairments under controlled driving conditions is startling. The implications for real-world driving, however, are even more alarming when you consider that there are substantially more cell phone drivers than drunk drivers – and that drunk drivers are more common at night, when there is less traffic, while cell phone drivers are pervasive during high traffic periods and around schools and playgrounds, where there are likely to be high concentrations of people.

David Strayer is a psychology professor at the University of Utah. His discipline is human factors and ergonomics, and he has done extensive research on distractibility. In 2006, he conducted his third scientific study of the effect of cell phone use on motor vehicle operators. Having concluded in prior studies that cell phone use clearly degrades driver performance, Strayer set out to quantify the degradation by comparing cell phone use with alcohol impairment, a known risk prohibited by law in the United States. As did the UK researchers, Strayer used a high-fidelity driving simulator to compare the driving performance of cell phone users with those impaired by alcohol at the legal limit (0.08% weight/volume). Consistent with the UK study, Strayer concluded that "[w]hen driving conditions and time on tasks were controlled, the impairments associated with using a cell phone while driving can be as profound as those associated with driving while drunk."[11]

Strayer acknowledges that drivers have always been subjected to distractions – eating, applying makeup, listening to the radio – but concludes that they are more cognitively engaged in cell phone conversations, and over a longer period of time.[12] Furthermore, his research shows that practice does not reduce the distractibility associated with cell phone use.[13]

In 2009, Strayer conducted another study, which confirmed the common sense notion that sending and reading text messages is more distracting than talking on a cell phone. Again, a driving simulator was used under highly controlled conditions. The resulting data showed that "the crash risk attributable to text messaging while driving is quite substantial," and "text-messaging drivers display a pronounced impairment in control."[14]

Strayer found significant and specific differences between cell phone use and texting while driving. Cell phone use employs a "sharing model" of attention, where the driver's attention is concurrently devoted to both driving and talking on the cell phone. By contrast, texting employs a "switching model" of attention, "in which attention is allocated in large part either to driving or to text messaging."[15] Drivers pay a substantial price in attention for the switching model. Strayer explains:

> When drivers have switched their attention to the text messaging task, that is, composing or reading or receiving a message, their reaction times to braking events are substantially higher, reflecting a substantial cost for task switching.

In the final analysis, Strayer concludes that not only does text messaging have a negative impact on driving performance, but the impact "appears to exceed the impact of conversing on a cell phone while driving."[17]

In September 2009 the Federal Motor Carrier Safety Association issued the results of its study entitled "Driver Distraction in Commercial Vehicle Operations."[18] Among the findings of this study was that texting by the operators of commercial vehicles increased the risk of a safety-critical event by staggering 23.2 times![19] Texting drivers took their eyes off the forward roadway for an average of 4.6 seconds during the six second interval immediately preceding a safety critical event.[20] These findings prompted President Obama to issue an executive order forbidding federal employees from texting while driving government-owned vehicles; using cell phones provided by the government while driving; or using a cell phone while driving a privately owned vehicle on government business.[21] Furthermore, on January 27, 2010 the FMCSA enacted a regulation prohibiting the use of electronic devices for texting by commercial motor vehicle operators while driving on public roads.[22]

Civil Liability

The explosive penetration of cell phone technology into the fabric of our society, its pervasive use by motor vehicle drivers, and the well-documented distractibility effects of talking and texting on cell phones – all create tort law issues that simply did not exist two decades ago. Consider three of those issues:

Is cell phone use while operating a motor vehicle a tort or merely the cause (or evidence) of a tort?

Is cell phone use while operating a motor vehicle willful and wanton conduct – analogous to alcohol impairment – sufficient to sustain a claim for punitive damages?

When and under what circumstances does mobile talking or texting change the rules of vicarious liability and respondeat superior so as to make an employer liable for the acts of its employee?

