COLUMBUS BAR

Lawyers QUARTERLY

WINTER 2010

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JUST TAKE ONE!

"Black bird singing in the dead of night
Take these brokin' wings and learn to fly,
All your life,
. . .
You were only waiting for this moment to be free.
Black bird fly,
Black bird fly,
Into the light of a dark black night."

— The Beatles, The White Album, 1968

Elizabeth J. Watters,
Columbus Bar Association President

By Elizabeth J. Watters

On my desk right now is my first draft of this President's column. The Columbus Bar President only gets four columns these days, so you really have to make them count and get to the point of what you want to share with the association's members. My first draft is filled with a wonderful accounting of the Columbus Bar's new initiatives and recent successes: the great start to our new LGBT Committee; the fabulous response to our CLE Master Series, which is selling out; our plans for a new, re-energized Martin Luther King celebration event; the changes made to the Columbus Bar's Code of Regulations; and the commitment of the Columbus Bar's Managing Partners' Diversity Initiative to the minority clerkship program, even in tough economic times.

However, like most of you, I recently received an open letter from the Chief Justice, Attorney General and others, asking attorneys in Ohio to take on at least one pro bono case this year because of the great unmet need in Ohio. This call to action was simply too important to ignore. As a result, I scrapped my first draft of this article and, instead, am using the space I have to ask you to support the Association's new pro bono program titled "Just Take One."

Developed by the Columbus Bar's Pro Bono Committee and approved by the Board of Governors last June, the Just Take One program is designed to encourage our members to accept one pro bono case this year in an area of their choosing. I realize that this subject matter is difficult for many attorneys. We all have tough jobs and demanding lives, and many of us have had a client or two that can't pay their bills and becomes "pro bono" by default. But, the economy has only made the justice gap that exists in this country even wider and the needs of the community greater. Pro bono volunteering is an opportunity for you to expand your legal knowledge and skill set, to gain valuable courtroom experience, while at the same time helping your community and many low income Central Ohioans gain access to justice.

The Legal Aid Society of Columbus, the Equal Justice Foundation, the Columbus Bar Association's Lawyers for Justice Program – they desperately need your support and just a few hours of your time. Not a big commitment. Just one pro bono matter. A single night at the Interfaith Legal Clinic, a day working on the Pro Bono Tenant's Advocacy Project, a federal or state appeals argument, a legal matter in your area of practice – these are just a few of the many options that are available. The most important thing is that you do it – just volunteer one time this year.

Thanks to Past President Sally Bloomfield and a dedicated Columbus Bar staff, the Columbus Bar has some of the best, most user-friendly pro bono resources in the country that members can go to, to match talent and time with need, to help you contribute in a meaningful and satisfying way. If you are willing to call the Columbus Bar, we can find you the pro bono volunteer project that is right for you. I hope you will join me and just take one this year.

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NOM DE AVOCAT

By Bruce E. Campbell

"With a name like yours, you might be any shape, almost."

— Lewis Carroll,
Through the Looking Glass

Names, like wildebeests, migrate in great herds with the changing seasons. Stragglers molder in the dust.

As a boy, I knew Gertrudes and Hatties, Arnolds and Karls. In college, there were Barbaras and Alices who dated Floyds and Freds. During the Aquarius years, offspring were sometimes given tags like Moonglow and Doobie. Since then, the decades have yielded a succession of babies named Jennifer, Christopher, Nicole, Jose, Maria, Ashley, Joshua, Brittany, Justin, Juan, Sofia, Brandon, and, Ella. About the only contrarian strain to à la mode naming orthodoxy are many African-American families who, when pinning names on their progeny, seem to place a refreshingly higher value on polyphonic lilt and imagination than trendiness.

Modishness is not limited to labeling people. Automobile appellations have gone from simple descriptives ("Model T"), through a long succession of ferocious and/or fleet animals ("Bearcat," "Jaguar," "Impala," "Thunderbird," "Ram," – oddly no "Wombat"). Also popular were tony locales ("Bellaire," "Catalina," "Seville," "Obetz?"). At the moment, manufacturers seem to be trying to out-pithy one another in coming up with new descriptors ("Vue," "Edge," "Flex," "Fit," "Versa" but, sadly, no "Vice").

Sports teams have moved from down-to-earth titles (the "Rangers") to mighty forces of nature (the "Avalanche," the "Wild," and the "Flames"). Eventually, some team somewhere will call itself the "Apocalypse." Come to think of it, one came close in 1922 when the Notre Dame football team's offensive backfield (those being the days of the T formation) was dubbed by a florid sportswriter "The Four Horsemen," and the name stuck.

Housing projects, be they composed of faux castles or genuine hovels, once had titles like "Bayside Estates" (150 miles from any body of water larger than a drainage ditch). Now, – apparently, by force of law – they are universally called "The Something at Something Else" (The Illusion at Conrad's Lagoon," "The Vanishing Nest Egg at Madoff's Double Cross).

Be the object software, pharmaceutical, clothing, beer, communication device, combat unit, or pet, it has to have a differentiating handle. The motive force behind all this diddling around with tags seems to be the hope of imparting to the named entity an aura of qualities which the thing or person may or may not possess – qualities like trustworthiness, intelligence, swiftness, brute strength, health, comfort, sexiness, individuality, status, to name a few. Depressing as it is, we actually fall for this horse pucky.

The learned professions have not embraced the branding fervor until recently and only then with some reticence. The old guard rails against the ignominy of it all, but financial realities inexorably drive even the stodgiest into the name-marketing circus.

Architects, being pathologically avante garde, started straining at the label leash first. Perhaps in deference to Louis Sullivan's admonition that "form follows function," collectives of these drawing board types began using creative monikers fairly early on. Current examples in the local phone book are "Arccon Integrated" (architecture/construction- get it?) and "PH7 Architects" (perhaps suggesting some neutral balance between the acidic and the alkaline).

The Docs mostly have stuck with standard formulations including their specialties, but a few innovative twists have crept in. "OrthoNeuro," and "DECO" (Diabetes & Endo. Cent. Of Ohio) show up in the yellow pages. A clutch of accounting firms have gone to using just initials, but that is about as edgy as the spreadsheet gang gets.

Then, there are the lawyers clinging with vice grips to the grounding rod of tradition. Many firms are still using titles that hang on the letterhead like a stringer of lead sinkers and flow from the receptionist's mouth like Gorilla Glue® — names like Fleckelston, Boylesteader, Jimpwag & Sump, LLP (all named partners, of course, being long dead).

To be sure, lawyers labor under ethical strictures not imposed on sellers of ShamWow®. They are constrained, under Ohio Rules of Professional Conduct 7.1 and 7.5 from using any firm name that is "false or misleading." They may not use a "trade name," a firm name that is misleading as to the identity of the lawyer(s) in the firm, or a firm name containing the name of someone not actually a lawyer in the firm (with an exception for the dear departed, of course). They also cannot string together names that imply a partnership or other organization when there is none. Neither can they claim ghost "associates." Gov. Bar R. III Section 2 sets up additional naming requirements for LPAs, LLCs, and legal clinics.

The Board of Commissioners on Grievances and Discipline has opined on the issue of firm names on 14 occasions to date. These helpful advisories can be found at www.sconet.state.oh.us. Of particular note are Opinions 91-4 and 97-1 (use of trade names or franchised names), 94-4 (differentiating web site addresses from regular firm names), and 06-2 (use of "Law Group," etc.). If you are in the process of creating or redoing the rubric under which you hold yourself out as a lawyer, all of these Opinions bear reading. So too, does *Cincinnati Bar Ass'n v. Heisler*, 113 Ohio St.3d, 447, 2007-Ohio-2338 (disciplinary sanctions for operating a law firm under a trade name).

Maybe, just maybe, there is a little oxygen left somewhere under this rubber sheet of nomenclature rules that apply to lawyers. Many of the main-line firms have come up with much-contracted versions of their original billings (show biz sense, not the invoice sense). These are then worked into creative, marketable logos. A few small firms have taken the bold step (yet unblessed by the Board of Commissioners) of ditching the ampersand and replacing it with the plus sign. Zounds! Surely, the Handbasket to Hades (located just east of Newark at present) will be departing soon with these rebels packed in the hold.

The sluices having been opened just a crack, what will be next?" Perhaps some legal assemblages will test the definition of "name" and use their given or nick names, like "Spike & Babs, LPA." Since firm designations need only include one individual's name, how about "Pugwillie & Assorted Toadies, LPA" or "Cranberger, + Fat Bald Guy + Two Nerds, LLC?" (assuming there is nothing misleading in these descriptions)? The possibilities are myriad.

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Ethics: *Personal Happiness and Professional Excellence*

By Chris Beck

What do ethics mean to you? Most people probably do not give this question much thought because the answer seems self-evident. However, if pressed to give a precise definition of what ethics encompasses, most people will only be able to give a vague generalization about being a good person. Why is it difficult to give a thoughtful answer when it seems like it should be so straightforward? If ethics is something that is so obvious, then why is the media bursting with stories of all sorts of people caught up in ethical scandals? A casual glance at a newspaper or a nightly news program will undoubtedly feature a story about some government official, corporate executive, local city council member, or even someone from the local church involved in an ethical controversy. These headline news reports have highlighted a widespread misunderstanding of what ethics actually is and how it fits into our lives.

Going back to antiquity, Aristotle suggested that ethics is a practical exercise undertaken for the purpose of achieving a deep and pervading happiness in our lives. This happiness, what the Greeks called eudaimonia, is not the same happiness we experience when we find $100 on the sidewalk. The happiness that results from living an ethical life is sometimes translated as "human flourishing." In this sense, the happiness derived from an ethical life is something much deeper and profound than the fleeting happiness each of us experiences during the normal course of a day. The joy of a new promotion will eventually fade and the happiness we experience from an exciting new purchase is never quite as fulfilling as we might hope it would be. It was this realization that led Aristotle, among a great number of other thinkers, to conclude that living for something beyond oneself is the key to lasting happiness. Therefore, ethics can be viewed not as a mere afterthought that is tacked on to our actions, but the engine that drives our daily decisions and our ultimate desire to experience the happiness that comes from a peace of mind in knowing that we are truly living with purpose.

Without going into a discourse on Aristotelian ethics, Aristotle explained that a person can achieve eudaimonia by living a life of virtue. It is in this connection between eudaimonia and living a virtuous life that we discover that ethics is the set of choices we make each day in order to move closer to happiness. While humans are imperfect and cannot be expected to act virtuously all the time, this goal can at least serve as a framework with which to structure our choices each day.

Arguably, a virtuous life is one based on serving other people because it shifts the focus of life away from instant personal gratification to solving a problem that someone else is unable to solve alone. While the practice of law may sometimes appear to be glamorous or a road to riches, the reality is that the law is a service industry at heart and attorneys, by choice, have elected to live a life of service to others. Attorneys, therefore, are in a perfect position in which to cultivate a life of virtue and ultimately set the stage for a deep sense of personal happiness. So why is it that there are so many unhappy lawyers?

As an extern in the Columbus Bar's ethics department, I have had the opportunity to see the trouble lawyers can get into for making unethical choices. Some of the stories that come across my desk are just sad and depressing while others are so utterly despicable that I wonder how a person can purposefully choose to mistreat a client so badly. But upon reflection, I believe that at the most fundamental level, the actions we take and the choices we make are all in an effort to be happy. Even the attorney who takes his client's money and does not do any work on the case, at some level, has made those particular choices in an effort to be happy. While misguided and seemingly without an ethical compass, the reasons behind most of these unethical actions can be traced to an incorrect understanding of how to obtain happiness. These unethical attorneys are blinded by the possibility of becoming wealthy at their client's expense or having lots of power and influence. They think that they will finally be happy and the desire is so strong they are willing to do terrible things to achieve it. I will concede that some attorneys find themselves in some pretty bad personal or financial situations which make it easier to rationalize the decision to act unethically. However, there are plenty of instances of attorneys who make poor decisions without an obvious reason beyond thinking that the short term gain in happiness will be worth the price paid. It never is.

While my time at the Columbus Bar is spent reading through grievances, the fact is that the intentions of most attorneys are in line with a desire to serve the client. Still, the legal field has recognized the tremendous power a lawyer has over a client and requires that lawyers take an oath to abide by a particular standard of ethical behavior. These guidelines are contained in the various codes of professional responsibility and often serve as the guide for how a lawyer should behave. For the most part, these rules are a more sophisticated codification of the principles we learned as children: do not lie, cheat, or steal. While serving as more a floor than a ceiling for ethical behavior, a lawyer can act within these guidelines, but not move any closer to finding that "human flourishing" Aristotle described. The key is not to view ethics in terms of "what things should I refrain from doing?" but rather, "how can I better serve the needs of the person before me right now?" This person could be a colleague, a judge, client, the person who cleans your building, or a family member. This road to human flourishing becomes clearer when ethics is viewed as countless opportunities to make someone else's life better, rather than a limitation on our own temptations to be selfish or underhanded. The rules in the various codes of professional responsibility are automatically met when we take the later view of ethics.

While life and the practice of law are certainly more complicated than can be presented in a brief article, the fact remains that each day presents us with countless opportunities to choose how we are going to treat each other. It is my contention that ethics is the choice we make to serve someone else instead of asking how much I can get away with and not get in trouble. Felix Adler may have said it best: "To care for anyone else enough to make their problems one's own, is ever the beginning of one's real ethical development."

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Chris Beck,
Columbus Bar Extern

Lawyers' Conduct in Depositions
PROFESSIONALISM APPLIES

By Frank A. Ray

Lawyers who conduct depositions in civil cases should respect the process as an extension of the courtroom. Recognizing that parties can use depositions in court proceedings,[1] lawyers should behave in a conference room as if they were in a court room and in the presence of the presiding judge.

Trial counsel are vested with a "power" to issue and serve a notice of deposition[2] or a subpoena for deposition to a non-party witness,[3] normally without leave of court. Despite lawyers' license to mandate a person to appear for sworn interrogation, counsel should not consider themselves immune from common courtesy. By taking a few minutes to place a telephone call to adversary counsel, much unnecessary angst caused by precipitous ex parte scheduling of depositions would evaporate. The seemingly growing tactic of scheduling and noticing a deposition without first communicating with adversary counsel invites an unattractive exchange between trial counsel. With trial lawyers' lives inherently subject to tension and drama, nothing within the Rules of Civil Procedure promotes elevation of such tension and drama by the display of unprofessional conduct.

Trial counsel should endeavor to schedule depositions with reasonable advance notice. The practice of scheduling depositions on short-notice has provoked amendment of Rule 32(a)(5) of the Federal Rules as follows:

"A deposition must not be used against a party who, having received less than 11 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place – and this motion was still pending when the deposition was taken." (version effective December 1, 2009)

Also, as a matter of courtesy, when counsel seeks to take the deposition of an adversary party's representative or of the individually named adversary party, the deposing lawyer should normally expect to conduct that deposition within the law offices of the deponent's counsel. No measurable "victory" of leverage or of a "home-court" advantage ever manifests when deposing counsel properly interrogates a deponent. Since the Civil Rules are unclear where a deposition should convene when an out-of-jurisdiction-located defendant must appear for a deposition, again, the pragmatic and professional approach for determining the location and scheduled time for the deposition should invite the input of the deponent's counsel. The courtesy of a pre-notice exchange by counsel promotes collaborative, cooperative, and professional concurrence on the site, time, and duration of the deposition. For example, if the deposing counsel anticipates that a deposition will exceed the limitation of "1 day of 7 hours" imposed by the Federal Rules of Civil Procedure,[4] before counsel issues a self-declared edict, once again, counsel should disclose the fact of the anticipated lengthy deposition to the deponent's counsel. Counsel's conversation should include discussion of the projected amount of time required to conclude the deposition and should seek agreement to duration and arrangements.

Deposing counsel has no obligation to deliver a set of copies of the planned exhibits to deponent's counsel in advance of the initiation of the deposition. Even so, deposing counsel should endeavor to provide duplicate pre-marked sets of exhibits for each of the appearing counsel, the court reporter, and the witness at the time of the start of the deposition.

The Federal Rules of Civil Procedure directly confront the unfortunate emergence of a seemingly growing number of trial lawyers who behave badly during depositions. Should this occur, Fed. R. Civ. Proc. 30(d)(3)(A) applies as follows:

"At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. . . . if the objecting deponent or parties so demands, the deposition must be suspended for the time necessary to obtain an order."

If the court sustains such a motion, the court has the authority to issue an award of expenses under Fed. R. Civ. Proc. 37(a)(5).

With an "equal opportunity" approach to slamming bad behavior by trial lawyers, the Federal Rules of Civil Procedure authorize court-ordered sanctions, including reasonable expenses and attorney's fees, "on a person who impedes, delays, or frustrates the fair examination of the deponent."[5]

The following projects the unattractive image that at least a few litigators have apparently earned from the federal judges who participated in authoring the Manual for Complex Litigation 4th, published by the Federal Judicial Center in 2004:

"Depositions are often overused and conducted inefficiently, and thus tend to be the most costly and time-consuming activity in complex litigation."

As a group, trial lawyers can do better and should do better. Just because a full day has been budgeted for the taking of a deposition does not mean that the lawyers are compelled to use the entire day or that participating lawyers should dominate a transcript with unprofessional salvos.

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1. *Rule 32, Ohio and Federal Rules of Civil Procedure*
2. *Rule 30, Ohio and Federal Rules of Civil Procedure*
3. *Rule 45, Ohio and Federal Rules of Civil Procedure*
4. *Rule 30(d)(1), Federal Rules of Civil Procedure*
5. *Rule 30(d)(2), Federal Rules of Civil Procedure*

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ETHICAL OBLIGATIONS IN BANKRUPTCY

"The law often permits what honor forbids."

— B.J. SAURIN, SPARTACUS, 1760

By Robert J. Sidman

I. General Considerations

In the broadest sense, ethics are ethics; that is, it should not matter the context or the court in which a lawyer operates. A lawyer should always act ethically. All Ohio lawyers are governed by the Ohio Rules of Professional Conduct ("ORPC"). While it is beyond the scope of this article to examine in detail the entire ORPC, there a few rules that are of particular note in the context of bankruptcy practice.

Rule 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

In the bankruptcy context this means that a lawyer must have studied and understood all aspects of the Bankruptcy Code that are implicated in any representation (query – can a consumer bankruptcy lawyer competently represent a client without knowing the provisions of both Chapter 7 and Chapter 13? Can any lawyer undertake to represent a debtor in Chapter 11 without significant prior experience in business bankruptcies?). Rule 1.2(c) of the ORPC speaks to another aspect of the competency issue by mandating that a lawyer may not limit the scope of a representation ("I only do Chapter 7s") unless such limitation is reasonable under the circumstances and is communicated to the client, preferably in writing.

Rule 1.4 of the ORPC addresses a circumstance that seems to arise quite often with lawyers generally, but perhaps more so with lawyers practicing bankruptcy law, where the numerosity of clients is common. That rule requires, inter alia, that a lawyer reasonably consult with a client about how the bankruptcy remedy accomplishes certain objectives of the client, and, importantly, the rule also requires the lawyer to keep the client reasonably informed about the status of his/her case. Quite simply, a bankruptcy lawyer needs to personally consult with the client, explain the ramifications of filing bankruptcy if that is the recommendation, then keep the client timely informed of the progress and termination of the case.

There is one other subject addressed in the ORPC that deserves mention. Rule 1.7 covers conflicts of interest and establishes two broad prohibitions: (1) a lawyer may not engage in concurrent representation of two clients with adverse interests and (2) a lawyer may not undertake representation of a client against a former client on a substantially related matter. Many bankruptcy practitioners are careful to represent only "one side of the street," that is, either exclusively debtor representation or exclusively creditor representation. But for those who do not so limit their practices, the conflicts rules are frequently an issue and must be carefully considered before undertaking a representation.

II. Bankruptcy – Specific Rules

There are two broad aspects of bankruptcy practice that have a direct bearing on ethical considerations. First, there are certain disclosure requirements that only apply to lawyers in bankruptcy cases. Second, the actions of bankruptcy lawyers are subject to scrutiny by others who are charged with the affirmative obligation to evaluate lawyer conduct; i.e, the U.S. Trustee, a bankruptcy trustee, and the Bankruptcy Judge.

One of the most common bankruptcy-specific rules implicating a lawyer's ethical duties is a simple one, and it occurs in every bankruptcy case. Official Form B203, entitled "Disclosure of Compensation of Attorney for Debtor" must be completed and signed by all lawyers filing a bankruptcy case for a debtor. This form requires an attorney to certify by signature several facts, among them the legal fee charged for the case, the source of compensation paid or to be paid to the attorney, any fee sharing arrangements, the scope of services to be provided for the fee, and, importantly, any legal services not covered by the fee. Any lawyer who files a bankruptcy case and signs this form without full and accurate disclosure of these facts is risking sanctions.

Another disclosure requirement of the Bankruptcy Code (see § 327 of Title 11 of the United Stated Code) mandates court approval for a trustee (or debtor in possession) to hire certain professional persons, including attorneys. The attorney sought to be hired must file a verified statement (see Bankruptcy Rule 2014(a)) setting forth the attorney's connections with the debtor, creditors, or other parties in interest in the bankruptcy case. While these statements are generally considered routine (and sometimes lengthy), especially in Chapter 11 cases, it would be a mistake to carelessly draft the Rule 2014 verified statement. A recent bankruptcy case from the Southern District of Florida illustrates the risk. In re Creative Desperation, Inc., 52 BCD 44 (S.D. Fla. 2009) a bankruptcy court imposed severe sanctions (including the disgorgement of all fees, monetary sanctions of over $90,000, suspension from the practice for 180 days, and mandatory CLE) because of misrepresentations made by a lawyer seeking to be employed as counsel to the Chapter 11 debtor. While the conduct of this lawyer was especially egregious (he made the questionable decision to sue the bankruptcy judge in the case), the case dramatically illustrates the dangers of a misrepresentation by a lawyer in papers filed with a bankruptcy court. Bankruptcy practitioners should also be aware that other provisions of the Bankruptcy Code and Bankruptcy Rules address disclosure/scrutiny issues for attorneys (for example, see Bankruptcy Code Sections 327(c) and (e), § 329(a) and § 504(a), (b) and (c) and Bankruptcy Rules 2016, 2017 and 2019).

The Bankruptcy Rules also adopt general prohibitions relating to the filing of harassing or frivolous pleadings by attorneys. Rule 9011 permits the Bankruptcy Court to sanction attorneys who file such pleadings, a remedy that is equally available in other federal and state courts, but which may be invoked more readily in the bankruptcy arena, and may be heard by a more attentive and sympathetic tribunal.

One final note of caution. Bankruptcy lawyers frequently encounter requests from clients (or prospective clients) for advice on what might be charitably termed "asset protection planning." While the ethical dangers associated with advice in this area are very real (see, ORPC 8.4(c), prohibiting a lawyer from engaging in conduct involving fraud), the consequences can reach beyond the realm of ethics. For example, in a recent West Virginia case a bankruptcy lawyer was criminally indicted for advising his clients to transfer a mobile home to a daughter before bankruptcy.

The practice of bankruptcy law requires lawyers to be fully knowledgeable of the Bankruptcy Code and Bankruptcy Rules (competency) and to be forthright and complete in all representations made to the Bankruptcy Court (honesty). Bankruptcy lawyers frequently must weigh multiple client interests at the outset of each engagement and throughout the representation (fully informing clients and avoiding conflicts). Strict adherence to these principles is a must for all bankruptcy practitioners.

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Special Dockets for *Timely* Consideration

By Atiba Jones

Specialized dockets have become a growing trend with courts throughout Ohio. After Miami-Dade County, Florida established the nation's first drug court, many states have found similar ways to collaborate with the community to provide services through a specialized docket model.

Drug Court

Following the success of Ohio's first drug court in Hamilton County, the Franklin County Common Pleas Court – General Division initiated its first specialized docket in April of 2004. The TIES (Treatment is Essential for Success) Program, was developed to lessen the impact of drug and/or alcohol use in Franklin County. Participants must complete three twelve-week phases of decreasing structure that promotes a healthier lifestyle and lessens contact with the court.

The TIES Program is under the direction of Judge Patrick E. Sheeran, whose team consists of the program director Catherine Richards and representatives from Probation, the Defense Bar, the Franklin County Prosecutor's Office; and liaisons from partner treatment agencies. Judge Sheeran notes that the program, "deals with those addicts who are 'sick and tired of being sick and tired.' We do not deal with first time offenders. Our focus is on the repeat offender who is not a drug trafficker, and not a violent offender, but who has had two or more felony convictions for offenses that are drug related." The TIES team works to find the most appropriate treatment facilities for the individual offender, and also requires regular courtroom appearances before the TIES Judge. Each participant is tested for drugs twice a week, and there are increasing sanctions for testing positive for drugs, including termination, which automatically results in being sent to prison. The program is demanding, but those participants who graduate have a strong likelihood of not returning to former drug habits or engaging in criminal activity.

Pat Sheeran has served as a judge on the Court of Common Pleas since August 1, 2005. Before his appointment and subsequent election, he served as the First Assistant Prosecuting Attorney, Civil Division, a senior supervisory criminal trial prosecutor, and a magistrate. Judge Sheeran is on the board of directors and the executive board of the Godman Guild, and was given a Presidential Volunteer Award for tutoring GED students there weekly. He is a twenty-year volunteer with VOICECorps, has taught numerous seminars for the Columbus Bar, and has served on the faculty of the National Judicial College. He has been married for 36 years to Ellen Sheeran. They have three children.

Commercial Docket

Effective January 2, 2009, the General Division created a Commercial Docket to expedite civil lawsuits between businesses, among shareholders or partners within a business, or addressing insurance coverage for such cases. The Supreme Court of Ohio initiated the docket as a pilot under Temporary Rules 1.01 through 1.11 of the Rules of Superintendence, in response to Ohio's call to assess the best methods for establishing commercial civil litigation dockets in the state. The program seeks to aid business development efforts in Ohio by competing with states that offer comparable business courts.

Judges John P. Bessey and Richard A. Frye of the Franklin County Common Pleas Court have been designated by Chief Justice Thomas J. Moyer to direct the commercial court docket in Franklin County. Judge Frye conveys the success of the programs as "a strong effort to offer more timely consideration to cases involving business issues, particularly those in which an injunction, receivership, or other early action by the court will avoid or mitigate harm." Many of the cases he and Judge Bessey see are, therefore, "front-end loaded" with conferences with the court, accelerated discovery, and accelerated briefing and hearings. While both judges still carry a full felony docket comparable to all the other judges, their effort has been to be as personally available as possible so civil lawyers cannot engage in delay tactics, and so their clients do not feel they only receive second-class justice.

Judge John Bessey has served on the Common Pleas Court since 1994, following experience in private law practice, as a private business owner, and as a government lawyer. He is a member of the American College of Business Court Judges, and he co-chaired the statewide task force that developed the commercial docket program at the request of the Ohio Supreme Court. Judge Bessey has also served as a member of the faculty at the National Judicial College.

Judge Richard A. Frye was elected to the Common Pleas bench in 2004. Prior to that, he was a partner in the Chester Willcox & Saxbe law firm. While in practice Judge Frye was selected as a Fellow in the American College of Trial Lawyers and as a member of the American Board of Trial Advocates, named in Best Lawyers in America, and was among the top 50 vote-getters in the 2004 Ohio Super Lawyers survey.

For additional information on the General Division specialized dockets, please visit the court website at www.fccourt.org.

Atiba Jones, Executive Director, Franklin County Common Pleas Court

The Franklin County Court of Common Pleas Commercial Docket

A YEAR IN REVIEW

By John P. Brody and Rebecca Roderer Price

The Ohio Supreme Court implemented commercial dockets in four common pleas courts in Ohio – Franklin, Cuyahoga, Lucas and Hamilton counties. The Franklin County Commercial Docket has been up and running since January 2009. We had the opportunity to talk with the Honorable John Bessey and the Honorable Richard Frye, our commercial docket judges, to discuss their experiences with this pilot project, and how the bar can make the most of the specialized docket.

As of late 2009, the commercial docket had approximately 160 pending cases. This figure did not reflect a number of cases which had already been terminated. The Temporary Rules of Superintendence governing the commercial dockets list 16 specific categories of cases that qualify for the docket. Judges Bessey and Frye estimate that approximately one-half of the cases on the Franklin County Commercial Docket involve claims for injunctive relief, many of which involve covenants not to compete and violations of trade secrets. Another significant number of cases include requests for appointment of receiverships. Injunctions and receiverships tend to be "front loaded" cases which require more involvement from the Court during the initial stages of litigation.

Judge Bessey indicated that facing similar issues on a regular basis has "been a very effective learning process." This meets one of the purposes of the pilot project. The specialized court was designed to have common commercial issues come before the commercial docket judges in order to provide greater uniformity of decisions. Also, the system is intended to accelerate the commercial cases. The Temporary Rules provide that commercial docket judges shall decide motions within sixty days of filing of the motion. In some cases, lawyers have granted each other extensions that limit the time the court has to issue rulings, so practically speaking the judges miss the timeframe set forth in the Temporary Rules. Even so, Judge Frye explained that "there is no question that we're going faster – the cases are being accelerated." In an effort to advance commercial cases, the judges are holding status conferences to resolve discovery disputes and sometimes rule from the bench after oral hearings with written decisions to follow. For very significant matters, the judges encourage the bar to consider requesting a status conference or an oral hearing to expedite decisions.

While some attorneys are filing motions to transfer cases to the commercial docket, there appear to be a number of cases that qualify for the commercial docket that are not being transferred there. Judges Bessey and Frye are exploring ways to streamline the process and assure that more qualifying cases end up on the commercial docket. One modification under discussion is an addition to the Clerk's civil case summary sheet to include "commercial docket" cases. If approved, the designation of a case at the Clerk's Office would result in an assignment of the case directly to the commercial docket. This would replace the current procedure requiring a motion to transfer and a ruling from the judge receiving the original assignment. Meanwhile, the rules permit either the initial trial judge, or either plaintiff's or defense counsel to seek transfer to the commercial docket. The judges encourage attorneys to take advantage of this specialized docket and transfer cases accordingly.

Currently, the commercial docket judges are omitted from the computer draw for one non-commercial civil case in exchange for every commercial case moved to their docket. The Cuyahoga County Common Pleas Court has elected to lighten the criminal caseload for its two commercial docket judges in an effort to permit them more time to devote to their commercial docket cases. The courts of common pleas in Franklin, Hamilton and Lucas counties have not yet modified their current systems of assigning criminal cases.

Both staff attorneys reported that they field more telephone calls related to commercial docket cases than for other civil cases. Many calls are related to scheduling discovery or similar disputes arising from the "fast track" process. The judges encourage attorneys to coordinate as many issues with each other as possible before calling the Court, in order to make the best use of the Court's limited resources, especially because so many cases involve claims for injunctive relief or other matters raising scheduling issues.

Another feature of this pilot project is that trial lawyers will be asked to evaluate the Court. Judge Bessey said that questionnaires are being finalized by the Ohio Supreme Court Task Force on the Commercial Docket. In the meantime, Judges Bessey and Frye both encourage lawyers to suggest practical improvements. Judge Bessey is co-chair of the Ohio Supreme Court's Task Force and he added that lawyers' comments "will really help us" assess the ultimate success of the commercial docket pilot project.

Select decisions from all of the commercial dockets in Ohio can be viewed at the Ohio Supreme Court's website, under the reference to the Task Force on Commercial Dockets at www.supremecourt.ohio.gov. Although not yet indexed, that is another change which has already been proposed to familiarize lawyers with decisions by specific commercial docket judges.

The Franklin County Commercial Docket is on its way towards meeting the goals of the Task Force.

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John P. Brody and Rebecca Roderer Price, Kegler Brown

Criminal Sentencing Remains a *Work in Progress*

By The Honorable David E. Cain

The Ohio Supreme Court is still trying to save the constitutionality of parts of the legislature's massive criminal sentencing "reform" that went into effect in 1996. And trial judges are still in the hot seat for not knowing that yet another step in the sentencing process would be required.

The headline across the top of the front page of a recent edition of the Cincinnati Enquirer proclaimed: "Judges Errors Letting Criminals Out Unsupervised – Convicts Freed Without Parole."

It came after the Ohio Department of Rehabilitation and Corrections (ODRC) began reviewing thousands of sentencing entries to see if they comply with a Supreme Court decision last summer that said judges must specifically tell defendants whether post release control is discretionary or mandatory and how long it might last. Then, the information must be put in the written sentencing entries, the Court said. With a wink toward basic logic, the Court's majority said many of the errors of omission can be corrected by re-sentencings. Fortunately, the legislature has provided for them to be done by video conferencing.

When Senate Bill 2 (S.B.2) became effective on July 1, 1996, it did away with indeterminate sentences – and thus "parole" – for all but murder offenses. (Sentencings and penalties in sex cases have been tinkered with more than once since then).

Touted as "truth in sentencing," the legislation made ten years in prison the maximum for first degree felonies (10 to 25 years was the max under the old law).

S.B.2 replaced parole with Post Release Control (PRC) and made five years of PRC mandatory for F1s and all sex offenses and three years of PRC mandatory for F2s and for F3s in which defendants caused or threatened physical harm to persons.

For all other felonies, PRC is optional with the Ohio Parole Authority for a period up to three years. If a person on PRC violates his conditions of PRC, the parole board can incrementally add prison time for violations until the offender has served 50 percent more than his original sentence.

In the case of Woods v. Telb, decided in 2000, the Supreme Court said the parole board's authority to impose PRC did not violate the separation of powers doctrine so long as the trial court incorporated post release control in its entry at the time of sentencing.

Four years later, in State v. Jordan, the high court declared that "because a trial court has a statutory duty to provide notice of PRC at the sentencing hearing, any sentence imposed without such notification is contrary to law and void."

In the 2006 case of Hernandez v. Kelly, the Supreme Court held that the parole board lacked authority to imposed PRC because the trial court failed to tell Hernandez about PRC or to put it in the sentencing entry and Hernandez had finished serving the sentence before the error was discovered.

Later the same year, the court in Cruzado v. Zaleski said a trial court did not ambiguously lack jurisdiction to hold a re-sentencing hearing and correct a sentence to include a notice of mandatory PRC because the offender had not yet completed his prison sentence.

In the 2008 case of State v. Simpkins, the Court reiterated that in a case with an offense for which PRC is required but not properly included in the sentence, the sentence is void and the state is entitled to a new hearing to have PRC imposed.

Meanwhile, the legislature (in 2006) codified the relevant caselaw to provide for re-sentencing if, prior to July 11, 2006, a court failed to notify offender of PRC at the original sentencing or failed to include it in the judgment entered on the journal and the offender is still incarcerated. That legislation included a provision allowing the re-sentencings to be done by use of video conference equipment.

In this year's case, State v. Bloomer, the defendant challenged the constitutionality of his re-sentencing on due process and double jeopardy grounds, along with the constitutionality of the statute enacted in 2006. The Court cited Jordan and reasoned that because jeopardy does not attach to a void sentence, the subsequent imposition of the statutorily required sentence cannot constitute double jeopardy.

"The judgment (of a sentence contrary to statute) is a mere nullity and the parties are back in the same position as if there had been no judgment." Bloomer had no legitimate expectation in the finality of his original sentence and, therefore, the re-sentencing did not offend the double jeopardy or due process clause, it reasoned.

The Court said there are no separation of powers problems because if PRC is part of the original judicially imposed sentence, the parole board's ability to impose PRC does not impede the function of the judicial branch.

The Court did not say how this reasoning applies when the parole board's decision on PRC is discretionary. And in a dissenting opinion by Justice Lanzinger, she continued to maintain her position that sentencing errors should be corrected on direct appeal because a deficient sentence is "voidable" not "void."

It came after the Ohio Department of Rehabilitation and Corrections (ODRC) began reviewing thousands of sentencing entries to see if they comply with a Supreme Court decision last summer that said judges must specifically tell defendants whether post release control is discretionary or mandatory and how long it might last. Then, the information must be put in the written sentencing entries, the Court said. With a wink toward basic logic, the Court's majority said many of the errors of omission can be corrected by re-sentencings. Fortunately, the legislature has provided for them to be done by video conferencing.

The Court had consolidated in case of State v. Barnes with the Bloom case and again said that once the offender has been released the sentence cannot be corrected.

"It is impossible for me to see how Barnes could be released if indeed the sentence already served were void and a nullity – a full re-sentencing first would be required to impose a valid penalty. Apparently what the majority holds is that a sentence is void only until it is served completely, when it then has full effect. This does not seem to be logical," Lanzinger declared.

In response to Bloomer, the ODRC notified common pleas courts that it is reviewing the entries of all prisoners sentenced since 1996 with priority being given to inmates nearing the completion of their prison sentences. Unless an individual with an entry that is not in compliance with the Supreme Court ruling is re-sentenced, he will be released without PRC.

ODRC is also reviewing entries for individuals currently under PRC supervision. Defective entries in this circumstance will result in termination of supervision, its memo pointed out. And it is reviewing entries for inmates who were on PRC and are back in prison for violating the PRC. If the entries are not in compliance, those inmates will be released immediately.

ODRC said it will work with courts to facilitate video conferencing (to be done at its 770 West Broad Street headquarters if necessary) and has established a hot line to assist with arrangements for re-sentencing hearings.

In Franklin County, the Common Pleas Court has had video equipment in the magistrates area (in the Municipal Court Building) connected with ODRC for teleconferencing. So, as cases are identified for re-sentencing, the hearings can be held "next door" by the originally assigned judge or the current duty judge. The Public Defenders office will counsel prisoners they originally represented. Other attorneys will have to be appointed for the rest.

This is only the latest in a series of constitutional attacks on S.B. 2. Under the old law, a defendant being placed on probation was told that violations of the conditions of probation would result in a prison sentence of up to a number of years or months. Now those sentences are deficient. The suspended prison time must be stated in certain term (although it can be lowered at the time of probation revocation). Now, an uncertain term can be corrected at a revocation hearing where the offender cannot be revoked. If a judge states an exact term for the suspended sentence, then it can be imposed at a later hearing if the offender violates again.