Cell Phones and the Law of Negligence

Negligence is the failure to use ordinary care, which is the care that a reasonably prudent person would use under the same or similar circumstances.[23] Ordinary care includes a duty to keep a lookout and pay attention to one's surroundings. Significantly, for purpose of this analysis, a person is negligent if he looks but does not see that which a reasonably cautious person would have seen under the same or similar circumstances.[24]

Thus, the operator of a motor vehicle has a duty to keep a reasonably careful lookout for traffic, commensurate with the circumstances.[25] This includes anything and everything that comes within the driver's field of vision, both direct and peripheral.[26] When a driver is inattentive or distracted behind the wheel, he has breached his duty to keep a careful lookout.[27]

While using a cell phone behind the wheel of a motor vehicle is dangerous, using the cell phone is not itself the tort; rather, the tort is failing to pay attention, and cell phone use may be a cause (or the cause) of the driver's inattention and consequent tortious act. In most cases cell phone use will be evidence of a driver's negligence.[28]

Evidence of negligence is important when the negligence is not self-evident. For example, simple rear end collisions are uncontroversial: a driver fails to maintain an assured clear distance, and the cause for failing to do so is largely immaterial. The same is true with failure to yield cases. If a driver runs a stop sign and causes a crash, negligence is normally established. The fact that the driver failed to heed the stop sign because of cell phone use is arguably immaterial in terms of negligence and proximate cause.

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Negligence

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Consider, however, more nuanced scenarios. Assume the defendant in the rear end collision claims the other driver "cut-off" his assured clear distance by suddenly pulling in front of him. Or suppose he claims a sudden medical emergency. Establishing that the defendant was using a cell phone at the time of the collision would be evidence that the cause of the collision was actually the defendant's inattention. Similarly, assume that there is a head-on collision with no witnesses. Each driver asserts the other went left of center first. Correspondingly, each driver claims he made a reflexive maneuver in response to the first driver. Neither driver can meet his burden of proof. However, establishing that one driver was using a cell phone at the time of the collision is evidence of negligence – and in a case where other evidence is inconclusive, that could tip the scales for one of the parties.

Many jurisdictions around the country have enacted statutory bans on cell phone use while operating a motor vehicle. There are three types of bans: (1) a ban on texting, (2) a ban on hand held cell phone use (which would also include a ban on texting) and (3) a ban on all cell phone use. In many jurisdictions, when a statute regulates the operation of a motor vehicle with an aim toward promoting public safety, a violation of that statute constitutes negligence per se.[29] So, in those jurisdictions banning some form of cell phone use while driving, using a cell phone in the prohibited manner may itself be the negligent act, not just evidence of negligence. Nevertheless, it will still be necessary to prove that the cell phone use was a proximate cause of the harmful occurrence.

A very recent decision out of an Indiana appellate court puts the most interesting spin yet on cell phone use constituting direct negligence. In that case, a mother called her daughter on the daughter's cell phone. The daughter answered, and it became known to the mother that the daughter was driving a motor vehicle while talking to the mother on her cell phone. During the conversation, the daughter caused a motor vehicle collision. Creating a new cause of action, in what appears to be a case of first impression, the court held the mother directly liable in negligence for knowingly "distracting" her daughter by talking to the daughter on the daughter's cell phone while she knew the daughter to be driving.[30]

Establishing a Claim for Punitive Damages

In Ohio, a plaintiff may seek an award of punitive damages if the tortfeasor acted with malice. Malice may be established by proving, by clear and convincing evidence, that the defendant acted with a conscious disregard for the rights and safety of another person in such a manner that there was a great probability of causing substantial harm.[31]

This is a high burden of proof. Nonetheless, two arguments may be advanced in cell phone cases to establish malice sufficient to have the issue of punitive damages submitted to a jury. Both arguments are premised on the scientific research showing a very high level of distractibility and cognitive impairment resulting from cell phone use while operating a motor vehicle.

The first argument is more likely to be successful where the specific use of the cell phone was texting rather than talking. As noted previously, it has been shown that texting while driving results in a higher level of cognitive impairment than talking. Furthermore, there is a fairly compelling argument that any motor vehicle driver should know (it is common sense at its most fundamental level) that texting is highly distracting. Correspondingly, any behavior that is highly distracting carries a high risk of causing a collision. Thus, it may be argued that texting behind the wheel involves a conscious decision to engage in conduct that has a high probability of causing substantial harm to others. And that, of course, is the definition of malice.