Then, the sentencing guidelines that came with S.B. 2 were jeopardized by a U.S. Supreme Court case that said a defendant's Sixth Amendment rights to a jury trial are violated when a judge engages in fact finding as part of the sentencing process.

The Ohio Supreme Court saved the guidelines by saying they would henceforth be considered voluntary rather than mandatory. Judges could no longer make findings to justify their sentences on the record. The Court basically changed a requirement to a prohibition.

My prediction is that once the courts have worked out all the problems with S.B. 2, the legislature will change the whole thing again. Remember decades ago when "premeditation" was changed to "prior calculation and design"? That wiped out all the judicial gloss on "premeditation."

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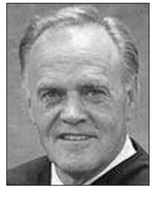

The Honorable David E. Cain, Franklin County Common Pleas Court

CIVIL JURY TRIALS

FRANKLIN COUNTY COMMON PLEAS COURT

By Belinda S. Barnes and Monica L. Waller

Verdict: $10,615,000.00 (Including $1,515,000.000 for loss of consortium). Medical Malpractice. In November 2005 Mrs. Barnish, a 53-year-old resident of Grove City, Ohio presented to a neurosurgeon, Carolyn S. Neltner, M.D. of Central Ohio Neurological Surgeons, Inc. with complaints of pain in her right arm. Dr. Neltner diagnosed Mrs. Barnish with radiculopathy and recommended an anaterior cervical diskectomy with fusion to remove the disc between the C5 and C6 vertebrae in Mrs. Barnish's cervical spine and replace it with a bone plug. On December 1, 2005, while performing the procedure, Dr. Neltner tamped the bone plug in too hard and too far, striking Mrs. Barnish's spinal cord. In the recovery room following surgery, it was noted that Mrs. Barnish had no sensation in her lower body, and a stat MRI was performed. According to the neuroradiologist at the hospital, the results of the study indicated that the bone plug was causing compression of Mrs. Barnish's spinal cord. Instead of taking Mrs. Barnish immediately back to surgery to remove the offending bone plug, however, Dr. Neltner delayed for more than six hours, resulting in further injury to Mrs. Barnish. The defense contended that: (1) Dr. Neltner did not tamp the bone plug directly into Mrs. Barnish's spinal cord; (b) the radiology studies did not show ongoing cord compression; and (c) the delay in taking Mrs. Barnish back to surgery to remove the bone plug did not cause any injury. Mrs. Barnish suffered incomplete tetraplegia. The jury awarded Mrs. Barnish $9,100,000.00 for her injuries and damages and $1,515,000.00 for her husband for loss of consortium. Plaintiff's Experts: Morris M. Soriano, M.D. (Neurosurgery), Jerome Barakos, M.D. (Neuroradiology), Walter Panis, M.D. (Neurology/Physical Medicine and Rehabilitation), Marianne Boeing (Life Care Planner), George Cyphers (Vocational Rehabilitation), Burke, Rosen & Associates (Economists). Defendants' Experts: Terry Lichtor, M.D., Ph.D. (Neurosurgery), Patrick W. McCormick, M.D. (Neurosurgery), Gordon Sze, M.D. (Neuroradiology), Edward Nieshoff, Jr., M.D. (Spinal Cord Injury/Rehabilitation). Plaintiff's Attorney: Brian N. Eisen. Defendants' Attorneys: John S. Wasung and David T. Henderson. Judge Sheward. Case Caption: *Elizabeth M. Barnish, et al. v. Carolyn S. Neltner, M.D., et al.* Case No. 06 CVA 15448 (2009).

Verdict: $250,000.00 (Reduced to $192,500.00 For The Negligence Of An Unidentified Driver.) Auto Accident. Plaintiff suffered a calcaneus fracture in an automobile accident. Defendant admitted fault, but alleged an unidentified driver had waved her to proceed with her turn. Plaintiff had a failed surgery and $50,000.00 in medical expenses. Defendant conceded that Plaintiff had a permanent injury. The jury found total damages of $250,000.00. The verdict was reduced by $37,500.00 for negligence of the unidentified driver (25% negligence times $150,000.00 non-economic damages) and by two $10,000.00 advance payments prior to trial. Plaintiff's Experts: Anthony Volpe, M.D. and John Feible, M.D. Defendant's Expert: Ed Season, M.D. The parties have differing recollections of the last settlement negotiations. According to Plaintiff, the last settlement demand was $450,000 and the last offer was $175,000. According to Defendant, the last settlement demand was $750,000.00 and the last settlement offer was $250,000.000 additional money in the form of a structure. Length of Trial: 3 days. Plaintiff's Attorney: Rex H. Elliott. Defendant's Attorney: J. Stephen Teetor. Judge Sheward. Case Caption: *Joann Neal v. Frances Greenberg, et al.* Case No. 06 CVC 14863 (2008). (Note: Plaintiff ultimately received $250,000 due to a $20,000 payment made before trial and a $37,500 payment as settlement of any potential appeal.)

Verdict: $129,629.65. Automobile Accident. Defendant ran a red light and struck the passenger side door of a vehicle in which Plaintiff was a front seat passenger. Both vehicles were totaled with Plaintiff's vehicle sustaining more than $40,000 in damage. Plaintiff claimed cuts and contusions to his face and body and a permanent closed head injury. Defendant denied that Plaintiff sustained a permanent injury. Medical Bills: $13,539.65. Lost Wages: Plaintiff alleged a permanent loss of earning potential. Plaintiff's Expert: Robert Bornstein, Ph.D.; Elizabeth Cook, M.D., Jess Harris, M.D. Defendant's Expert: None. Last Settlement Demand: $75,000. Last Settlement Offer: $30,000. Length of Trial: 4 days. Plaintiff's Counsel: Gerald Leeseberg and Susan Hahn. Defendant's Counsel: Belinda Barnes. Judge Hogan. Case Caption: *William Weidinger v. Eunkyung Kim, et al.* Case No. 06 CVH06-8272 (2008).

Verdict: $60,527.07. Medical Malpractice. Plaintiff, age 40, sought treatment from Defendants for injuries and a fracture sustained to the small finger of her left hand. On 11/19/99, Dr. LaDu negligently operated on Plaintiff's finger. As a result of Defendant's malpractice, Plaintiff's finger was deformed, disfigured and discolored. Plaintiff lost circulation and sustained nerve damage to the finger, both of which injuries were permanent. Ultimately, the joint in Plaintiff's finger was fused because of Defendant's negligence. Plaintiff incurred medical bills of $17,882.37 (the majority of which were paid by insurance), which fact was considered by the jury. The jury found Defendants to be negligent in their care and treatment of Plaintiff and awarded her $10,525.07 for economic damages and $50,000 for pain and suffering and permanent damages. Plaintiff's Experts: James Nappi, M.D., Catherine Lee, M.D. and John W. Dietrich, M.D. Defendant's Experts: Desmond Stutsman, D.O. and Joseph Schlonsky, M.D. Settlement Demand: $110,000. Settlement Offer: None. Length of Trial: 5 days. Plaintiff's Attorney: Judith E. Galeano, James S. Mowery, Jr. and Nicholas W. Yeager. Defendant's Attorney: Patrick F. Smith. Judge Brown. Case Caption: Lori J. Putman v. Keith A. *LaDue, D.O.. Case No.: 04* CV 009871 (2007).

Verdict: $7,236.29. Auto Accident. Defendant Jonathan Burum ran a red light going approximately 45 miles per hour and struck Plaintiff Michele Conlon in a t-bone collision. Liability was stipulated. Plaintiff claimed soft tissue injuries to her neck, hip, back and ankle. Her primary medical provider was Chiropractor Matt Ashkettle. Medical Bills: $7,236.29. Lost Wages: None. Plaintiff's Expert: Matt Ashkettle, D.C. Defendant's Expert: None. Settlement Demand: $30,000. Settlement Offer: $7,995. Length of Trial: 2 days. Plaintiff's Attorney: Ray J. King. Defendant's Attorney: LeAnna Smack. Magistrate Browning. Case Caption: *Michele Conlon v. Jonathan Burum*. Case No. 06 CV 4175 (2008).

Verdict: Defense Verdict. Product Liability (adulterated food). 39-year-old nurse at the Ohio State University Medical Center and other medical personnel consumed deli food allegedly purchased at Giant Eagle store on West Fifth Avenue at a luncheon inside the gastroenterology department on December 30, 2005. Plaintiff and 4 others developed intestinal symptoms consistent with E-coli 157. Cultures from plaintiff confirmed E-coli. Injuries claimed beyond the intestinal symptoms included the onset of a cataract in one eye, and nerve damage (probably to C-7) causing blepharospasms and other significant, permanent vision and nerve problems around plaintiff's right eye. Plaintiff was restricted to working substantially fewer hours per week since fatigue magnified her vision difficulties. Lost wages, retirement benefits, and potential scholarship money for plaintiffs' sons were alleged to be approximately $900,000. In all 21 witnesses testified. Final demand $950,000; final offer $50,000. Plaintiff's experts: Thomas Maugher, M.D., Mary Lou McGregor, M.D., Edward J. Levine, M.D., Jeff Nelkin, Fred B. Thomas, M.D., David Boyd, Ph.D. Defense experts: Edward Richter, Ph.D., Richard G. Orlando, M.D. Length of trial 7 days. Plaintiffs' attorneys Thomas W. Trimble and Keri N. Yaeger. Defendant's attorneys James F. Rosenberg (Pittsburgh) and Timothy P. Bricker. Judge Frye. Case caption *Cami Bowman, et al., v. Giant Eagle, Inc.,* Case No 07CVC-12-17599 (2009).

Verdict: Defense Verdict. Breach of Contract. Plaintiff Great American Insurance Company sued multiple defendants seeking recovery of in excess of $4,000,000.00 of surety bond payments made by Great American. One defendant, Richard Stover, claimed his signature on the indemnity agreement was a forgery. The parties agreed to bifurcate the forgery issue for a separate trial. The jury answered interrogatories finding that the signature was a forgery and the letter signed by defendant admitting that he signed agreement was not sufficient for ratification. Defendant Richard Stover was dismissed and the case continues as to the remaining defendants. Experts: None. Last Settlement Demand: $850,000.00. Last Settlement Offer: $150,000.00. Length of Trial: 7 days. Plaintiff's Attorney: Steve Strawbridge. Defendant's Attorney: J. Stephen Teetor. Judge Bender. Case Caption: *Great American Insurance Company v. Stover*, Case No. 07 CVH 5997 (2008).

Verdict: Defense Verdict. Automobile Accident. On November 12, 2003 then 25-year-old Steven Sombati failed to yield at a stop sign causing a collision between his Ford F150 and a Ford Explorer driven by Plaintiff Wendy Stauffer who was also 25-years-old at the time of the collision. Plaintiff treated the same day at the OSU ER for neck and back complaints. She had further chiropractic treatment, follow up visits with her PCP and physical therapy. Mr. Sombati was insured by Geico with liability limits of $12,500/$25,000. Plaintiff had UIM limits with State Farm of $100,000/$300,000. Geico paid its $12,500 limits with State Farm's consent. The jury determined that the Plaintiff was not injured in the accident. Medical Bills: Approximately $8400. Lost Wages: None. Plaintiff's Expert: Adam Sullivan, D.C. Defendant's Expert: None. Last Settlement Demand: $18,000 in addition to the $12,500 already advanced by Geico. Last Settlement Offer: $1,000. Length of Trial: 2 days. Plaintiff's Attorney: Braden Blumensteil. Defendant's Attorney: Jason Founds. Judge Horton. Case Caption: *Wendy Stauffer v. Steven Sombati, et al.*, Case No. 05 CVC11-12678 (2007).

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A Jury of Your Peers

By Christina Fitchner with Marty Eisenbarth

A couple of months ago, I received a letter from the Franklin County Court of Common Pleas summoning me to appear for jury duty. I was not thrilled by the prospect, but made arrangements to take time off work to do my duty. On the Monday morning when I first arrived at the Franklin Court of Common Pleas, I was nervous and did not know what to expect. I was hoping that the letter I received that told me I would be there for two full weeks was wrong. After hearing about others' experiences I was under the impression that I may not have to come in some of the days during the two weeks and that I may be called daily to let me know whether or not I needed to report. This however did not happen. I had to appear in person every day for two weeks and, since I'm used to working in the suburbs, I dreaded having to fight the wonderful downtown traffic!

On the first day I arrived at 8am – an hour earlier than the days to come. We had to fill out paperwork and watch a somewhat outdated movie about the judicial system. Then we were introduced to one of the judges who gave us a brief description about some of the things we may be involved in, in the weeks to come. We found out we could either be assigned to a case or we could possibly be sitting in the waiting area all day. At about 10:30 on the first day, my name was called along with 24 others. I had been selected to serve on a jury!

Once in the court room, we got right down to business. The lawyers introduced themselves and briefly described the type of case we were now a part of. The case was a murder case. After lunch we began voir dire. Each lawyer asked questions, some directed to individuals, other questions to everyone in general. This process was interesting. It made me wonder what "type" of person they were looking for to sit in on the jury for this case. Someone young, someone old, male, female, minority or non-minority, it was hard to tell. Some jurors were let go and replaced by another juror, but for what reason the lawyers had I would never know. Finally, after half a day the final jury was selected.

The judge on the case was wonderful. He explained everything to us and in a way we could understand. He was very clear that we were not to discuss this case with anyone and we were not allowed to do outside investigations on our own. This meant, no internet searching or driving by the crime scene. The judge also discussed with us that during the trial there may be some things that will be said that we will be asked to ignore. This part sounded impossible, how can you simply forget something you've heard, but we were asked to do this several times.

Being on a jury gave me the feeling of being part of something much bigger than I could have ever imagined being part of. I was an American citizen getting the chance to see first hand how our judicial system works and to be a part of the process. This was a great opportunity that at the time I was summoned I did not realize. I, along with 11 others had the job of deciding the fate of an individual. Not whether he lived or died, but whether he would be spending most of his life in jail or not. In the case I served on, the facts seemed cut and dried, but there were still the "what ifs" that ran through my head. I wondered what facts, if any, were not or could not be presented in the court room. I took my job in this case very seriously, but you could tell that there were others who were not happy to be there. It is discomforting to know that there could be people on a jury who simple don't care about the case and just feel bothered that they have been called for jury duty and are forced to participate.

After both sides presented their cases, we began our deliberations. It was interesting to see how some of the jurors heard some of the testimony differently from others, and there was a great deal of give and take as individual jurors presented their points of view. The foreman kept everything orderly and everyone who wanted to say something had the opportunity. After several hours, when it appeared from the discussions that we had reached a consensus, we took a vote and, indeed, reached a unanimous decision.

It was a little nerve-wracking, filing back into the court room to render our verdict, knowing that we had made a decision that one side would like and the other side wouldn't. The presentation of the verdict was a lot like you see on TV – the foreman handed a piece of paper with the decision on it to the bailiff who presented it to the judge. The judge had the defendant and counsel stand and read our decision. After it was done, the lawyers met with the jury and told us some things that hadn't been presented as part of the trial. That was very interesting and made me comfortable that we'd made a good decision.

The privilege – and I did conclude that it was a privilege – of participating in our justice system by serving on a jury was an experience that was educational, interesting and rewarding. It certainly disrupted my life, both at home and a work, but provided me an opportunity to be a part of a bigger picture and see a side of the world that was certainly not familiar to me. So while many of you who will be summoned in the future, will grouse and groan about having your routine turned topsy turvy, I hope you will all respond to the call to perform this most basic of our civic responsibilities and that you will have as positive an experience as I had.

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Christina Fitchner, Juror, with Marty Eisenbarth, Collection Manager, Bricker & Eckler

WHAT IF JURORS DRAFTED OUR LAWS?

We Could Only Be So Lucky!

By The Honorable Charles A. Schneider

Twelve people go off into a room. . .
12 different minds, 12 different hearts,
From 12 different walks of life;
12 sets of eyes, ears, shapes, and sizes.
And these 12 people are asked to judge another human being as different from them as they are from each other. And in their judgment, they must become of one mind – unanimous. It's one of the miracles of man's disorganized soul that they can do it, and in most instances, do it right well.
God bless juries.

Anatomy of a Murder – 1959

These words were spoken by Jimmy Stewart's co-counsel just before the verdict was announced. The operative word is before. He recognized the wisdom of the jury before he knew the verdict – and he was a recovering alcoholic. I guess the operative word is recovering.

All too often the wisdom of the jury is not recognized but, rather, criticized. What were they thinking? Where did they get lost? What trial were they listening to? These reflections are most often the observations of the losing party. But then again, I guess the operative word is "losing."

I have had the privilege of observing the hard work of jurors for almost 15 years both at the Municipal Court and at the Court of Common Pleas. I can honestly say that they work as hard and take it just as seriously if they are deciding an assault or a felonious assault; a DUI or a vehicular homicide; a theft or a robbery with a firearm specification. It does not matter to a juror if the amount in controversy is $5,000 or over one million dollars. They understand that what they are asked to do is important. At least that is my observation as an observer. "Observer," I understand, is the operative word.

When the trial is concluded, I always go back to the jury room to thank the jurors for their service and to answer questions. Without fail, I am always asked: "Did we get it right?" "What would you have decided?"

My answer is always the same. "If you followed the law, listened to the evidence and voted your conscience, you got it right." I really believe this because I do not have (nor do the prevailing or non-prevailing counsel) the benefit of the 12 minds, hearts, eyes and ears. I hope that it does not sound too corny. This time I hope that the operative word is not "corny."

Remember, these jurors were all strangers when the trial began. They come from all over the county and from different walks of life. They each have their own biases, prejudices and life's experiences. They make very difficult decisions that are not always popular. They understand that their job is not to be popular. They come together to act as one in an effort to get it right. Yes, the operative words are "to get it right."

The other observation I frequently express to the jurors is that perhaps our legislative bodies, both in Columbus and in Washington D.C., would be more productive if they were more like jurors. What could be accomplished if the legislators were strangers to one another, like jurors? What if they did not work with each other every day? What if their only job was to take on difficult tasks in order to find a solution and that the solution might not always be popular? What if the legislators' primary goal was to use their collective minds and hearts after using their multiple set of ears and eyes to draft the very best legislation that they can, regardless of political bias – and just try to get it right?

What if legislators were more like jurors? We could only be so lucky. And yes the operative word is "lucky"!

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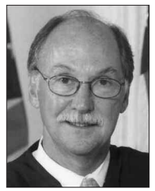

The Honorable Charles A. Schneider, Franklin County Common Pleas Court

Notes from the Federal Court

JUDGE WATSON MARKS FIVE YEARS ON FEDERAL BENCH

By The Honorable Mark R. Abel

This past fall Judge Michael Watson completed five years on the federal bench. He came to federal court already an experienced state court judge. Watson served Franklin County Common Pleas from January 1, 1996, until April 30, 2003, when he was appointed to the Ohio Court of Appeals for the Tenth District. He received his commission as a United States District Judge September 10, 2004. His public investiture ceremony was November 19, 2004.