The second argument is premised specifically on the scientific research showing that using a cell phone while driving results in a level of cognitive impairment equal to that caused by alcohol intoxication at the legal level. Again, the issue is malice, which is necessary to make a claim for punitive damages. In 1994, the Ohio Supreme Court decided *Cabe v. Lunich*, holding that where a negligent driver was under the influence of alcohol at the legal limit, and the alcohol impairment was a proximate cause of the collision, a jury question was established as to the existence of malice, and the question of punitive damages could be submitted to the jury.[32] Accordingly, the argument is that if cell phone use while operating a motor vehicle is tantamount to alcohol impairment at the statutory limit, *Cabe v. Lunich* requires a finding of malice and submission to the jury on the issue of punitive damages.

Finally, in a recent development, a Texas jury returned a $21 million verdict after finding the defendant "grossly negligent" for texting while driving and causing a fatal crash. The evidence showed that the defendant made 7 phone calls and sent 15 text messages during the 45 minutes he was on the road prior to the accident! Of the $21 million verdict, $20 million was for punitive damages, based on a willful and wanton standard similar to that in Ohio.[33]

Vicarious Liability

Not only have cell phones changed the way people communicate and interact with each other, they have changed the way we do business. Where laptop computers have enabled workers to establish virtual offices in their homes, hotels, and coffee shops all over the world, cell phones have enabled workers to establish virtual offices in their cars, trucks and SUVs. This necessarily changes the underpinnings of rules that have governed vicarious liability and respondeat superior for more than a century.

In order for an employer to be liable for the negligence of an employee, the employee must be in the course and scope of his employment at the time of the tortious act. Much has been written about what activities are deemed to be in the course and scope of one's employment. However, suffice it to say that the activity must be of the type that advances the interests of the employer, generally with the knowledge and consent of the employer.

Travel to and from a fixed place of employment – subject to limited exceptions – has always been held to be outside the scope of one's employment. This is known as "the coming and going rule," and it means that the average worker's commute between home and office is personal travel, not business travel. However, the pervasive use of cell phones by commuting workers to conduct business while travelling to and from work "changes the game" with respect to the coming and going rule.

The wheels of justice grind slowly, and so it is with the judicial consideration of new legal issues created by cell phones. Not surprisingly, there is a paucity of legal authority addressing a phenomenon that is barely two decades old. Nonetheless, we can find guidance in the case law that is slowly emerging on the subject.

Some courts have held that an employer may be vicariously liable for damages caused by an employee while using a cell phone for business purposes on the commute to or from work.[34] For example, a Georgia appellate court in *Hunter v. Modern Continental Const. Co* held that in light of evidence that an employee was on a work-related cell phone call while commuting to work, a jury question existed as to the employer's vicarious liability.[35] The Georgia court acknowledged the "coming and going rule" but explained that "special circumstances" may exist while an employee is traveling to or from work that can nevertheless expose the employer to liability. The court held that the evidence of the tortfeasor's cell phone call to a co-worker at the time of the accident altered the coming and going analysis. The fact that the employee was commuting to work did not absolutely preclude the imposition of vicarious liability under the theory of respondeat superior.

Similarly, another Georgia appellate court held, in *Clo White Co. v. Lattimore*, that an employer could be vicariously liable for its employee's work related cell phone use.[36] In *Clo White*, an employee was making phone calls to his office while commuting to work and caused a motor vehicle collision. The Georgia court held that evidence of a work-related cell phone call at the time of an accident, while an employee was traveling to work, created a jury question regarding the employer's liability for the employee's negligence. Evidence that the employee-tortfeasor's phone calls were work-related, the court said, supported a rational conclusion that the employee was engaged in his employer's business, regardless of the fact that he was within the parameters of the coming and going rule. The court explained that "[t]his was a special circumstance whereby the employee may have actually been conducting some manner of company business at the same time that he was on his way to work when the accident occurred."[37] Under the rationale of *Clo White* and *Hunter*, the coming and going rule will not automatically relieve an employer of vicarious liability if there is evidence that the cell phone use at issue was in furtherance of the employer's business.