Although born in Akron, Michael Watson grew up in central Clintonville and has lived most of his adult life in the Worthington area. He served from 1975 to 1978 in the United States Air Force and in the Ohio Air National Guard from 1978 to 1984. A graduate of the Ohio State University, Watson served as bailiff and law clerk to Common Pleas Court Judge Tommy Thompson while attending Capital Law School. After graduation, he practiced law from 1988 to 1991 with Lane Alton & Horst and with Delligatti Hollenbaugh Briscoe & Milless. His areas of practice emphasis were personal injury litigation, employment disputes, workers' compensation and criminal defense. From 1991 through 1993, Watson was deputy chief counsel to Governor George Voinovich and chief counsel for the Ohio Department of Commerce. In 1994 and 1995, he was chief counsel to Governor Voinovich.

Judge Watson enjoys trial but laments that they are increasingly rare in federal court. He is aware of the pressure on litigators during trial and works to insure that the lawyers appearing before him have the opportunity of presenting their best case to the jury. Civil cases are not on a trailing calendar. Counsel are expected to submit an agreed, neutral statement of what the case is to be about that Judge Watson reads to the prospective jurors during voir dire. Counsel must also submit agreed jury instructions.

During voir dire, Judge Watson asks a standard set of questions. Although counsel should not repeat those questions, Judge Watson likes to see that litigators have the opportunity to try their case. He gives them a fair opportunity to find out what the jurors think and to explore whether they can be fair and impartial.

Although it's hard to pick out just one trial, Judge Watson said that Fossyl v. Watson was a case in which he found it satisfying to be the trial judge. It was a wrongful death 1983 trial arising out of the 1977 murder of a 16-year-old Brown County girl. The victim's decapitated head and torso were found shortly after she disappeared, but no one was ever charged with her murder. Thirty years later, the civil jury found that the two defendants had wrongfully caused her death, spoliated evidence and intentionally inflicted emotional distress.

One difference Judge Watson sees between state and federal court is the much more hands off approach the presiding judge brings to settlement discussions with the parties. He believes that lawyers in federal court don't want to see the trial judge take an aggressive role in hammering out a settlement. Although Judge Watson routinely notices a settlement conference before trial, he does not hold many. He asks for a confidential assessment letter. If those indicate the parties are too far apart, he cancels the settlement conference. If it looks like there is an opportunity for the parties to resolve their dispute, Judge Watson will likely refer the case to the Court's mediator Bob Kaiser.

Only one to two percent of federal court cases go to trial. Judge Watson thinks more cases would if it were not for the fact that too much time and money is spent on discovery and motions practice. The goal in many cases appears to be to "try" it during discovery, making it prohibitively expense to actually try the case in the courtroom.

Motions practice is approaching the cost of trying a case. Too many lawyers file massive briefs supported by an even more daunting pile of exhibits. Judge Watson believes that lawyers who want to convince a judge of the merits of their clients' positions should focus on essentials and fine tune their briefs to state their case with a minimum of verbiage and excess baggage. He does not permit briefs exceeding 20 pages without a good reason. If you want to file a longer brief, call his law clerks and give a good sound reason for the additional pages. When you file a brief, send a courtesy copy to the Judge's chambers.

At a more personal level, Judge Watson spent much of his time during his first three years on the federal bench traveling between Columbus and Cincinnati. Originally, he was reluctant to take on a Cincinnati caseload but ended up loving it. Cincinnati is a great town and he enjoyed the good lawyering and the opportunity to get to know the judges there and across the River in Covington.

Judge Watson said that one of the satisfactions of the federal bench has been the camaraderie among his colleagues. There is a deep and abiding respect among the judges, genuine friendship, and a sense that they are all in this together.

The Judge's staff includes three law clerks and a courtroom deputy/case manager.

Dorci Gass-Lower has served as a law clerk to Judge Michael Watson for ten years. She is a history and political science graduate of St. Mary's College in South Bend. Dorci earned her law degree at the Case Western School of Law. After graduation, she engaged in the general practice for a year and a half. Her most rewarding cases were two private adoptions.

Keith Mayton is a career law clerk. He came to the Court in 1987 as a pro se law clerk working on prisoner habeas corpus petitions. Since then he has served as a law clerk to Judges James L. Graham and George C. Smith and now Judge Watson. Keith's interests include bicycling and collecting fountain pens.

Catlin Chamberlin has been a law clerk with the Judge for two years. She is a Kentucky native who earned her bachelors degree at Miami of Ohio and her law degree at Moritz College of Law. She has enjoyed working on securities cases and constitutional law issues. Out of the courthouse, Catlin is a runner.

Jennifer Kacsor has been the Judge's courtroom deputy and case manager for the last three years. She has been a deputy clerk of court for five years. Jennifer earned her bachelors degree in psychology from OSU. At home, she enjoys spending time with her 17-month-old son.

New Chief Probation Officer.

In December, John Dierna became the Southern District of Ohio's new chief probation officer. Our Probation Department has 76 employees scattered between Columbus, Cincinnati and Dayton. Probation officers either do presentence investigations or supervise offenders. There are also specialists who deal with drug addiction, offenders who require intensive supervision, electronic monitoring and the sentencing guidelines. Dierna's career has been mainly in presentence investigation, but he is also experienced in supervision. And he has been the deputy chief probation officer the last 4 years. John earned a B.A. in Sociology from the Notre Dame and an M.A. in Social Service Administration from the University of Chicago. He joined our Probation Office in 1986. He has served under three chiefs, Pat Crowley, Dave Miller and Gerry Wright. John has learned from each and wants to keep the District on the course we're on.

Probation has a very committed and well-educated staff. Most officers have a master's degree. Twenty percent of the Department's staff has been hired during the last five years. There are 200-400 applicants for each opening. Relying on this valuable resource, Dierna's leadership style is participatory management. The staff has a say in decisions and policies that affect them.

John wants people to know that he is both passionate and compassionate about probation. He and his officers take seriously both making sure that offenders meet their obligations under the law and assisting them in becoming productive members of the community. Year after year, our probation office's revocation rate is under 6%, which means most offenders under supervision are complying with the rules and not engaged in criminal conduct. Probation collects over a million dollars every year in fines and restitution. The Probation Department's work load is impressive. For example, last year they investigated and wrote 700 detailed, meticulously prepared presentence reports to assist counsel and the judge in sentencing. There are over 1,700 offenders under supervision.

Workforce development – assisting offenders in getting employment in jobs they find meaningful and remunerative – is a priority goal. Probation provides supervisees with information about community jobs resources, housing, substance abuse and mental health treatment, education, vocational trades and apprentice programs. Probation officers work with their supervisees to develop personal, social and life skills to improve their chances for a successful re-entry into the community.

The Court has also recently begun a 12-month START program (Steps Toward Addiction Recovery Together) for a small group of offenders who meet regularly with a judge, prosecutor, probation officer and federal public defender to address addiction and other issues that jeopardize their successful completion of supervision. Dierna hopes these initiatives will give offenders a different perspective on the judicial system and reinforce their desire to turn their lives around and avoid further criminal conduct.

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

U.S. District

Animal Cruelty & Free Speech

United States Supreme Court

V.

Pit Bull Video

By Renee Amlin

A video depicts two pit bulls engaged in an organized dog fight, a hunting excursion showing pit bulls catching wild boar, and some gruesome footage of pitbulls being trained to catch and subdue hogs. Is this video footage, which was created for commercial gain, a depiction of animal cruelty that can constitutionally be prohibited by law? Or, is it protected speech under the First Amendment? This is the question the United States Supreme Court will soon have to decide in the case of United States v. Stevens, No. 08-769.

In 1999, Congress passed a law which attempted to limit animal cruelty. 18 U.S.C. §48 prohibits the creation, sale, or possession of depictions of a live animal being intentionally maimed, tortured, wounded or killed, with the intent to place them in interstate or foreign commerce for the purpose of achieving commercial gain. However, the law contains an "exceptions clause" which provides an exception for depictions which have "serious religious, political, scientific, educational, journalistic, historical, or artistic value."

Following the passage of this law, Robert Stevens, a published author and documentary producer, was investigated by federal and state law enforcement officers after they learned he was advertising pit bull-related videos using an underground publication called Sporting Dog Journal, which featured articles on illegal dog fighting.

Stevens was indicted for violating 18 U.S.C. §48. He was charged with three counts of knowingly selling depictions of animal cruelty with the intent to place those depictions into interstate commerce for the purpose of achieving commercial gain. Stevens' motion to dismiss the indictment was denied and a jury convicted him on all three counts. Stevens' case was the first prosecution in the country under 18 U.S.C. §48 to proceed to trial.

Stevens appealed his conviction. The United States Court of Appeals for the Third Circuit, sitting en banc, reversed the conviction and struck down the statute. The Third Circuit found the speech restricted by the law was in fact protected by the First Amendment. Applying a strict scrutiny standard, the Third Circuit declared the statute unconstitutional on its face as a content-based restriction on protected speech.

In its decision, the Third Circuit noted the United States Supreme Court had not recognized a new category of unprotected speech in more than 25 years, since it declared child pornography to be unprotected in 1982 in *New York v. Ferber*, 458 U.S. 747. Without guidance from the Supreme Court, the Third Circuit declined to extend the reasoning in Ferber beyond the regulation of child pornography and refused to create a new category of unprotected speech by declaring depictions of animal cruelty to be unprotected speech.

The government filed a petition for a writ of certiorari to the United States Supreme Court. The United States Supreme Court granted the petition and accepted the case for review.

The government asserts the statute was enacted in response to the growing market for videos and photographs depicting the gruesome torture and killing of animals. Specifically, the category of speech sought to be regulated includes dogfights, hog-dog fights, and cockfights, as well as "crush videos." Crush videos are depictions of women inflicting torture on small animals by "crushing" them to death with their bare feet or while wearing high-heeled shoes.

Because commercial trade in these videos is the driving force behind the underlying acts of animal cruelty, the government argues a prohibition against such trafficking prevents acts of animal cruelty. It submits the intent behind the statute is not to target the contents of the depiction or the offensiveness of its message, but to dry up the underlying market for animal cruelty, which is prohibited in all 50 states.

Although the statute is a content-based restriction on speech, the government argues it does not regulate protected speech.

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the Third Circuit declined to extend the reasoning in Ferber beyond the regulation of child pornography and refused to create a new category of unprotected speech by declaring depictions of animal cruelty to be unprotected speech.

Instead, it prohibits a very narrow category of speech that is unprotected by the First Amendment because depictions of animal cruelty have little or no expressive value and cause serious harm to society. Under a test which involves the categorical balancing of the value of the speech against its societal costs, the government argues its interests in eradicating animal cruelty and preventing its associated harms, such as gang activity, overwhelmingly outweighs any limited value these depictions may have. As a result, the speech can be prohibited.

Even if the statute does reach some protected speech, the government contends it is not invalid on its face because some applications of the statute are clearly constitutional, even if other applications are impermissible. It argues the Third Circuit improperly invalidated §48 on its face without a showing of substantial overbreadth. Additionally, the government argues Congress carved out a broad exemption to ensure that messages which are expressive are not "swept up" by the law. Under the "exceptions clause," materials which have recognized serious value, such as educational or artistic depictions of Spanish bullfighting, are not prohibited under the statute.

On the other side of the issue, Stevens argues the prohibited speech does not fit within any existing category of unprotected, prosecutable speech. Stevens rejects the government's contention that this speech can be regulated using an ad hoc balancing test and argues that images of animals being intentionally wounded or killed are not categorically valueless or harmful to society. Stevens argues his work, which focuses on pit bulls, seeks to educate the public about the dogs and how to train them for hunting and protection. He argues his film clips should be viewed from an educational and historical perspective and asserts they do not promote dog fighting, but instead document how it occurred in the United States before it became illegal. He further argues the videos have serious value because they demonstrate the beneficial use of pit bulls.

Stevens asserts the speech he depicts has been deemed unprotected by the statute and outside the reach of the exceptions clause simply based upon its content and the unpopular viewpoint it advances. He argues the government cannot prohibit the expression of an idea simply because the majority of society finds it to be offensive. Although they may be controversial, Stevens argues his films are not obscene, pornographic, inflammatory, defamatory, or even untruthful.

To further his point that the statute is vague, overbroad and a content-based regulation, Stevens cites to the images used by various animal rights groups who show photographs and video documentaries depicting animal mistreatment in order to fuel their movement for the proper treatment of animals and to spark vigorous political debate over issues such as fur-wearing. He also cites to the use of similar images in American culture, such as in movies like Conan, the Barbarian. He argues that the government has not specifically sought to prohibit such depictions as categorically valueless, yet they would seem to fall within the plain language of the statute.

Additionally, Stevens argues the law does not advance a compelling interest, is not narrowly tailored, and is not the least restrictive means of protecting animals from harm. Stevens argues the statute bears little resemblance to the government's asserted interest of preventing animal cruelty, since the legislative record demonstrates Congress's original intent was to specifically prohibit only crush videos. However, the actual statute goes much further.

During oral arguments, which were heard on October 6, 2009, the Supreme Court seemed to reject the government's comparison of animal cruelty to child pornography, which has been categorically declared to be unprotected speech. The justices also questioned the wide sweep of the statute, implying the law goes too far and is so vague that it makes it difficult for one to know if certain conduct is legal or illegal.

The justices posed various hypotheticals to question the proposition that the current statute seems to encompass conduct not sought to be regulated or conduct outside the bounds of Congress's power to regulate. For example, one justice inquired whether depictions of bow hunting would be considered animal cruelty that would be covered by the law. Another justice inquired as to whether Congress could prohibit an ethnic cleansing channel or a human sacrifice channel on cable tv.

Although a decision isn't expected for several months, the case will likely be monitored by various groups, including animal rights activists, hunters, photographers, film producers, lawyers, teachers and historians, among others, all of whom could have a stake in its outcome.

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Renee Amlin,
Tenth District Court of Appeals

Vicious Dogs In Ohio

By Bill Hedrick

Vicious dogs and the laws regulating them have been a growing issue for communities throughout Ohio. One such dog commonly found to be vicious by law is the pit bull. One common misconception is that the term pit bull is specific to a single breed of dog; it actually refers to a group of several breeds that share common characteristics, traits, and behaviors. Also, a dog does not have to be a "pure bred" pit bull to fall under ORC definitions and regulations.

What the Law Says

Pit bull dogs and their owners' legal obligations are directly addressed by ORC §§ 955.11 (A)(4)(a)iii and 955.22(D) and (E).

955.11(A)(4)(a)iii defines a vicious dog as a dog that "belongs to a breed that is commonly known as a pit bull dog" and that owning, keeping or harboring a pit bull is "prima-facie evidence of the ownership, keeping, or harboring of a vicious dog."

955.22(D) requires an individual to securely confine a vicious dog while it is on the home premises by keeping it in "a locked pen with a top, locked fenced yard, or other locked enclosure that has a top" such as a house. If the dog is off of its home premises, the individual must keep the dog "on a chain-link leash or tether that is not more than six feet in length" and comply with one of three additional requirements as outlined in 955.22(D)(2):

"(a) Keep that dog in a locked pen that has a top, locked fenced yard, or other locked enclosure that has a top;

(b) Have the leash or tether controlled by a person who is of suitable age and discretion or securely attach, tie, or affix the leash or tether to the ground or a stationary object or fixture so that the dog is adequately restrained and station such as person in close enough proximity to that dog so as to prevent it from causing injury to any person;

(c) Muzzle the dog"

955.22(E) requires all individuals having vicious dogs to obtain $100,000 of liability insurance.

Failure to abide by these ORC requirements is a first degree misdemeanor. If the dog in question kills or seriously injuries a person, the penalty is increased to a fourth degree felony.

What the Courts Have Said

Two recent Ohio Supreme Court decisions have clearly defined the laws concerning pit bulls and vicious dogs in general.

The regulations concerning Pits were recently challenged in City of Toledo vs. Tellings, 2007-Ohio-3724, which ended up on the Ohio Supreme Court's docket after the 6th District Court of Appeals found Toledo Municipal Code 505.14 and ORC §§ 955.11 and 955.22 unconstitutional. The appeals court held the statutes and ordinance all violated procedural due process, substantive due process and equal protection. The Ohio Supreme Court in turn held the provisions did not violate substantive due process or equal protection because the State of Ohio and the City of Toledo have a legitimate interest in protecting citizens from unsafe conditions caused by pit bulls, as substantial evidence showed they caused disproportionate danger to people, and the laws were rationally related to those interests when the dogs' owners had to obtain liability insurance and were barred from surgically silencing them, and, under the ordinance, the number of pit bulls per person or entity was limited. The Court also held the provisions did not violate procedural due process because pit bulls were classified generally as vicious dogs and there was no unilateral, case by case decision making and all pit bull owners knew that failure to abide by the laws related to pit bulls was a crime. The provisions were also found not void for vagueness based on the theory that one could not tell if one owned a pit bull since the dogs' traits and commonly available information about dog breeds sufficiently informed owners whether or not they owned a pit bull.

Outside of pit bulls, the Ohio Supreme Court in City of Youngstown v. Traylor, 2009-Ohio-4184, upheld Youngstown's vicious dog ordinance, which defines a vicious dog as "any dog with a propensity, tendency or disposition to attack, to cause injury to or to otherwise endanger the safety of human being or other domestic animals" or "any dog which attacks a human being or another domestic animal without provocation." In this case, two Italian Mastiff/Cane Corso dogs were running at large when they attacked a dog owned by David Roch who was subsequently bitten as he attempted to protect his dog. The Court ruled YCO 505.19 does not classify or label dogs as vicious; rather dogs are rendered vicious under the ordinance by their propensity to attack or by their attack, and dog owners are merely required to keep such dogs confined.

The debate over laws concerning vicious dogs and potentially vicious dogs will continue. But the right of the state to regulate these animals is clearly established by the case law. Owners failure to control dogs classified as vicious can result in those owners being bitten both civily and criminally.

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Bill Hedrick, City of Columbus, First Assistant Prosecutor

EMPLOYEE MONITORING

Not What It Used To Be?

By William A. Nolan

Twenty-o-nine was a tough year for employers checking up on their employees' electronic activities. I recently had occasion to collect the year's decisions relating to employer monitoring of employee computer use. While the volume of cases is significantly less than one might expect judging from the tidal wave of law firm articles and seminars about employees and social networking, there were enough cases that I was somewhat struck by a surprising fact – employers seem to be losing a lot of these cases.

A bit of historical background is in order. Perhaps 12 years ago, employee computer monitoring was the "hot" employment law issue. While email certainly existed before then, that was when we first started to see client issues involving employees doing dumb (or worse) things via the company's computers. Employers would become aware of these dumb things, and have the very understandable impulse to immediately look to at the various electronic resources owned by the company to get the details.

Just one problem – such investigation by the employer could violate the federal wiretapping statutes and its state counterparts. Generally speaking, these laws, with certain exceptions, prohibit the interception of wire, oral, or electronic communications. So it was not uncommon for an employer to be waiting patiently on the verge of busting an employee while the company's lawyers for the first time got their arms around these statutes.

It seemed like the wave of the future. While few if any of us knew electronic communications would dominate our existence the way they now do, certainly it was clear that email and other computer resources would continue to increase in importance, and we would all become wiretapping statute litigators.

That didn't happen. I have given a lot of advice regarding issues relating to employee's use of employer's electronic devices, but have not defended a single wiretapping statute claim. Certainly there are employment lawyers who have, but not many of them.

What happened? Two things, in my opinion. One, it is a legal issue relatively easily prevented by a document, in this case the employee's signed advanced consent to the employer's monitoring of the employee's emails. Consent is an exception to the wiretapping statutes. Problems that can be fixed with a document are much easier to solve than those where employee behavior must be changed. (See, e.g., the old but timeless issue of sexual harassment.)

The other – and more common – issue is the employee who communicates with his or her attorney about possible actions against the employer. The questions arises in many legal settings – when the employee uses the company's computer system, and in many cases has signed off on a policy recognizing it is the company's computer system and not for personal use, does the employee maintain an attorney/client privilege in those communications?

Two, even where the employer has not properly set up and administered its policies, other than egregious cases of employer overreaching, employees who in fact have done something rotten on the employer's computer are unlikely plaintiffs, even if the employer arguably did not technically comply with the applicable statutes.

So, employers have been counseled, get your policies in place, but conduct yourself reasonably and this is not a particularly high risk area. The real electronic workplace issue has become trying to teach managers not to preserve every little thought they have in an email, and beginning to try to exert some control over the proper retention and destruction of the tsunami of electronic data so as to avoid disaster in litigation.

That brings us to some of 2009's cases. *Hillstone v. Pietrylo*, 2009 WL 3128420 (D.N.J. 2009) and *Pietrylo v. Hillstone*, 2008 WL 6085437 (D.N.J. 2008), involve two restaurant servers who set up a Myspace page for the restaurant's employees to communicate about "any BS we deal with at work without any outside eyes spying in on us." The group was founded on the inevitably incorrect assumption that it was private and could be joined only by invitation.

A trusted supervisor was at some point given access by one of the users, and the supervisor in turn shared her access to higher level supervisors, who read some of what was being said and, not surprisingly, fired the two plaintiffs. The posts included sexual remarks about management and customers and references to violence and illegal drug use.

The plaintiffs filed a lawsuit under the stored communications laws that limit what individuals can access stored electronic communications. The employer's summary judgment was denied, the decision turning on the key fact that the mid-level supervisor who first was given access felt pressured to provide the access information to her supervisors. A trial and a small jury verdict in favor of the employees followed, and in the court's second opinion, it denied the employer's post-trial motion.

The other – and more common – issue is the employee who communicates with his or her attorney about possible actions against the employer. The questions arises in many legal settings – when the employee uses the company's computer system, and in many cases has signed off on a policy recognizing it is the company's computer system and not for personal use, does the employee maintain an attorney/client privilege in those communications?

The most recent decision on the point says that they do retain the privilege. See *Stengart v. LCA Holdings, Inc.*, 973 A.2d 390 (N.J. Ct. App. 2009). As noted, there are cases going both ways on this issue, and this particular case will be heard by the New Jersey Supreme Court, but this Stengart, Pietrylo, and other 2009 cases suggest that open season on employee's electronic activities is over.

While I learned a long time ago to resist the temptation to declare a major trend at every blip on the employment law landscape – it seems that the principles of proactive management and good employee communication trump any legal change as the best predictors of employer legal trouble – this apparent development does bear close attention. These new situations fall outside the scope of the aforementioned advanced consent, and clearly we will see other new technological situations where the employer's impulse to know what its employees are doing will need to be managed.

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William A. Nolan, Barnes & Thornburg

Sustainable Law Office Drives Future Success

By Alex Shumate

In today's value conscious legal marketplace, clients are scrutinizing every aspect of the legal services offered by law firms, including the space in which lawyers practice. At the same time, that space must fulfill lawyers' need to meet clients' requirements for maximizing new technology with its emphasis on video conferencing and instant communication. Plus, studies show that employees are more productive and morale improves in workspaces that emphasize natural light.

When Squire Sanders & Dempsey moved its Columbus office location last year to new space in the Huntington Center, we wanted to design an office that met all of those considerations – and more – in providing a sustainable environment that benefits clients, employees and the community at large. It was imperative to build a space that reflects our status as both as an international law firm and a leader in central Ohio; an environment that sent the right message to clients, employees, and visitors – impressive without being extravagant, and progressive and modern while being warm and welcoming.

To reach that goal, we used sustainability as a driving force in creating a world-class, sophisticated space. It has been a successful tool for relationship building – both within the firm and in the greater Columbus community.

Elements of Sustainability

For many, the term "sustainable" means environmentally friendly. We, however, considered the broadest possible definition of the term. We wanted our space to reflect all four elements of sustainability. They are social (acting in the interests of the community); economic (operating profitably); environmental (protecting and restoring the ecosystem); and cultural (protecting and valuing cultural diversity). To achieve this balance, we decided to pursue LEED (Leadership in Energy and Environmental Design) certification.

Elements of a LEED-CI Space

The LEED Green Building Rating System™ system, administered by the U.S. Green Building Council, encourages and accelerates global adoption of sustainable green building and development practices both through the creation and implementation of universally understood and accepted tools and performance criteria (www.USGBC.org) and by promoting innovative approaches to environmental challenges.

Because the office space was redeveloped within an existing space rather than a new building, it qualified as a LEED-certified interior (CI) project, meaning there is less control in the structure of the building than would normally take place.

In August 2009, Squire Sanders received notice that we were the first LEED certified law firm office in the state of Ohio, according to USGBC. With a Gold LEED-CI Rating, as of August our space was one of only three Gold LEED-CI certified projects – and one of only 87 total LEED certified projects – in Ohio.

To become LEED-certified, the USGBC considers various categories and scores points for meeting those criteria. For example, one category is the materials and resources. Using recycled materials and products manufactured within a 500-mile radius all earn points toward the LEED certification. Another factor is how much construction waste is created. Squire Sanders proudly diverted 80 percent from the landfill by reselling and reusing materials from the demolition.

A second category is indoor environment quality, such as low-emitting materials, indoor chemical and pollutant control, and thermal comfort maintained for occupants.

A variety of other factors considered include access to alternative transportation such as bicycle storage, reduction of water use, energy performance optimization through lighting power reduction, lighting controls, and HVAC, and zero use of CFC-based refrigerants in HVAC&R systems.

The checklist is extensive, and a decision must be made at the very beginning of the project to pursue LEED certification. It requires a coordinated team of designers, general contractors and subcontractors who are familiar with LEED guidelines, standards and procedures. The expertise, experience and guidance of Design Collective Inc., Pepper Construction and Jones Lang LaSalle were invaluable in achieving our success.

Pursuing Sustainability In All Aspects

While LEED certification drove much of the design and construction decision-making and process, other amenities were incorporated into the design to ensure all aspects of sustainability.

One example was the construction of an internal staircase to encourage connectivity between all three floors. This was important to drive collaboration among attorneys and staff. We also focused on amenities such as improved sound-proofing of offices, access to natural light and views and controllable lighting.

There also are elements to allow for improved client interaction such as multi-functional conference rooms and progressive technology for improved video conferencing. To enhance our internal culture and add to the welcoming nature of the office, we constructed "Starbucks-inspired" coffee bars on two of the three floors, with a similarly themed cafe on the other floor that serves as a lunchroom and employee-gathering space.

Office Space As A Business Development Tool

Our clients face the same, and even tougher, environmental challenges than we do. Already, our LEED Gold Certified Space has served as an important business development and retention tool. Our clients want to know what the firm is doing to be environmentally conscious, and it is an increasingly asked question on Request for Proposal forms and in quarterly reports requested by our clients. Likewise, as many of our clients are building new sites using LEED, it is important for us to reflect the same commitment.

Our commitment to sustainability is ongoing and will only grow in importance over the coming years. It is clear that the design and construction of our new space is only the beginning.

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Alex Shumate,
Squire Sanders & Dempsey

Back to the *Green* Future

By David M. Scott

Experts cite the "energy crisis" as the impetus for exploring the "heat of the sun, the power of the winds and the rains, and the warmth of the earth" in order to "capture energy from sources available, renewable and infinite."

Was this a commentator discussing the President's recent visit to a solar installation in Florida? Part of the mission statement for an alternative energy startup? Promotional materials from an oil company touting its new non-petroleum initiatives?

None of the above. It's from the opening comment to A Bucket of Oil (The Humanistic Approach to Building Design for Energy Conservation), published thirty-five years ago.[1]

As the Columbus Bar's Green Committee works to identify and understand the role of lawyers with respect to energy, climate, sustainable design and construction, and all things "green" (whatever that over-used and under-defined term might mean), I can't help but notice that many of the "latest" insights could more properly be filed under the heading Everything Old is New Again.

For example, my wife's grandparents down in Logan, Ohio have had a rain barrel for decades, yet just recently Whole Foods started carrying them (word to the wise: you can get one cheaper from Greenovate in the Short North — tell Tyler I sent you). This year the tanking economy had more and more people turning sod in their yards for fresh fruits and vegetables, harkening back to the Victory Gardens of the 1940s. Composting is back in vogue, with no fewer than ten different types of compost "systems" available for purchase on eBay. It turns out that we're recycling good ideas along with our glass, plastic, aluminum and food scraps.

Turning back to A Bucket of Oil, the authors (a group of architects, engineers, and design professionals) offer several guidelines to save energy in building design. These include using the climate (putting the elements to work); designing lighting systems for specific tasks; using energy efficient systems (cooling, heating, lighting and fenestration); and providing automatic controls so energy can be saved when spaces are not in use. As those of you who attended the ALI-ABA program "Attorney's Role in LEED Construction" already know, these concepts are among the things that can contribute to points under the LEED® rating system — first launched in August of 1998.

Green Times

As the Columbus Bar's Green Committee works to identify and understand the role of lawyers with respect to energy, climate, sustainable design and construction, and all things "green" (whatever that over-used and under-defined term might mean), I can't help but notice that many of the "latest" insights could more properly be filed under the heading Everything Old is New Again.

Although A Bucket of Oil didn't quite nail everything (contrary to its prediction that the "detached single-family home as we know it will disappear," such homes very much still exist and ballooned in size from an average 1,695 square feet in 1974 to 2,349 square feet in 2004), it presciently pontificated that there would be "'solar farms' in deserts … wind power plants with huge windmills," and we would have "multi-use" buildings where people would live, work and play. Today manufacturers in Toledo supply solar photovoltaics, wind farms are popping up in northern Ohio, and multi-use areas like the Arena District downtown are proliferating.

The subject of downtown, and Columbus in general, brings us back to the Columbus Bar Green Committee which was recently honored by a visit from Erin Miller, the Cap City's Environmental Steward. Erin explained that one great first step for law firms is to become a GreenSpot (www.columbusgreenspot.org), which basically involves making some relatively simple and inexpensive changes. These changes might not look like much on the small scale but, collectively, they make a big difference. The idea is that one step will lead to another until, eventually, everybody in your firm will be vegans who bike to work and live in cob houses.

Okay, I was kidding about that last part … you'll need to pry that t-bone from my cold, dead hands. But Columbus is developing some interesting programs to encourage its definition of "sustainability," which essentially means balancing the economic, energy, and environmental aspects of any decision. For example, the City recently announced the E-3 Initiative, a $1,000,000 revolving loan to support a pilot program encouraging energy efficiency projects for businesses. Going forward, Columbus intends to create the Clean Columbus Fund (target release in 2011), which would have the dual goals of brownfield cleanup (targeting smaller sites not eligible for full state or federal funds) and offering reimbursement of registration fees for projects that achieve LEED certification. Another program in the works is the Green Business Incubator (target release 2012), through which the City intends to work with TechColumbus to provide marketing support and help facilitate venture capital investment in green startups. The seeds of the new economy are being planted.

Hard work and abundant resources fueled Ohio's past prosperity. But unsustainable practices left a legacy of 11% unemployment and a tainted environment. Attorneys, like any business, can look to lessons of the past to help build a more sustainable future.

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1. Props to my friend and colleague Matt Canterbury of m+a architects (www.ma-architects.com) for sharing this book with me.

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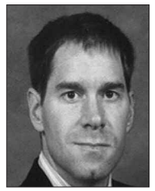

David M. Scott, LEED®-AP with Luper Neidenthal & Logan

The Amended ADA Conversing on Accommodations

The ADA does not require employers to delete or modify "essential functions" of a job as part of a reasonable accommodation, although the employer may nonetheless choose to do so.

By Christopher Hogan

As the impact of the Americans with Disabilities Amendments Act begins to be felt in both workplaces and courtrooms around the country, no one can doubt that effective accommodation dialogues have never been more important. The Amendments Act's regulatory and interpretive directives will more often than not ultimately require employers to set aside questions of whether an employee requesting an accommodation has a disability covered by the ADA and instead collaborate with that employee to identify accommodations that are effective, reasonable, and without undue hardship. What follows are some guidelines to help both employers and employees make accommodation dialogues win-win encounters.

The Interactive Process

When the employee's disability or need for an accommodation is not obvious, an employee's request for an accommodation requires employers and employees to engage in what the EEOC terms an "interactive process." The EEOC describes the interactive process as an informal dialogue between the employer and the employee designed to identify the precise limitations resulting from the employee's disability and potential accommodations that could overcome those limitations. Both parties have a stake in getting the interactive process right. An employer's failure to engage in good faith in the interactive process or its premature termination not only could result in the needless loss of a qualified disabled employee but also subject it to liability under the ADA. Similarly, an employee who is responsible for a breakdown in the interactive process will likely lose his or her job and the solicitude of the judiciary and the EEOC. While there is no one way to conduct accommodation dialogues, effective ones have the hallmarks outlined below.

Timely Requests. Serious Reponses

Timely accommodation requests taken seriously benefit both employers and employees. An employee who makes an accommodation request only after a negative performance evaluation or disciplinary action becomes imminent risks creating the impression that the request is more of a job protection stratagem than an earnest request for accommodation. On the other hand, employers who react stridently to accommodation requests perceived as disingenuous risk creating a perception of unwelcomeness that chills legitimate requests. A welcoming environment permits employers and employees to address potential problems early – something that's as good for employee morale as it is for risk management.

Employers and employees should demonstrate their commitment to a successful accommodation dialogue by meeting promptly. The purpose of this meeting should be to establish a cordial tone and to make an initial assessment. Because these meetings can sometimes be emotional and the issues blurry, it's in the best interest of both parties not to adjourn the meeting until there is a consensus as to open questions and next steps.

Consider Accommodating

Employers who believe additional information is needed to evaluate an accommodation request should nonetheless consider providing the employee with the requested accommodation on a provisional basis. Though not always appropriate, a provisional accommodation is one answer to the often awkward question of what to do with an employee during the information gathering phase. Both parties benefit if the employee is able to return to work or improve job performance during the information gathering process. Employers that carefully document the provisional nature of the accommodation face little danger of being required to provide the accommodation on a permanent basis solely by virtue of having provided it in the past. For their part, employees should not seek to punish good deeds; instead, they should accept the provisional nature of the accommodations, while moving quickly to provide the information needed for a final decision.

Understand the Job at Issue

The ADA does not require employers to delete or modify "essential functions" of a job as part of a reasonable accommodation, although the employer may nonetheless choose to do so. In the eyes of the EEOC, a job function is essential if its removal would "fundamentally alter" the position. The EEOC considers many factors – including the employer's judgment – in determining whether a job function is essential. An intellectually honest, wide-angle view of a job is the Rosetta stone that unlocks its essential functions.

Assessing Potential Accommodations

A "reasonable accommodation" is one that is plausible or feasible and allows the disabled employee to perform the essential functions of the job in question. Examples of potential reasonable accommodations include modifying facilities, job restructuring, schedule modification, and time off. While medical information will no longer be as important in determining who's covered by the ADA, it may assume added importance in fashioning accommodations. Given the likely increase in employees entitled to accommodations, employers will now more closely scrutinize the precise limitations imposed by an employee's disability and how those limitations can be accommodated.

If potential accommodations are identified, attempt to achieve a consensus on a particular accommodation. If consensus cannot be achieved, the employer is entitled to implement any reasonable accommodation available, not necessarily the one the employee desires. However, it's always helpful to give the employee's requested accommodation singular and well documented consideration. If there are no reasonable accommodations, the employer should document this fact very carefully and have persuasive evidence to back it up. Handle these situations with empathy and care.

Once a reasonable accommodation is agreed upon or chosen by the employer, create an accommodation plan or similar document that outlines the accommodation and acknowledges any concerns the employee may have concerning the accommodation. Thereafter, the employer and the employee should work together to monitor the continuing need for and effectiveness of the accommodation.

Complying with the amended ADA makes actively discussing accommodations more important than ever. Employers and employees must work together to realize ADA's goal of opening workplaces to qualified individuals with disabilities without requiring businesses to change essential job functions or incur undue hardship.

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What is a Trust Protector and How Might You Use One?

By Richard F. Meyer

A trust protector is a separately designated fiduciary appointed by the Grantor to ensure compliance with the Grantor's intent of the Trust, especially where the Trust is to be administered over a period of years. The trust protector is empowered to enforce the trust provisions as to distributions to trust beneficiaries, and therefore, protect the interests of the trustee and/or beneficiaries. Traditionally, only very wealthy Grantors used trust protectors for offshore trusts. However, trust protectors are gaining popularity with less affluent Grantors.

There are a number of reasons for including a trust protector. If the Grantor is unsure of the Trustee due to past inter-familio disputes, death of a known trustee with the successor being less predictable, and/or turnover in corporate trust department personnel, the trust protector will enforce the Grantor's intent regardless of the trustee administering the trust. The Grantor may want to protect the trust from foreseeable events such as a divorce, premature death vesting grandchildren, invidious beneficiary behavior or a later beneficiary disability. The Grantor may want to protect a family member trustee from unreasonable distribution requests from a family member beneficiary. The Grantor may want to protect the beneficiary from a trustee more interested in investment income than distribution. The Grantor effectuates intent by vesting the trust protector with the power to remove and appoint the trustee – either a non-performing trustee or a battered trustee.

Provisions for a trust protector should include the name of the primary and successor appointees, the powers of the trust protector, resignation and appointment of successor, removal and or default designation.

Powers of a trust protector are defined by clauses that provide:

Authority to remove any trustee of a trust created under the agreement;

Authority to appoint a successor trustee;

Power to amend or modify the trust agreement as follows:

Alter the administrative and investment powers of the trustee;

Reflect tax or other legal changes (special needs) that affect trust administration;

Correct ambiguities, including scrivener errors, that might otherwise require court construction or reformation;

Grant beneficiaries testamentary powers to appoint all or part of such beneficiary's trust to the creditors of the beneficiary's estate;

Amend the trust to alter the dispositive provisions of the trust that apply following the Grantor's death for the benefit of the trust beneficiaries, in order to provide the beneficiaries with any additional protections deemed appropriate by the trust protector;

Examine the books and records of each trust created under the agreement, including all documentation, inventories and accountings, at all reasonable times.

Powers of a trust protector are limited by clauses that provide:

That notwithstanding any other provision in the agreement to the contrary, the trust protector shall not participate in the exercise of a power or a discretion conferred under the agreement that would cause the trust protector to possess a general power of appointment;

For the ability to irrevocably release powers by written instrument delivered to the Trustee;

For the removal for cause;

For the imposition of a good faith standard;

That a trust protector may not serve as a trustee and a trust protector may not simultaneously serve as both trust protector and trustee.