Some courts have referred to such "special circumstances" as the "dual purpose" exception to the coming and going rule, placing a commuting employee within the scope of employment. Under the dual purpose exception, even if an employee is traveling to or from work when he causes an accident, the employer may be held vicariously liable if the employee-tortfeasor is furthering a business interest of the employer. Thus, the commuter has two purposes: driving to or from work and conducting work-related tasks. In *O'Toole v. Carr*, a New Jersey Superior Court held that "[w]here, at the time of the negligent conduct, the employee is serving an interest of the employer as well as his or her private interest, a 'dual purpose' is established and the employer is vicariously liable."[38] Likewise, in *McClelland v. Simon-Williamson* Clinic, an Alabama appellate court recognized a "dual purpose" exception to the coming and going rule.[39]

Based upon the rationale of the limited case law to date, it can be expected that most jurisdictions will follow the trend to apply the "special circumstances" ("dual purpose") exception to the coming and going rule with regard to cell phone use. Checking voicemails, on the other hand, may be construed as a personal activity. Nonetheless, depending on the degree to which the activity furthers an employer's business, checking voicemails could conceivably be interpreted as a "special circumstance" that places a commuting employee-tortfeasor within the scope of her employment. This argument would be more compelling if, for example, the employee was expecting a time sensitive message with an urgent business purpose, and was checking voicemails for that specific purpose.

Not surprisingly, courts have held that the mere use of a company owned cell phone, even while operating a company vehicle, is not itself sufficient to impose vicarious liability upon an employer. Rather, the call must have a tangible business purpose that conveys benefit upon the employer, and if this is the case, it is largely irrelevant who owned the cell phone or the vehicle.[40]

Finally, it is worth noting that a policy argument may be advanced for imposing vicarious liability upon an employer arising from an employee's cell phone use. In the case of *Osborne v. Lyles*,[41] the Ohio Supreme Court considered favorably a policy objective analysis previously enunciated by the California Supreme Court.[42] The issue in both cases was whether a police officer was in the course and scope of his employment when he engaged in tortious activity. In this context, the Ohio Supreme Court acknowledged (without adopting) the following policy objectives for holding an employer vicariously liable for its employees' negligent conduct: "(1) to prevent recurrence of the tortuous conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury."[43]

While the Ohio court recognized these three policy considerations with favor, the court did not specifically adopt them. Nonetheless, they could serve as the starting point for a policy objective rationale to hold an employer vicariously liable in a cell phone case. The argument, based on the first prong of the policy analysis, would be that, given the dangers posed by cell phone use by motor vehicle operations, and the foreseeability that such use can cause substantial harm, there is a legitimate policy objective in imposing vicarious liability on employers. The policy objective would be to educate employees on the dangers of cell phone use and establish policies prohibiting the use of cell phones (company owned or otherwise) for business or personal use in a company or personal vehicle.

Direct Liability of Employer for Employee's Cell Phone Use

Vicarious liability occurs when the negligence of the employee is imputed to the employer. The employer itself is not negligent but rather is held accountable for the negligence of its employee. This is the doctrine of respondeat superior, or "let the master answer for the servant."

At least one court has suggested, however, that liability may be imposed directly on the employer for damages caused by an employee while using a cell phone owned and provided by the employer.[44] The argument is that an employer is negligent in providing a cell phone to an employee for the purpose of making business calls while operating a motor vehicle when it is foreseeable to the employer that this poses a high risk of harm to others. An alternative theory of direct liability is that the employer provided a cell phone to the employee without establishing a clear policy that a company cell phone should never be used while operating a motor vehicle. In such a case of direct liability, the employee need not be in the course and scope of her employment for liability to attach to the employer.

Research demonstrates that cell phone use is distracting, and that texting is more distracting than talking. The more distracted a driver becomes, the higher the risk of an accident. At least two studies equate the level of distractibility of cell phone use with operating a motor vehicle while impaired by alcohol at the legal limit. This raises the question of whether using a cell phone while driving may constitute malice, for the purpose of imposing punitive damages.

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Furthermore, cell phones have enabled workers in almost every line of work to conduct the business of their employers in motor vehicles. This undermines the basic premise of the "coming and going rule" and exposes employers to vastly enlarged vicarious liability for the negligence of their employees outside of the "traditional" course and scope of employment.

These are issues that should be considered by plaintiff's lawyers in every vehicular collision case. Likewise, employers and their counsel should consider their duties (and resulting exposures) and implement clear policies with respect to employee cell phone use while operating motor vehicles. In the coming years, more and more courts will be addressing these issues, and the judicial inclination is likely to disfavor the cell phone user and the employer that ignores its duties to establish clear polices for cell phone use.

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21. Press Release, United States Department of Transportation, Office of Public Affairs, DOT 156-09 (October 1, 2009), available at http://www.dot.gov/affairs/2009/dot15609.htm.
22. Regulatory Guidance Concerning the Applicability of the Federal Motor Carrier Safety Regulations to Texting by Commercial Motor Vehicle Drivers, 75 Fed. Reg. 4,305–07 (Jan. 27, 2010) (to be codified at 49 C.F.R. ch. III).
23. 1 CV Ohio Jury Instructions 401.01.
24. 1 CV Ohio Jury Instructions 401.05.
25. *See State v. Ward* (1957), 105 Ohio App. 1, 10, 150 N.E.2d 465 (describing a driver's duty when operating a motor vehicle as "maintaining a lookout in the same manner as would a reasonably prudent person under the same circumstances").
26. *See, e.g., Bell v. Giamarco* (1988), 50 Ohio App.3d 61, 64, 553 N.E.2d 694 (asserting that the defendant "was charged with the duty to keep a lookout, not only in front of his vehicle, but to the sides and the rear as the circumstances warranted").
27. *See Shortridge v. Dept. of Public Safety* (Ohio Ct. Cl. 1997), 90 Ohio Misc.2d 50, 54, 696 N.E.2d 679 (recognizing that Ohio common law imposes a duty upon motorists "to observe the environment in which one is driving," and holding that because the defendant drove through an intersection without paying attention to traffic conditions, she was negligent).
28. *See Cleveland v. English*, Cuyahoga App. No. 92591, 2009 WL 3043572, 2009-Ohio-5011, at ¶18 (holding that because a witness observed the defendant talking on his cell phone at the time of the accident, sufficient evidence was presented that the defendant's full time and attention was not on his driving).
29. *See, e.g., Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96, 269 N.E.2d 420 (recognizing that the violation of R.C. § 4513.03—mandating that "every vehicle upon a street or highway during the time from one-half hour to sunset to one-half hour before sunrise shall display lighted lights"—constitutes negligence per se).
30. *Buchanan ex rel. Buchanan v. Vowell, No. 49A02-0909-CV-873, 2010 WL 1904572 (Ind. Ct. App. May 12, 2010.*
31. *See Calmes v. Goodyear Tire and Rubber Co.* (1991), 61 Ohio St.3d 470, 473, 575 N.E.2d 416; *Preston v. Murty* (1987) 32 Ohio St.3d 334, 335, 512 N.E.2d 1174; *Roberts v. Mason* (1859), 10 Ohio St. 277, 279–80.
32. Cabe et al. v. Lunich (1994), 70 Ohio St.3d. 598, 640 N.E.2d 159.
33. *Small v. Vestal, No. 08-01-18000-CV (Tex., Robertson Co. Dist. Ct. Mar. 17, 2010).*
34. Further, it has been suggested in commentary that "[w]ith the advent and proliferation of cellular phones, employer liability for commuting collisions is now, not only possible, but likely." H.J.A. Alexander, *Who Maimed Rhonda? Employer Liability—Cellular Phone Respondeat Superior,* 1 Ann.2005 ATLA CLE 771, 771 (July 2005).
35. *Hunter v. Modern Continental Const. Co., Inc.,* 652 S.E.2d 583, 593 (Ga. App. 2007).
36. *Clo White Co. v. Lattimore,* 590 S.E.2d 381 (Ga. App. 2003).
37. *Zehe v. Falkner* (1971), 26 Ohio St.2d 258, 261, 271 N.E.2d 276.
38. *See O'Toole v. Carr*, 786 A.2d 121, 126 (N.J. Super. 2001), citing *Gilborges v. Wallace,* 396 A.2d 338 (N.J. 1978)
39. *McClelland v. Simon-Williamson Clinic, P.C.,* 933 So.2d 367, 370 (Ala.Civ.App. 2005),
40. *See Easterling v. Man-O-War Automotive, Inc.,* 223 S.W.3d 852 (Ky. Ct. App. 2007); *Steele v. Cingular Wireless*, No. A112870, 2007 WL 2456104, at *3–4 (Cal. App. 1 Dist. Aug. 30, 2007); Hoskins v. King, ___ F. Supp. 2d ___, 2009 WL 3878244 (D.S.C. 2009); *Miller v. American Greetings Corp.*, 161 Cal.App.4th 1055, 1064–65, 74 Cal.Rptr.3d 776, 784 (2008).
41. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 587 N.E.2d 825.
42. *Mary M. v. Los Angeles*, 814 P.2d 1341, 1343, 285 Cal.Rptr. 99, 101 (1991).
43. Osborne, 63 Ohio St.3d at 332, citing *Mary M.*, 814P.2d at 1343.
44. See Hoskins, 2009 WL 3878244.