Remember that the trust protector represents the Grantor. Thus, whatever powers the Grantor grants the trust protector, the provisions should be drafted accordingly.

Carefully drafted specific power clauses balance the Grantor's intent against allowing the trust protector too much power. The trust protector should be informed of the designation and the intent of the Grantor at creation.

Technically, anyone can serve as a trust protector, however, it is a good idea to appoint an independent third party (CPA, Attorney, Financial Advisor, and friend) rather than a family member or a beneficiary. A Grantor may name successor trust protectors, or require that any successor trust protectors named or appointed shall be a corporate fiduciary or an individual who is not related or subordinate to any beneficiary or the Grantor.

In the alternative, the new Ohio Uniform Trust Code allows for the appointment of a beneficiary surrogate. O.R.C. 5801.04(C) states that with respect to one or more of the current beneficiaries, the Grantor (in the trust agreement) may waive or modify the duties of the trustee to notify beneficiaries 25 years of age or older of the existence of the trust. The waiver or modification may be made only by the Grantor designating in the trust instrument one or more beneficiary surrogates to receive notices, information, and reports in lieu of the current beneficiaries. This "beneficiary surrogate" shall act in good faith to protect the interests of the current beneficiary for whom notice, information, and reports are received.

The difficulty in either a contractual trust advisor paragraph and/or a beneficiary surrogate paragraph is the language. While the contractual designation allows the drafter to expand and/or contract the powers, duties, and compensation of a trust protector, the statute on beneficiary surrogates is much less pliable. Therefore, I would recommend utilization of a contractual provision for a trust protector drafted with the beneficiary surrogate statute in mind.

Simply put, a trust protector may be beneficial in a number of settings that occur long after the trust is created thereby allowing Grantors concerned with trustee oversight more comfort in planning.

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The Modern Family Feud

By Ehren W. Slagle

When you think of family feuds, you likely recall *Hatfield et al. v. McCoy et al.*,[1] or the once popular television game show. However, the modern family feud often involves intense disputes over the assets of a decedent. For attorneys, the survey says: will contests and other probate litigation.

Only a few areas of law find parties to heated litigation in court on a Friday, and then seated together for dinner on Sunday. Probate litigation is one of those areas of law. In recent probate litigation in which our firm was involved, we frequently received Monday morning case plan revisions and alliance updates from our clients that were the result of their Sunday dinner. In addition to creating entertaining stories and unique dynamics, the typically close-knit relationships between litigants in contested probate matters can complicate the case for attorneys. It is an ongoing challenge to separate a client's emotion from substance. When this happens, it is best to focus on the basics, understand your client's goals, and ensure that you file the correct action to accomplish those goals.

The term "will contest" is too often used loosely for any dispute over the property of a decedent. However, an actual will contest is limited in its application, and most disputes regarding the assets of a decedent require actions in addition to a will contest for proper resolution.

Will contests, which are governed by Ohio Rev. Code §§ 2107.10 to 2107.77, only challenge the validity of a will that has been admitted to probate, and thus only effects those assets that pass via the will. The verdict form for will contests in the Ohio Jury Instructions asks the jury to answer just one simple question. Is the admitted will the valid last will of the decedent?

The significance of this is that a will contest is not many things. In Richard Dawson style, here are the top ten issues a will contest can not, will not, shall not resolve: (1) not a challenge to wills that are not admitted to probate; (2) not a challenge to the proper admission of the will to probate; (3) not an action to interpret the provisions of a will; (4) not a contest of the jurisdiction of a probate court to admit a will; (5) not an action to enforce a contract providing for the division of a testator's estate; (6) not a creditor's claim against the estate; (7) not an objection to the inventory; (8) not an action to retrieve concealed and/or embezzled assets under Ohio Rev. Code § 2109.50 et seq.; (9) not an action to force the production of a will; and perhaps most significantly, (10) nor a challenge to other beneficiary designations such as POD/TOD accounts, joint and survivorship accounts, life insurance beneficiary designations, and other contractual beneficiary designations.

Further, while the facts that support a will contest may also support a challenge to contractual beneficiary designations,[2] those contractual beneficiary designations must be filed separately – a will contest has no effect on them. Even then, if the result of a successful challenge to a contractual beneficiary designation is that the asset passes via the will, a will contest may be necessary to get the asset to your client.

Aside from ensuring that a will contest accomplishes your client's goals, and/or determining what additional actions you must file to accomplish those goals, the most important aspect of will contests is knowing when the statute of limitations runs. Generally, the statute of limitations for filing a will contest is three months; however, the tricky part is knowing when the three months begins. Pursuant to Ohio Rev. Code §§ 2107.19 and 2107.76, the estate's fiduciary is required to give notice of admission of the will to probate. Notice must be given to all persons listed in the statute. After notice is given, the fiduciary must then file a certificate of service evidencing that the fiduciary gave notice. Upon the filing of the certificate of service, the three-month deadline begins to run. Also, keep in mind that the Ohio savings statute does not apply to will contests.[3] Thus, do not file a will contest thinking you can voluntarily dismiss it and re-file at a later time – you will instead be calling your malpractice insurance carrier.

Will contests are quirky, and special attention must be paid to the relevant statutes as referenced above. Frequent challenges in will contests include necessary parties, standing, shifting burdens of proof, and discovery of attorney-client privileged and patient-physician privileged information. Generally, however, once it is determined that a will contest will accomplish the client's goal, and it is timely filed, it becomes classic litigation where the edge goes to the attorney who is the most prepared, and best uses creativity and persuasion to obtain a successful resolution for the client.

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1. While the famous feud between the Hatfields and McCoys is now metaphorical for parties with a bitter dispute, it is reported that the feud may have started with a lawsuit over an allegedly stolen pig. See West Virginia Division of Culture and History reprint of Shirley Donnelly, Hatfield-McCoy Dispute 75 Years Old Today, Beckley Post-Herald, August 7, 1957, available at http://www.wvculture.org/hiStory/crime/hatfieldmccoy01.html.

2. Testamentary capacity to make a will is different from the various legal capacities recognized in Ohio law, including "incompetency" for guardianships, "mental illness" for involuntary civil commitments, and legal capacity to form a contract. "[T]he general rule is that it takes more capacity to enter into a contract . . . than to make a will." Di Pietro v. Di Pietro, 10 Ohio App. 3d 44, 46 (10th Dist. Ct. App. 1983); but cf., Rogers v. Frayer, 1995 Ohio App. LEXIS 2677 (11th Dist. Ct. App. 1995) (holding that "[w]hen testamentary capacity is established, mental competency is sufficient to create a P.O.D. account.").

3. See Ohio Rev. Code § 2107.76(B).

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Surfing the Web Anonymously

There comes a time when you don't want anyone to know you are visiting certain web sites. That's not necessarily a bad thing, although it does seem to have an unsavory connotation.

By Ken Kozlowski

There comes a time when you don't want anyone to know you are visiting certain web sites. That's not necessarily a bad thing, although it does seem to have an unsavory connotation. However, you may be an attorney digging around for information, a paralegal conducting pre-trial research, or perhaps a marketing person looking for new clients or information on what competitors are doing. Business, or Competitive Intelligence, has been around for quite some time, and the Internet has made it rather easy to conduct.

What are your options, however, if you want to do a bit of electronic skulking but don't want the web sites you're accessing to have your information – your IP address, geographical location, or even some other type of identifiers? There are ways to surf the web anonymously. A lot of them involve the use of proxies (which is not the subject of this article). With a proxy, you browse to a web site and jump off from their location without leaving your own tracks all over the place. Others involve loading some software that will mask your identity. To get you started on the road to anonymity, we'll take a look at some of these devices that can be used to mask your identity. A few months ago I came across an online article that touted a software-based anonymous surfing product and thought it might be of interest to legal researchers.

First off we're going to take a look at a couple of the software-based products, some of which are mobile enough to be carried around on a jump drive for use anywhere you happen to be located.

The first one we'll explore is Covert Surfer (http://www.covertsurfer.com/). This product is manufactured by Diginonymous, LLC, a Florida based Service Disabled Veteran Owned Small Business. It is fully portable and provides anonymous Internet surfing, file encryption, and the ability to clean your registry. As to the mobile part, Covert Surfer is downloadable to a flash drive from which you can establish and access email accounts, surf websites, download, encrypt and store files. A free trial is available, and a subscription runs $75 annually.

Next up is the Anonymizer Total Net Shield (http://tinyurl.com/fdvj9), coming in at $100 per year. This product works by creating what they call an encrypted "virtual tunnel" to and from your computer that will protect you from the bad guys. It is described as being similar to the secure Virtual Private Networks (VPN) that corporations use. This "secure tunneling" creates an impregnable Secure Shell (SSH) connection from your computer to your destination site, protecting you from man in the middle (MITM) attacks and evil twin scams. Sorry for the jargon, but that is the way Anonymizer presents the information. Total Net Shield will also encrypt emails and protect your chat and IM communications as well.

A few of the other software products are GhostSurf (http://www.tenebril.com/v2009/consumer/consumergsp.php), which promises to erase all traces of your web surfing, remove aggressive spyware, prevent identity theft and credit card fraud, secure confidential files and passwords, eliminate online ads, and stop spam from flooding your inbox. There is a 15-day free trial, and they sometimes run sales on full purchases. IP Privacy (http://www.privacy-pro.com/) is a piece of software that will find the proxy servers for you that you can use to surf anonymously. It seems like a basic program that more technologically advanced users would not need. A review of the product from PC World (http://www.pcworld.com/downloads/file/fid,76369-order,3/description.html) even states that users can fiddle with their browser settings to have them point to known proxy servers. IP Privacy will also, however, clean up your online "tracks" and block invasive code.

Some other software-based products to take a look at are Go Trusted (http://www.gotrusted.com/), Hide My IP (http://www.hide-my-ip.net/) and Stegano's Internet Anonym (http://tinyurl.com/ry4hgb). The first two are pretty straightforward products that will allow the same types of things we have already discussed above. Stegano's seems to be a very robust product based out of the U.K. Aside from the surfing aspect of the product, you will also be able to stop hackers who are using their own version of a VPN to try and attack you, secure your own traffic with a VPN connection, and share files anonymously within peer-to-peer file sharing networks.

That's about it for this topic. Hope you enjoyed the info concerning ways to keep your online research identity a bit more confidential than it was before. My take is that you should shell out a few bucks for one of the better, more sophisticated programs that also have the ability to go mobile. The free ones can be used in a pinch, but third parties will still have access to your surfing habits. You will then have to rely on the kindness of strangers to not reveal the information when push comes to shove. Good luck.

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Ken Kozlowski, Director,
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How Bilingual Should My Interpreter Be?

By Bruno Romero

It depends. Am I ordering in an ethnic restaurant? Am I touring a distant land and want to hear about the attractions? Am I looking to set up a business in a foreign country? Or am I being charged with a crime in a legal system that uses a language different than my own or am I trying to collect intelligence from an enemy? The aim of this article is to explore two main factors in the use of interpreters: degree of bilingualism and setting.

Each of the scenarios above requires a different level of skill and formality on the part of the bilingual. If you are ordering from a menu, a couple of semesters of college in the foreign language may be sufficient. The restaurant may offer some formality and maybe some predetermined norms but the consequences of a breach of this formality may be inconsequential; so what if people will think you are a boor?

If you are vacationing and want to learn more about, say, the ruins or the culture of a distant land, the bilingual may need sufficient fluency to convey historical and cultural information, perhaps engage in a question and answer process and so forth. Most likely, the information will be canned and flow within certain parameters: dates, names, events, history and directions to the gift shop. There would be little formality or predetermined protocol required for the exchange of information. Also if the information is incorrect, does it matter? So what if at the next cocktail party, you blurb out that the pyramids were built with the help of alien technology, so now you're a boor and loco.

In court, however, the bilingual must demonstrate complete command of both languages. The bilingual, now anointed court interpreter must also function within prescribed protocols, standards and norms. The court interpreter must deliver utterances accurately and completely without adding or changing the message. The bilingual must possess the linguistic ability of an educated native speaker and must also understand linguistic nuances: metaphors, similes, idioms, slang and proverbs. In addition to fluency, the bilingual to act as an interpreter needs technical ability and skill to navigate jargon-filled conversations. He or she must also understand the requirements of the setting. What if the "interpreter" does not understand some words? Should the interpreter guess? Consult the dictionary? Or make it up to hide deficiencies?

Bilingualism and Fluency

Many people, including legal professionals, assume that bilingualism is a skill that is fully developed in people who identify themselves as bilingual. Typically, if a person states he or she is bilingual or multilingual, monolinguals will usually accept this at face value. After all, they are in no position to judge foreign language fluency. Worse, yet, is when self-affirmed bilinguals exaggerate their abilities or simply do not understand the requirements of the job.

Simply defined bilingualism refers to the ability to read and speak two languages. Many monolinguals assume that this ability is equal in both languages. Looking at this closely, however, we find that there are different degrees of bilingualism. Most bilinguals have a dominant language. Few have equal fluency or near equal fluency but these people are fully immersed in these two worlds.

Language Testing International, a licensee of the American Council on the Teaching of Foreign Languages and developer of language proficiency testing methods, came up with this framework to classify fluency in foreign language speakers: NOVICE , INTERMEDIATE, ADVANCED, SUPERIOR; and High, Mid, Low rating in each designation.

NOVICE speakers have no real functional ability or very little. They can use some nouns and maybe count, identify colors, family members and so forth. Their pronunciation is poor and often unintelligible. Their grammar is simple and clumsy. They may be able to exchange greetings. A Novice Low speaker can greet the waiter for you with success. The next step up, a Novice Mid, has slight more function on the language. A Novice Mid uses a few more words, has memorized phrases, provides simple responses to direct questions and utters a few words at a time, perhaps even adds adjectives to nouns. They pause frequently to search for simple vocabulary.

Novice High may be able to handle some conversation, but not sustain complex discussions. They may successfully manage a simple communication of limited nature in straightforward situations. They can navigate conversations restricted to a few

Continued on Page 36

Language Testing International, a licensee of the American Council on the Teaching of Foreign Languages and developer of language proficiency testing methods, came up with this framework to classify fluency in foreign language speakers: NOVICE , INTERMEDIATE, ADVANCED, SUPERIOR; and High, Mid, Low rating in each designation.

Continued from Page 35

predictable topics involving simple information, basic objects and familiar activities. They will possess a few phrases and handy expressions. However, they will run out and then sound inaccurate or awkward. Because phrases have been memorized, they may sometimes appear surprisingly fluent and accurate, but they are not. These speakers may greet the waiter, order you a meal and get directions to the next place.

INTERMEDIATE LOW speakers can handle a limited communication. Conversation may be restricted to concrete exchanges and predictable topics around personal information, the weather, family, work, school, sports, etc. Speakers may order stuff and make simple purchases. They are mainly reactive and struggle to answer direct questions or requests for information. They may ask a few appropriate questions, but their speech is typically filled with hesitancy and inaccuracies as they search for appropriate expressions. Pronunciation, vocabulary and syntax are heavily influenced by their first language.

Intermediate Mid handle a slightly higher range of communication. Conversations will mostly be limited to predictable and concrete exchanges. They may do well with personal information and may also accurately express physical and social needs (food, travel, lodging, etc). They can ask a variety of questions to obtain simple information to satisfy basic needs but may have difficulty linking ideas and using proper tenses. Their speech is filled with pauses and self-corrections. Their pronunciation, grammar, syntax and usage will be weak in complex communication.

Intermediate High speakers successfully handle routine tasks, social situations and uncomplicated language. They also do well with basic information related to work, school, recreation, particular interests and areas of competence. These speakers are significantly above novices but not quite advanced. Hesitation and errors will be evident. Their performance if complex will breakdown, i.e. fail to maintain good narration, semantics, and/or descriptions. They may even use the wrong verb tense. Intermediate High speakers can be understood by native speakers although the dominant language is still evident because they will use of code-switching, false cognates or literal translations. A good tour guide may be in this category.

ADVANCED LOW Speakers can handle most communications, but may sputter in their delivery. They can participate in most informal and limited formal conversations related life activities including current events, public matters and personal interest. They will narrate and describe past, present and future time frames, but errors may be subtle. When pressed for fuller accounts, they will rely on minimal discourse. Conversations may be limited to a single paragraph. Their dominant language will still be evident. They'll also be fooled by false cognates and literal meanings. They'll construct messages in the grammar of their native language rather than the target language. In complex functions, the linguistic quality of their speech will deteriorate significantly. Vocabulary will primarily be generic.

Advanced Mid speakers handle larger communicative tasks with ease and accuracy. They can participate in informal and some formal conversations related to concrete topics (work, school, home, and leisure) but may be challenged by formal discussions outside current experiences or individual relevance. They may have good command of verb tenses but some wrong conjugations may be noticeable. They may be able to adapt to unexpected discussions and can have good conversations about familiar topics. Advance Mid speakers can be accurate, clear and precise and they convey their intended message without confusion. However, they lack the ability to deliver structured arguments in extended discourse. In some conversations, they may delay to search for appropriate or less complex words.

Advance High speakers communicate with linguistic ease, confidence and competence. They consistently explain details and accurately narrate fully accounts of experiences. They use proper verb tenses. These speakers can handle sophisticated conversation but cannot sustain the performance across a variety of topics. Additionally, they can provide structured arguments to support their opinions, and may do well at constructing hypotheses. However, some subtle errors appear. Abstract discussions may be difficult but they are accurate in discussing concrete experiences. On occasion their language may appear inadequate. Overall, however, their performance is pretty good.

SUPERIOR foreign language speakers possess native-like fluency of the language. They can communicate with accuracy and ease in simple or sophisticated conversations. They are well versed on a variety of formal and informal topics. They are capable of providing lengthy, complex and coherent narrations. They can engage in dialogue about intricate subjects and experiences. They command a variety of interactive and discourse strategies, have a solid understanding of syntax, lexicon, intonation, pitch, stress and language nuances present in well-read natives. They demonstrate virtually no pattern of error. They have the fluency of an educated native person.

If we add technical training to the Superior and even perhaps the Advanced High, we have a court interpreter in the making or a bilingual good enough to translate intelligence. How bilingual does your interpreter need to be?

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Bruno Romero,
Supreme Court of Ohio

Court Speak

2009 Ethics Advisory *ROUND-UP*

By Alysha Clous

Every year, the Board of Commissioners on Grievances and Discipline issues a number of Advisory Opinions based on requests submitted by attorneys and judges. The opinions, dating to 1986, are available on the Supreme Court's website. Although the opinions are informal and nonbinding, the collection is a treasure trove of valuable information for tricky ethical issues.

Below is a summary of the 2009 opinions issued (as of print time) by the Board. To view the entire text and/or to discover how you can submit your own tricky ethical issue to the Board, go to: www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/default.asp

Opinion 2009-1

Full-time magistrate may not work as independent contractor.

The Board was asked if it is proper for a full-time magistrate to work as an independent contractor performing legal research projects for a legal publishing company. The Board's Opinion concluded that this type of work did not fall into one of the exceptions noted under Rule 3.11(B) of the Ohio Code of Judicial Conduct and, therefore, was not permissible. Full-time magistrates (as well as full-time judges) are, however, allowed to write and teach.