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One Out Of Thirty Attorneys Loves Timekeeping

By Matthew Krejci

A year ago, we embarked on an extensive research project assessing the management pains in the legal profession. One aspect of the research involved detailed interviews of thirty attorneys to identify developing trends. Shortly after starting our interviews, it became apparent timekeeping was one of the top management pains for attorneys. The first 29 interviews gleaned the following quotes:

"Timekeeping is the most unpleasant experience of being a lawyer."
"Every attorney hates timekeeping."
"Timekeeping is the worst thing I faced in my law firm and was one of the reasons I quit and took a job with the state requiring no timekeeping!"
"The practice of billing time makes liars out of honest people."
"It is inevitable time is lost every day."
"Thinking is hard to capture on a time sheet."
"Excessive time is lost each week due to having to record time."

Then we interviewed Attorney #30. With genuine excitement, he stated: "I enjoy timekeeping! It is the opportunity to showcase my talents for my clients. I love entering the details into our billing software. It's my livelihood. If I don't bill, I don't get paid." Imagine our shock when we realized he was not kidding. So why do 29 of 30 attorneys share the opposite view?

Timekeeping creates angst among attorneys, and is a symptom caused by the infamous billable hour system. Without the billable hour, there would be no .2 phone call, followed by a .3 conference, broken up by .2 in the restroom, continued with a .5 of reviewing complaint, finished off by a .2 of writing things down frantically on a steno pad. Can you imagine the sense of freedom from an alternative flat fee billing arrangement whereby you wouldn't have to record any of this, and you'd still get paid for your hard work on a case? You could even take a .3 in the restroom! Eventually, significant portions of the legal practice will move to alternative billing methods, but until that day, we must make do with what we have and learn from Attorney #30's timekeeping exuberance.

No two attorneys keep their time in the same way. Some scratch it out on a steno pad, some dictate it for their legal assistant, and some enter it directly into a software billing system. In the majority of cases, it is reviewed at least one time by another attorney before it goes out to the client. Inevitably there is time lost in the process. The key, according to Attorney #30 is to track your time contemporaneously. Each and every one of us can learn to record our work as it is completed.

Most law firms do not spend a lot of time training their new associates on the process of timekeeping. It does not take long for a negative attitude toward the entire process to formulate. Attorneys quickly realize that if they are too efficient in their work, they get penalized and may hear about their low billable hours from their superiors. If the attorney is not efficient enough, their time will be cut and opportunities for advancement may be diminished. Furthermore, clients can be overcharged for the work of less than efficient lawyers. Firms will benefit from teaching their young associates the effective timekeeping techniques and positive outlook successfully implemented by Attorney #30.

Many attorneys don't even realize the way they are keeping their time is inefficient. We interviewed one attorney who bragged to us about his effective process. "I keep a grid sheet at my desk and when I do something I write it down. Every three or four days I dictate my time for my secretary. After she types it up, I review it. After I give the okay, my secretary enters it into our billing software system." This "effective" process requires a single time entry to be written or typed a total of three times and then reviewed three times before it lands in a pile on a partner's desk to be reviewed again. It is easy to see how attentive but ineffective timekeeping can become cumbersome rather than helpful.

Thank goodness for Attorney #30! These strategies will help attorneys stay focused, organized, and profitable while providing clients with exceptional services.

Attorney #30's Five Tips for Efficient Timekeeping

1. Keep time contemporaneously with each task performed and in adequate detail: Carry the pen and pad with you at all times. You learned to carry the cell phone and as a business tool the timesheet is just as important.

2. Itemize your time: This will protect you later if you are forced to explain yourself to a client or to the court when opposing counsel charges your claim for attorney fees is exorbitant. Some clients require block billing, so obviously if a client provides guidelines you need to keep those in mind.

3. Record your time once: Avoid confusing yourself or your assistant by not taking notes on separate pieces of paper and then trying to coordinate the details.

4. If your firm offers a timekeeping software program, use it! If your personal computer contains the firm's billing software, you have no excuse for not entering it yourself. It shouldn't take any more time than scribbling it out on a piece of paper and it saves your secretary time in having to decipher your notation. Make a point to have your time entered before you leave for home each day.

5. Prior to submitting your time, review it once for mistakes and spelling errors: After you have done so, your timesheets are ready to go to your supervisor or client and were only recorded and reviewed once. Instead of losing two billable days per month as one attorney we interviewed claimed, you may only lose a small portion of one day per billing period.

With an overhaul of your timekeeping process, you too may learn to love timekeeping. It sure would make life easier to share the outlook of Attorney #30. Use timekeeping as a way to showcase your talents….and to get paid.

By Matthew Krejci,
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Good Ol' Buckeye State And Its Challenging Trails

By The Honorable David E. Cain

After twenty-three years of backpacking in mountain ranges at points south and southeast, it was about time we tried some trails in Ohio.

We deserved a break, a chance to stroll gracefully over the rolling hills along the southern edge of the Buckeye State.

Four days of R&R instead of busting our legs and lungs on the wicked slopes of the Smokies or somewhere similar.

This will be a walk in the park.

Wrong!

Straight up and straight down. Nothing subtle, crooked or evasive. Head on. Maybe only five or six hundred feet at a time, but nearly always straight up or straight down. The trail never saw a hill, a knoll or even a little rise without going directly over the top of it.

Even George Luther, the Columbus attorney who suggested the venue and accompanied us, couldn't believe the terrain despite having grown up in nearby Portsmouth and having recently worked all over the country as a park ranger for the National Park Service.

The site was the Shawnee State Park located in a 63,000-acre forest near the banks of the Ohio River in southwestern Scioto County. A website for the park says it is nicknamed "The Little Smokies." And, except for the lack of rhododendron, it looked and felt like the Smokies – heavy with hemlock interspersed by hardy stands of oak and hickory while decorated by a variety of flora and fauna including several types of wild orchids such as the elegant pink Lady Slippers. Ridges pile on ridges until disappearing over horizons in a bluish haze.

"But at least in the Smokies they know what switchbacks are," my brother, Greg, commented as to the boldness of the trails. He lives in Raleigh, N.C. and reported that several friends had asked him where we were hiking this year. His response of "Ohio" was met with snickers or disbelief.