Opinion 2009-2

Juvenile judge and staff may not accept travel expenses or meals from a private placement facility.

It is not proper for a juvenile court judge, or staff, to accept travel expenses or meals from the owners of a private placement facility that seeks to receive placements of juveniles by the court. Reporting the conduct on an annual financial disclosure statement does not resolve all of the impropriety.

Opinion 2009-3

County prosecuting attorney may represent multiple statutory clients in some negotiations, but may not file a lawsuit by one against the other.

If the conflict is waivable and the parties give consent, a county prosecuting attorney may represent multiple statutory clients in the negotiation of a contract or a memorandum of understanding. See Rule of Professional Conduct 1.7 (a) and (b). However, if one party must file suit against the other, a conflict arises where the clients' interests are directly adverse, and the county prosecutor should withdraw from the representation of either client.

Opinion 2009-4

Lawyer-Mediator may not prepare legal documents for filing by or on behalf of both parties in a domestic relations proceeding.

Although a lawyer-mediator may not prepare legal documents for both parties, this Opinion states that the attorney may prepare the necessary legal documents, such as petitions, decrees and ancillary documents, on behalf of one of the parties if certain requirements relating to conflicts and mediators are met.

Opinion 2009-5
"General Counsel"

A lawyer or law firm may be listed as "General Counsel" on the letterhead of a client organization and may use the designation in signing correspondence written on behalf of the client organization if the communication is not false, misleading or nonverifiable, and: (1) The lawyer or law firm represents the client organization in all or most of the client's legal matters; (2) Devotes a substantial amount of professional time to the client organization, and; (3) Is given the title by the client organization.

Opinion 2009-6

Outsourcing legal or support work is not prohibited, but applicable rules impose significant ethical requirements.

Before outsourcing work (domestically or abroad) a lawyer must disclose, consult and obtain informed consent from the client. The outsourcing lawyer has responsibility for another lawyer or nonlawyer's conduct if the outsourcing lawyer orders, or with specific knowledge of the conduct, ratifies the conduct involved. The extent of supervision for outsourced services is a matter of professional judgment for an Ohio lawyer, but requires due diligence as to the qualifications and reputations of those to whom services are outsourced. Finally, fees and expenses charged to a client must be reasonable and not excessive. Any amount charged over the direct cost of the outsourcing must be reasonable and communicated to the client.

Opinion 2009-7

It is improper for a newly appointed magistrate to continue serving out a term as an elected member of city council.

The Ohio Code of Judicial Conduct does not allow a full-time or part-time domestic relations magistrate to continue to serve in a nonjudicial office that he or she was elected to prior to becoming a magistrate as this may compromise public confidence in the magistrate's independence, integrity, and impartiality.

Opinion 2009-8

Judicial party endorsement verses party affiliation

During a judicial campaign, a candidate may state in person or in advertising that he or she is endorsed by the Democratic or Republican party. However, after the primary, a candidate may in person but not in advertising identify himself of herself as a member of or affiliated with a political party.

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MAY THE FORCE BE WITH YOU IN COURT

By Stephen E. Chappelear

It's time to bring cultural relevance into the courtroom. That means movies and television.

Outdated trial advocacy books of the past suggested that juries would be swayed to the litigator's pitch through inspirational quotations from Shakespeare and the Bible. Perhaps in days of yore the average juror was familiar with "The Merchant of Venice," and would resonate to, "The quality of mercy is not strain'd...." Today, I'm not so sure. What I do know is that the good citizens of central Ohio enjoy going to the cinema, and relaxing in the family room watching popular television shows.

So I propose a new lexicon for trials. Put away the Concordance, and the literary classics. If you want to reach today's jurors, find a good quote from the silver screen or the TV.

And to get you started, I am happy to give you several ideas on how to sprinkle snappy quotations into your closing arguments.

While defending an individual charged with a multi-million dollar Ponzi scheme: "Who could blame this man? He was simply acting as we all would. After all, Gordon Gekko recognized this in the classic film Wall Street. when he said 'Greed, for lack of a better word, is good.'"

In seeking a substantial monetary award: "Let's be frank, ladies and gentlemen. This case deserves, no, demands, a huge verdict. As Rod Tidwell said to Jerry McGuire, 'Show me the money!'"

To justify a punitive damage award: "I expect that the evidence you have seen and heard would make you upset. Angry. And for good reason. You may feel like Howard Beale in 'Network' when he shouted out the window, 'I'm as mad as hell, and I'm not going to take this anymore!'"

When there is great debate about what really happened: "How do we determine what happened that night? You have heard two different stories. Dr. Gregory House tells us 'Everybody lies.' Well, Fox Mulder on the X-Files said 'The truth is out there.' But we also know from Col. Nathan Jessup, 'You can't handle the truth!' It might be easier if we lived in the land of Pinocchio, where the Blue Fairy said, 'A lie keeps growing and growing until it's as clear as the nose on your face.'"

After critical comments from opposing counsel about your trial tactics: "I am disappointed that learned opposing counsel saw fit to criticize some of the things I did during this trial. How sad. I say to her, in the words of Pee-Wee Herman, 'I know you are, but what am I?' And as Dan Aykroyd informed Jane Curtin on 'Saturday Night Live,' 'Jane, you ignorant slut.'"

In prosecuting a product liability claim, and questioning the wisdom of engineers: "They rushed this product to market to make lots of money. They didn't take time to think. It's like in the movie 'Jurassic Park,' where Ian Malcolm said, 'Yeah, but your scientists were so preoccupied with whether or not they could, they didn't stop to think if they should.'"

To express incredulity at the adversary's version of the events: "The evidence does not support that claim. I am reminded of Cher Horwitz in 'Clueless' when she uttered 'As if!'" And Arnold Drummond in 'Different Strokes': 'Whatchoo talkin' 'bout, Willis?'"

To counter negative comments about your female client: "It is so sad the lack of respect given to this poor young woman. She is a human being, and deserves decent treatment. It's like Johnny Castle said in 'Dirty Dancing,' 'Nobody puts Baby in a corner.'"

To dismiss cavalierly the adversary's claims: "I suggest you pay no heed to that silly claim. As Donnie Brasco said, 'Forget about it.'"

In arguing for the plaintiff in a wrongful death case: "I don't think I could say it any better than Bill Munny in 'Unforgiven.' 'It's a hell of a thing killin' a man. You take away all he's got and all he's ever gonna have.'"

To counter an emotional plea: "Ladies and gentlemen, we saw some tears from the plaintiff. And you might feel some sympathy for her. But the judge will instruct you that you should not let sympathy interfere with your verdict. Just as Jimmy Dugan noted that 'There's no crying in baseball!', similarly, there is no crying in a court of law."

In defending a divorce: "Yes, my client did some bad things. Said some bad things. Actually, did and said lots of bad things. But . . . that's ok. Because wasn't it Oliver Barrett IV who told us in 'Love Story,' 'Love means never having to say you're sorry'?" John Wayne as Capt. Nathan Brittles in "She Wore a Yellow Ribbon,' said, 'Never apologize and never explain, it's a sign of weakness.'"

In appealing to the jury: "The case is now in your hands. I have done everything I can. Now, it is up to you. I feel a little bit like Blanche Dubois as she declared, 'I have always depended on the kindness of strangers.' So I will leave you with the wisdom of Harry Callahan: 'Go ahead, make my day.'"

To cloak yourself in heroic terms: "Ladies and gentlemen, just like Superman of Metropolis, 'I'm here to fight for truth, justice, and the American way.'"

At the end of the first segment of closing argument: "I will now sit down, and my opponent will argue her case. But, just like the Terminator, 'I'll be back.'"

Th-that's all, folks!

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Amended Appellate ***Rules*** *to Allow En Banc* ***Rehearings***

By Glen Pritchard

The twelve district courts of appeals in Ohio comprise as many as twelve judges. It is not uncommon for different three judge panels within the same district to reach different conclusions about the same legal issue. No procedural device currently exists in Ohio for resolving these intra-district conflicts. That may change starting on July 1, 2010.

The Supreme Court Commission on rules of Practice and Procedure has recommended amendments to the Ohio Appellate Rules of Procedure to implement a process for appellate courts to sit en banc[1] to resolve intra-district conflicts. The amendments to Rules 14, 15, 22, 25, 26, and 30 of the Rules of Appellate Procedure are responsive to the Ohio Supreme Court's 2008 decision in *McFadden v. Cleveland State Univ.*[2] holding that "if judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict, they must convene en banc to resolve the conflict."

Availability of En Banc Review

Under the proposed rule amendments, the majority of a court of appeals judges may sua sponte order an en banc rehearing[3] or a party may apply to the court for rehearing en banc.[4] Unlike Federal Appellate Rule 35, nothing in the proposed rule permits a court to conduct the initial hearing en banc.

The proposed rule makes clear that en banc rehearing is "not favored and will not be ordered unless en banc consideration is necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed."[5] The appellate court's decision with respect to an application for en banc rehearing will be subject to an abuse of discretion standard.[6]

En Banc Procedure

A party seeking en banc rehearing is subject to the same timing requirements governing motions for reconsideration, and an application for reconsideration must be filed in the same document as an application for rehearing en banc.[7] The party seeking reconsideration or rehearing en banc must file an application with the court within ten days after the announcement of the court's decision. The application for rehearing must explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions.[8]

The opposing party must file an opposing brief within ten days of service of the application, and a reply brief may be filed within seven days of service of the opposing brief.[9]

Impact on Appeals to the Ohio Supreme Court?

Under the current rules, the filing of a motion for reconsideration does not extend the time for filing a notice of appeal in the Ohio Supreme Court.[10] Indeed, the current rules require appellate courts to rule upon applications for reconsideration within 45 days of filing so as not to interfere with the timing of Ohio Supreme Court filings.[11] An application for reconsideration, rehearing en banc, or both, under the proposed amended rules, however, will extend the time for appeal. This is accomplished by amendment to App. R. 22(A) which requires the appellate court to issue its written opinion, but defer entry of judgment until after the court of appeals rules on a timely filed application for reconsideration or rehearing en banc.

Likewise, the proposed amendments modify App. R. 25 by requiring a party to file a motion to certify a conflict to the Ohio Supreme Court under Article IV, Section 3(B)(4) of the Ohio Constitution within ten days after the judgment or order of the court has been filed with the clerk for journalization. The amended rule eliminates the "announcement of the court's decision" as a trigger for the deadline to file a motion to certify a conflict.

Constitutional Considerations

The Ohio Supreme Court paved the way for the proposed rule changes in *McFadden v. Cleveland State Univ*. In McFadden, the Tenth District Court of Appeals held that the two-year statute of limitations governs employment-discrimination claims against the state of Ohio, consistent with its earlier decision in *McCoy v. Toledo Corr. Inst.*[12] A 1994 decision by the Tenth District Court, however, held that the a six-year statute of limitations applied to such claims. In dealing with the conflict, the Tenth District panel in *McFadden* concluded that its 1994 decision was "an aberration" and explicitly overruled it.

The plaintiff in *McFadden*, filed a motion for reconsideration, arguing that the court of appeals' decision was invalid because the court resolved the intra-district conflict without an en banc proceeding.[13]

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The Tenth District Court of Appeals denied the plaintiff's motion for reconsideration, finding that en banc proceedings violated Section 3(A), Article IV of the Ohio Constitution which provides for three judge panels as follows:

The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. [Emphasis added.]

The Ohio Supreme Court reversed, finding that the Ohio Constitution's reference to three judge panels is a quorum requirement and does not prevent consideration by a larger appellate panel when warranted by extraordinary circumstances.

The new en banc rule is available for public comment until November 18, 2009,[14] and must be submitted to the Ohio General Assembly by January 15, 2010. Proposed rule amendments will then be republished for a second comment period and may be further revised prior to May 1, 2010. Rule amendments filed with the General Assembly in January and not withdrawn prior to May 1, 2010, will take effect on July 1, 2010, in the absence of a concurrent resolution of disapproval adopted by the General Assembly prior to that date.

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1. En banc is defined as "[w]ith all judges present and participating; in full court." Black's Law Dictionary (8th Ed. 2004) 568.
2. 120 Ohio St. 3d 54, 2008-Ohio-4914, syllabus ¶ 2.
3. Proposed App. R. 26(A)(2)(a)
4. Proposed App. R. 26(A)(2)(b)
5. Proposed App. R. 26(A)(2)(a)
6. McFadden, supra. at syllabus ¶ 2.
7. Proposed App. R. 26(A)(2)(c)
8. Proposed App. R. 26(A)(2)(b)
9. Proposed App. R. 26(A)(1)(b)
10. App. R. 26(A)(1)(a)
11. App. R. 26(C)
12. Franklin App. No. 04AP-1098, 2005-Ohio-1848.
13. The plaintiff relied upon In re J.J., 111 Ohio St. 3d 205, 2006-Ohio-5484 ("Appellate courts are duty-bound to resolve conflicts within their respective appellate districts through en banc proceedings.")
14. The proposed rule is available for inspection at the Ohio Supreme Court's website: www.sconet.state.oh.us/RuleAmendments/

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Face Time – *Better* Than Facebook

Facebook is like wearing 2D glasses. Transforming our three dimensional existence into a two dimensional replica, not of who we really are, but of how we want others to see us.

By Aaron L. Granger

I welcomed the disappearance of vinyl records, cassette tapes, Polaroid cameras, VCRs, DOS commands, and the original ATARI games with enthusiasm. Why? I always wanted the next big thing. After all, technology normally improves the tools we already use. However, the new social networking vehicles don't feel like an improvement. More and more technology is enabling us to forgo the handshake or hug with regularity. By embracing technology instead of each other, we slowly shed away the most important aspects of our human experience.

Looking for ways to reduce expenses my twin brother in California cancelled his cell phone. He got rid of his land line years ago. Now he demands that people "Facebook him" instead of calling. As twins we are complete opposites. In rebellion, I have refused to set up a Facebook account. I won't tweet on Twitter, and MySpace is a small area in the basement next to the water heater where I keep a work bench and power tools. Of course, we still email each other which helps maintain our technological stalemate. Okay, perhaps we have stubbornness in common.

Still, the Facebook phenomenon is troubling. I remember as a junior associate I was told that I should attend the departmental meetings of other practice areas within the firm. It provided me an opportunity to get to know a wider range of people and helped eliminate the occasional awkward moment in the elevator where the partner standing next to me asks: "Do you work here?" I suppose Facebook could eliminate those awkward moments if I sent "friend" invitations to everyone. I wonder how many partners would have accepted. Anyway, I discovered that after attending several of these meetings in other departments I was encouraged to stay involved. People would stop by my office to see if I was attending the next meeting. Questions would come up at the meetings that involved my area of practice and I would chime in with value added advice. I picked up on all the inside jokes told in the hallways when others were oblivious. I became actively, rather than passively, engaged. By the time I was being considered for partnership, I had developed "real" rather than "virtual" friendships with several partners throughout the firm. I couldn't have done that on Facebook.

I was also told as a developing lawyer to attend the Columbus Bar substantive law committee meetings. The normal benefits of meeting people and learning the area of practice were given as the primary reasons to attend. I suppose Facebook could do that without the loss of billable time traveling to and from the meeting. Although many who subscribe to Facebook admit they waste multiple hours reading about how other people spent their weekend. In my experience, there is no substitute for physically being at the meeting. I could readily discern the level of confidence and competence of my fellow brothers and sisters of the Bar. These are brilliant lawyers and I gained tremendous respect and appreciation of the local talent that we have in this community. Unexpectedly, it also helped me develop a greater commitment to civility because I knew I would see many of my adversaries at the next committee meeting or Columbus Bar sponsored pro bono project. How can Facebook improve civility if you can unilaterally reject a friend invitation or "un-friend" someone from your account?

At a reception I ran into two exceptional professionals, Robert Duncan and Norton Webster. In the brief exchange of our greeting there was an immediate transference of information to the limbic system in the brain that can only be transmitted through face to face contact. Eye recognition instantly synchronizes with their broad smile reinforced through a firm handshake. The exchange triggers autonomic responses that can't be replicated through a computer screen. I can sense the genuine zeal they both have for life. Not because they typed colon, dash, parenthesis at the end of a sentence to depict a smiley face. You can simply hear it in their laugh. Standing in the middle of the room where others are having similar greetings and exchanging pleasantries, the atmosphere becomes palpable. Each human connection augments the one next to it. Despite the lack of a recognizable song emanating from the orchestra of competing voices everything is in complete harmony. The environment permeates the human spirit. Facebook can't do that.

I suppose I will eventually cave in and declare my brother the winner in our little tug-of-war on technology. Which is really annoying because he's already taller, thinner, and better looking. If eyes are windows to the soul, Facebook is like wearing 2D glasses. Transforming our three dimensional existence into a two dimensional replica, not of who we really are, but of how we want others to see us. In the end, I will suffer the same fate as the VCR; unceremoniously tossed aside for the next big thing. Until that day comes, I will relish the symphony of voices in a crowded reception. I will strive to develop "real" friendships, and maintain civility with my adversaries through face to face contact. Most of all, I will cherish every handshake and hug.

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New Year Resolve:

Grow new brain cells

By Jessica G. Fallon

It's official. The holiday gauntlet is behind us.

Although it's a brand new year, it's back to the same old grind — clients, deadlines, billable hours, student loans and all of the other assorted perks that come with being an attorney. Before the stress of the day-to-day catches up with you quicker than those holiday credit card bills, consider taking the time this year to focus on yourself — or more specifically, your health.

I know what you're thinking. "Here we go again. Another exercise junkie with too much time on her hands, telling me how exercise will change my life." Well, rather than rolling your eyes and simultaneously dismissing the thought of making health and fitness your New Years' Resolution, consider this. Just 10 minutes of aerobic activity can increase you energy levels for up to four hours. Falling asleep drafting that statute of limitations argument? Take a quick walk! Exercise boosts blood flow to the area of the brain responsible for memory and may actually grow new brain cells. Studies have shown that even moderate exercise can improve the memory. Now what was the name of that case where you wanted to drop to the judge?

Exercise is the all natural way to decrease stress because when you engage in physical activity your body releases serotonin and endorphins – the chemicals that make you feel good both mentally and physically. Is there anyone who couldn't use a free stress reliever? Exercise helps you get a good night's sleep. Combined with the calming effect on your nerves, a quick workout is exactly what you need the day before trial or closing that big deal.

We're not talking giant life changes here people. Start small. All it takes is twenty to forty minutes on most days of the week to obtain these types of health benefits. And it doesn't have to be all at once. Take a ten minute walk before breakfast, a ten minute walk on your lunch break, and a ten minute walk after dinner, and you are well on your way.

There are few simple ways to get into the swing of things. The cheapest and easiest thing to do is grab your iPod, friend, spouse, kids or dog and take a walk. You'll get your body moving and spend time with loved ones. It doesn't get much better than multitasking at something besides email, phone calls, motion practice and billable hours.

You could also consider checking out a local health club. Most offer one to two-week trial passes so you can use the facility for free. Group exercise classes are a great way to get your cardio and strength training when you are new to exercise. There will be an instructor there to tell you exactly what to do and many people there to suffer through it with you.