Greg, my late brother-in-law David Shooter, and I began backpacking together in 1988. We have missed weddings, births and international news bulletins, but never a four-day backpacking hike in the mountains in late April.

In the early '90s, we began referring to these hikes as "death marches" and made it clear that any male who was thinking about marrying into one of the families would have to take the acid test – join us for a "death march."

My grandson's first trip carrying a backpack was three years ago at the age of seven.

The size of the group has expanded and contracted over the years – as few as the original three and as many as fourteen. This year we had eleven, including my son, Alex, son-in-law John Boley, and their friends, Matt Eshom and John Williams of Columbus.

Our cousin, Stan Jones, of St. Louis, has participated in most of the last 20 years and often brings friends such as Nick Riggio who has joined us several times, including this year, since 2002.

Jim Deloatch of Raleigh came with my brother for the umpteenth time. Chris Ruess a former Navy Seal and a marathon runner was a welcome addition from St. Louis.

As usual, we met at a public campground on Wednesday evening and headed down the trail Thursday morning. We took the Shawnee Backpack South Trail. The map showed it to be about 23 miles, but we suspected it became a few miles longer after wildfires caused detours to be blazed last year. The weather was great and plans called for only a five-mile trek on Thursday. So, we didn't complain too much about the steepness of the trail or the regular significant changes in elevation. We thought it was just an unusually hard portion of a trail that would be much friendlier tomorrow.

We arrived at a designated camping area and actually found an outhouse privy and a hydrant offering fresh drinking water. Both were the first we had ever seen in 23 years. But they are available in nearly all of the eight campsites along the 60 miles of trails in Shawnee. The water comes from underground tanks located up hillsides from the hydrants and are serviced by the Division of Forestry which maintains the entire park.

Although the forest is known for copperheads and timber rattlesnakes, we had no sightings. That and an abundance of windfall firewood are advantages of hiking early in the year.

A disadvantage is increased chances of rain and that reality hit hard on Friday morning.

Hiking all day in the rain would not have been so bad except the trails were just as steep and now they were often narrow and muddy.

"It's pretty bad when you're climbing a hill and your knees are touching the ground in front of you," George quipped.

"I climbed out of the Grand Canyon once upon a time. And it wasn't this bad," I offered. "Can't believe we're in Ohio," was a common comment.

Nick described the trail as "a series of nasty surprises" after we got to a campsite and, thankfully, the rain stopped.

Nearly everyone confessed to having taken a fall – a frightening and rare experience for a seasoned backpacker. George declared that the grades of the trails were worse than the Smokies. He ought to know.

He retired from the practice of law in 1999, suffering temporary "burn out" after 160 homicide cases of which 30 had capital specs.

He took courses in backpacking, rock climbing and sea kayaking to become an Outward Bound leader in the boundary waters of Minnesota in 2002. In 2003, he worked for the Appalachian Trail Conference as a ridge runner, hiking five days a week, ten miles a day, to help hikers and give information on outdoor etiquette.

From 2004 through most of 2007, George worked as a park ranger for the National Park Service, leading hikes and helping staff visitors' centers from the Smokies, to Rocky Mountain National Park, the Outer Banks, and various parks in California.

In the fall of 2007, he returned to law practice in Columbus because he now has two grandsons living here.

Friday night's respite from the rainfall also gave Stan a chance to stir up a pot of sassafras tea. With a little sugar, it was quite tasty.

Saturday's weather was nice, but the trails continued to challenge (seven or eight miles) and not long after we reached the campsite, severe thunderstorms set in and lasted well into the night.

The next day we packed up our wet gear, joined up with the Buckeye Trail and hiked another five or six miles to complete the loop.

Someone asked Matt if he worried about the lightning the night before as he slept, as usual, in a covered hammock stretched between two trees. "I was in the safest spot there," he responded, "suspended in air with no conductor to the ground."

Next year we'll probably go back to a mountain range for an easier pathway. We're thinking about the Ozarks.

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The Honorable David E. Cain
Franklin County Common Pleas Court

Classified Marketplace

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