If you are not ready to invest the time and money in a gym membership, there are many options for squeezing a fun and effective workout in at home. Many cable companies provide FitTV and FitTV on demand, which offers mini workouts in all forms and for all fitness levels. You can also rent exercise DVDs from your local library, Netflix, or your favorite movie rental spot. All you have to do is move your coffee table out of the way and turn on your TV. That is very little commitment with a big payoff!

Finally, consider signing up for a charity run or walk. You will reap the benefits of physical activity and social camaraderie while donating time and money to a worthy cause. To find an event in your area, you can visit websites such as www.runohio.com, www.ohiorunner.com, or www.premierraces.com.

Whatever you do, do not consider making time for exercise and a healthy meal just one more thing you can't possibly squeeze onto your plate. Consider your health — physical, mental, and emotional — your plate. Without it, you will not be able to effectively pile on and maintain all of the things that fuel your personal and professional life. So, MAKE THE TIME. Your family will thank you. Your co-workers will thank you. Your clients will thank you. But most of all, you will thank yourself.

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Executing the Constitution

AND OTHER WORKS ON PAPER

By Janyce C. Katz

On her first tour of the U.S. House of Representatives in D.C., my late mother-in-law Revekka Glazman stared intently at Howard Candler Christy's depiction of George Washington signing the U.S. Constitution.

"Aha," she finally exclaimed strongly, "Washington signing the executions."

Perhaps the biggest difference between the former Soviet Union, in which Revekka lived for the majority of her life, and the U.S. is the Constitution under which we live and the way our legal system attempts to uphold it. In Russia, Stalin and other Russian leaders, when victorious, would have ordered executions of their opponents without trials, let alone fair trials.

The U.S. power struggles and aftermath are usually less violent. More often opponents might try to destroy rivals using words or by limiting their professional opportunities, rather than by outright eliminating them.

Here, when morality and civility doesn't constrain such bad behavior, our legal system, based upon our Constitution and the Rule of Law can be used to force some to behave more honorably or pay consequences for not doing so. For that reason, Revekka's love for the U.S., her new country, grew daily for the rest of her life.

Michael E. Tigar, a trial attorney whose clients have included Angela Davis, Terry Nichols and Mobil Oil, also loves the U.S. legal system. He has, in his most recent book, *Nine Principles of Litigation and Life* (ABA Books, 2009) given the profession of law a boost.

To Tigar, the legal profession is about Justice – finding justice for clients by telling their story properly to the court. His philosophy seems to be Rule of Law, Constitution and Bible rolled up into one moralistic position about the role of the lawyer. He points out that attorneys should recognize the difference of every client, and should carefully construct and tell the client's distinct story. He argues that attorneys have an obligation to remember not to treat clients with cookie-cutter expediency, even if to do so would be more profitable when the cases are essentially the same.

Tigar advances nine principles in his very readable book. He says these principles "express ideas about will and skill, litigation, and life" necessary to deliver "practical, workaday ideas about trying cases." Courage, rapport, skepticism, observation, preparation, structure, candor, empowerment, and finally, presentation.

Tigar, graduated from Berkley and was editor-in-chief of Berkley Law's law journal during the Berkley free speech movement. He clerked for Justice Brennan, worked for and learned from other great litigators and has, himself, become well-regarded. Perhaps this explains his optimism about our being in a profession rather than a possibly very lucrative business. He has written a useful, readable book, encouraging to those of us who believe, still, that law should be a profession rather than a business. For that reason, his multiple references to articles about himself and to his own speeches can be excused.

And speaking of the Constitution, University of Pennsylvania professor, former history department chair and assistant dean of the School of Arts and Sciences, Dr. Richard R. Beeman, has written another history about the men who wrote the document that forms the backbone of our legal system. In *Plain, Honest Men* (Random House, 2009), Beeman tells the story about the Constitution's origins. Every few years, a new theory about the origins of the Constitution emerges. Perhaps most famous was the economic interpretation advanced by Charles and Mary Beard in *An Economic History of the Constitution* (1913), and refuted by Forrest McDonald in *We The People: The Economic Origins of the Constitution* (1958). More recent historians have shifted to another theory based upon intellectual history and written by Gordon Wood, Bernard Bailyn and others who emphasized the influence of the Eighteenth Century Enlightenment and thinkers like John Lock or Montesquieu on the writers of the Constitution.11 Many others including Alfred H. Kelly, *The American Constitution and It's Origins* or William Peters, *A More Perfect Union: The Making of the United States Constitution*, have written about this document.

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When morality and civility doesn't constrain such bad behavior, our legal system, based upon our Constitution and the Rule of Law can be used to force some to behave more honorably or pay consequences for not doing so.

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Beeman's book subtly enters the current struggle to determine how best to interpret the U.S. Constitution. He shows that the founders had many opinions, not one when they wrote the Constitution and suggests that those interpreting the Constitution should give it the veneration it deserves. At the same time, he offers a history of the Constitution that would allow its words to be understood as a continuing guide for our political experiment. Beeman argues that not only the words of the Constitution as written are important but also "in the egalitarian and democratic spirit of Jefferson, we must have faith in the wisdom of citizens of our own age to guide our continuing political experiment down paths that will ensure that we fulfill the promise of our other great Revolutionary document, the Declaration of Independence." With that, he dispatches the argument that the Constitution should be interpreted as written in the Eighteenth century, basing the interpretation on original intent.

Beeman, also a graduate of Berkley during the Free Speech movement, with a William and Mary MA and a University of Chicago PhD, writes history that reads like good fiction. It is good to see that the pedantic, deadly dull style of writing that prevailed when I attended graduate school many years ago has evolved into this readable, well-researched style.

In contrast with the Constitutional protections and the Rule of Law that we all try to uphold in our own careers, read Daniel Silva's newest book, *The Defector* (G.P. Putnam Sons, 2009). Silva's well-written fast-paced spy novel creates a world where Rule of Law doesn't exist. One spy, who has a conscience and who would rather be restoring old paintings, takes on a Russian billionaire without a conscience but with the ability to wreck havoc through the use of his personal body guards, his international sale of arms and his payments to governmental leaders. Spy battles spy or works with spy to overcome evil. It is a Hobbesian, Darwinian war where the strongest, fastest, cleverest wins.

I vote we try to strengthen The Rule of Law. It offers a more pleasant and just way of life than does the world depicted by Silva. But, *The Defector* is great fun to read and hard to put down. I recommend all three of the books reviewed.

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The Eponymous Mr. Ponzi

He had discovered there was no limit to the number of people ready to risk the necessary in order to obtain the superfluous.

By Jacob A. Stein

Hardly a day passes without the Securities and Exchange Commission or some defrauded party filing a pleading charging a defendant with engaging in a Ponzi scheme.

I asked the drafter of one such pleading what the words "Ponzi scheme" meant or contributed to the short and plain statement of the claim showing that the pleader is entitled to relief. No satisfactory answer and no idea who Ponzi was.

Last week I saw the eponymous Mr. Ponzi's name appear in three different newspaper stories. This triggered the recollection that many years ago I had in hand Ponzi's autobiography. With no hope of success in locating the copy again, I turned to the never-failing assistance of The Congressional Library, and Ponzi's book was in hand again. Ponzi published it himself in 1935, some 15 years after his plea of guilty to mail fraud.

The most interesting events in the story commence in 1919, when Ponzi found himself in Boston in a one-room office, with no prospects and no money. In his wanderings he had picked up knowledge of the export-import business and differences in currency rates. He discovered that postage rates and currency rates opened an opportunity to make money on a differential that occurred because of a drop in the value of foreign currency. He had no money to exploit his discovery. But he had imagination. He immediately formed a company to act as the investing agent. He named the company the Security Exchange Company, the first appearance of the SEC. He then deputized acquaintances to spread the word that people who lent him money would be repaid with a 50 percent return within 45 days. He had notes printed in the name of the company. Ponzi's calculations led him to believe that he could earn enough on the postage differential to make the repayment as promised and still take money off the top for himself.

The money flowed in so fast he hardly knew what to do with it. It became apparent he could not deal with such large sums in accordance with his original plan. He had tapped a Niagara of greed that picked him up and carried him forward despite his occasional desire to arrest it. He had discovered there was no limit to the number of people ready to risk the necessary in order to obtain the superfluous. Thus, the Ponzi scheme was born. It is summarized in In re Ponzi, 268 F. 997

While Mr. Ponzi is not to be classed in the same category with a robber and burglar, he was undoubtedly a clever manipulator, who took advantage of the credulity of the investing public, which in this instance is the usurer. The investors loaned their money for a return of the principal and 50 per cent interest [and] would seem themselves to be guilty of usury, if such existed. That Mr. Ponzi took advantage of a weakness and willingness of the community to be victimized is apparent, and sufficient to condemn his acts. So long as the current of money continued to flow in, he could pay the first investors with the receipts from the latter. It was another instance of robbing Peter to pay Paul, of which the past affords example.

The money came in so fast that he opened branches. He bought banks. He bought the Hanover Trust Company, the Lawrence, Massachusetts Trust Company and large shares in the South Trust Company, the Fidelity Trust Company, and the Tremont Trust Company.

In July of 1920 Ponzi's scheme reached its peak. The main office of the Securities Exchange Company was mobbed with people anxious to give Ponzi their money based on his promise of a 50 percent return in 45 days. Here is the way he describes one unforgettable Boston morning in front of his office:

The air was tense with ill-suppressed excitement. Hope and greed could be read in everybody's countenance. Wads of money nervously clutched and waived by thousands of outstretched fists! Madness, money madness, the worst kind of madness, was reflected in everybody's eyes! In a silent exhibition of utter disdain to all principles of calm and careful judgment. In a silent exhibition of reckless mob psychology, entirely too susceptible to the fatal spell of misguided or perverted leadership!

On that Monday morning in July his cash receipts were one million dollars in three hours. By August he controlled fifteen million dollars and he was under investigation by the postal authorities and the United States attorney. On November 1, 1920, he entered a plea of guilty to mail fraud. Despite the eloquent allocation of counsel, Ponzi received five years.

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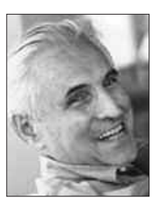

Jacob A. Stein,
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Survival of the Fittest

(or, How to Protect Yourself from "Collateral" Damage)

By Judith M. McInturff

I have devoted some time for many months thinking about the good old days. There was the time when the big bank lawyer filed vociferous objections to my self-employed debtor's Chapter 13 plan, thinking that his Chapter 11 expertise would win the day. I compliantly gave him an inflated value for his client's precious collateral. He crowed triumphantly. What I have never told him is that he forgot to ask for a cash collateral order, and the approval of my valuation order forever cut off his client's future rights to a renewing lien. Too bad for him. Worse for his client. I reminded myself that it is not my job to do anybody else's homework.

I am writing this article on the eve of the biggest change the Federal Bankruptcy law has seen in 25 years. My staff has survived the final onslaught of desperate debtors, those who have put off to the very last minute a decision that will forever change the economic playing field of their lives. We have spent countless hours away from our families, communities and sanity just to get a "case number" from the electronic God we know as ECF, so that our clients can say they filed under the "old law" – for whatever that is worth.

When I go to bed Sunday night, I will do so as a bankruptcy lawyer. When I awaken Monday morning, I will have morphed magically into a "Debt Relief Agent." I could spend pages and hours waxing philosophic about what has gotten all of us to this tragic point…but that wouldn't be entertaining, much less humorous. I'd rather talk about the good old days.

Or the time that my client simply wanted to divorce his wife, a loon (the reason for the divorce). He was forced into Chapter 13 by his noble desire to remain married until his son turned 18 and graduated from high school. The minute the son turned 18, he signed up for the armed forces and my client filed for the divorce. Three years into the divorce, and thousands of dollars later, I was retained. We filed a Chapter 13. The wife promptly sued me – several times, in fact, over the course of the Chapter 13. I came to expect a process server at my door, in fact bonded with him (the last subpoena served came with an apology). I filed more motions to quash than I thought possible. She even went so far as to file a Motion to Restrain the United States Department of Defense from sending her son overseas (an assignment he sought to put as many miles between him and his mother as possible). Throughout the litigation, I was kind to the woman, but the kindness was never returned. When a week before the domestic trial I was served up a motion to compel me to be her expert witness, I couldn't resist. I think she was surprised that no Motion to Quash was filed. I appeared at the trial. I was sworn, and gave hours of detailed testimony. She questioned me relentlessly. At the conclusion of the trial, she thanked me and we parted ways. The Judge took the matter under advisement. Weeks later, my client got his decision – he won in a big way. To this day, it likely never occurred to the wife that her biggest single mistake was eliciting my testimony. Sometimes you get what you ask for.

Then there was the time I filed a business 13, a reorganization of a recognizable Columbus business not to be mentioned here. The CEO was well respected in the community and a genuinely nice man. He was mortified to find himself in the position of having to discuss serious financial matters with anyone, especially a stranger and a woman to boot. He insisted that those of his business associates he considered friends would never give him trouble. He was wrong times ten. I was bombarded with vituperative telephone calls from his "friends," of the ilk that you do not need enemies. Strong reminders revolving around morality were doled out, aimed not just at the debtor but at me, too. The mother of all threats was in writing, from a local lawyer no less. His big beef was that the debtor still occupied seats at a big public sports arena, and, even more importantly, that those seats were far too close to his own seats. I assure you, Mr. Lawyer, red ink is not catching.

But really what I want to talk about is the good old days. Back in the day, before electronic case filings and before vexatious litigators and before friends were actually puffed up enemies in disguise, we really had fun in court. There were no marshals to wand us, no machines to buzz at us, and the bankruptcy hearing rooms were nowhere near bankruptcy court. I moved into the LeVeque Tower decades ago specifically because the bankruptcy hearings were there, right on the third floor, in front of God, Katherine LeVeque and anybody else who wanted to wander up there. We would meet our clients in the hall, talk to each other and work things out, like human beings should do. We all knew the goal – either get paid something, or get our collateral and go home.

In interviewing clients, it was always a good idea to let them know the rules. The most basic bankruptcy rule is that you can't keep somebody else's stuff. So, if a loan was collateralized, we needed to sort that out. What is the collateral? Can you live without it? Can you afford to keep it? Can we make a deal? Impressing upon a client to tell the truth, the whole truth, and absolutely nothing but the truth was easier back then. In fact, it was fairly easy to scare the bejeebers out of clients, Bankruptcy being a Federal Law and all.

All of this finally brings me to my point: collateral and the damage it causes.

So, we go to the first meeting of creditors. We are in the hallway at the LeVeque tower, milling around waiting for clients before we go into the hearing room. My client, a sweet young woman, was a little late. The elevator doors opened, and there she was. I motioned her over to the corner, by the window. "Don't worry," I tell her. "The Trustee is a little slow today, no problem." I let her take her coat off and settle down a little. It is then that I notice she is carrying a shoebox. I always hated it when clients schlepped their bills in to me in a big box, and I feared that the box contained a slew of new bills. "Hey, what's in the box?" I asked. She motions me closer. "What?" I ask again. She says: "Well, remember when you told me I wasn't allowed to get rid of anything?" "Yes," I said, thinking this is not going well at all….

"So, I figured I just couldn't throw this away, that it would be a crime or something." "Okay…" I drawled…(no, no this is just not going well at all). She opened the box. In it, nestled in crumpled tissue paper, was what was once a lovely parrot, now in full rigor mortis. "Don't we need to give this back?" she asked. We really had fun in court that day.

Then there was the nasty Doberman incident. Again, back in the day, various pet stores took their security agreements very seriously. (Yes, one can actually finance a pet, but that is wholly another story). Because there were no metal detectors, marshals or deterrents to entry, people could really bring a lot of stuff to court. As we were all milling around in the hallway waiting for hearings to start, increasingly loud yelping was heard in the elevator. The doors opened, revealing a nicely dressed couple with a Doberman pup. The pup's ears and tail were taped. They had obviously recently been clipped. The dog was snarling and drooling and yelping and yipping and wriggling. In short, the dog was not a happy pup. The owners were on a mission, headed straight to the hearing room door, opened it, and took a seat. We all ran in, eager to be entertained. Finally, the case was called. The couple stood at the hearing table and was sworn (or I thought I heard swearing, I can't be absolutely sure). The dog was now emitting a constant guttural sound that was really a little unnerving. I moved back a row. The Trustee asked for entries of appearance from creditors. In the front row sat a lawyer whom we all knew routinely represented a finance company that held "pet paper." He entered his appearance. In bankruptcy, a debtor has three choices relative to collateral: retention for full payment ("reaffirmation"), redemption (a one time payment equivalent to the value of the collateral), or surrender of the collateral. We all knew what was coming next. "Mr. and Mrs. Smith" says the brave creditor-lawyer, "What is your intention relative to this collateral?" Before the final syllable quit resonating, Mr. Smith said "Surrender." " I don't think I heard you right," says creditor-lawyer. "I said surrender." "We can talk out in the hallway and perhaps make a deal. I am sure your children wouldn't want to part with the family pet." "Oh, but we do." Said Mr. Smith, now standing, arms outstretched, dog dangling at the end of those very arms. Creditor-lawyer stands, and, in a move that he will probably forever regret, puts his hands out towards the dog. "Are you sure? Are you really really sure? Why would you want to surrender this beautiful animal?" In that moment, we knew what was going to happen. Kind of like watching two trains hurtling towards each other…the moment of impact inevitable, in slow motion. And just as Mr. Smith said, "Because the dog bites," the dog did just that. Ouch. From that day forward, creditor-lawyer sent his junior associate to hearings.

But back to wives. The biggest lesson I have learned in my 25 years as a bankruptcy lawyer is that everybody has somebody who is really, really mad at them. If they are lucky, that person won't interfere with their smooth sailing in bankruptcy court. But many are not that lucky. Again, back in the day, Lazarus took purchase money security interests in virtually everything they sold. And, their lawyer, a testy old lady who really was endearing, showed up at every single hearing in which Lazarus was involved. (Believe me, that was a lot.) So, here we are sitting in the hearing room, listening to dozens of boring cases. In walks an imperious, but well-dressed woman. Her carriage was deliberate and definitive. We took notice. Something big was going to happen. She sat next to me. I assured my client, once again, that if the cases he hears before his go badly, that does not mean his will, not to worry. He is worried. I calm him again, no problems, just listen; it will be fine. The next case is called. A man, whose eyes are darting and who is sweating, steps up, accompanied by a much younger woman, his wife. They are sworn. Testimony is taken. At last, the Trustee asks, "Are there any creditors?" "Yes!" says the imperious well-dressed woman. She identifies herself as the man's ex-wife. Question after question is asked, all revolving around his less than savory character based upon his nonpayment of joint marital debt. Finally, the Trustee cuts her off and advises her that this is not the time and place to rehash the divorce. She is not satisfied, but, fuming, sits down. "Any other creditors?" "Yes" says Lazarus-lawyer. "You may inquire," says the Trustee. Questions are asked about the use of the Lazarus charge, culminating with this: "Mr. Jones, do you recall purchasing a Blackgama full length female pelt mink coat on December 10, 1988?" I can still feel the suction generated by the ex-wife's vacation of the seat next to me. "I OBJECT!! THAT SONOFABITCH NEVER BOUGHT ME A MINK COAT!"...And who thought practicing bankruptcy was boring?

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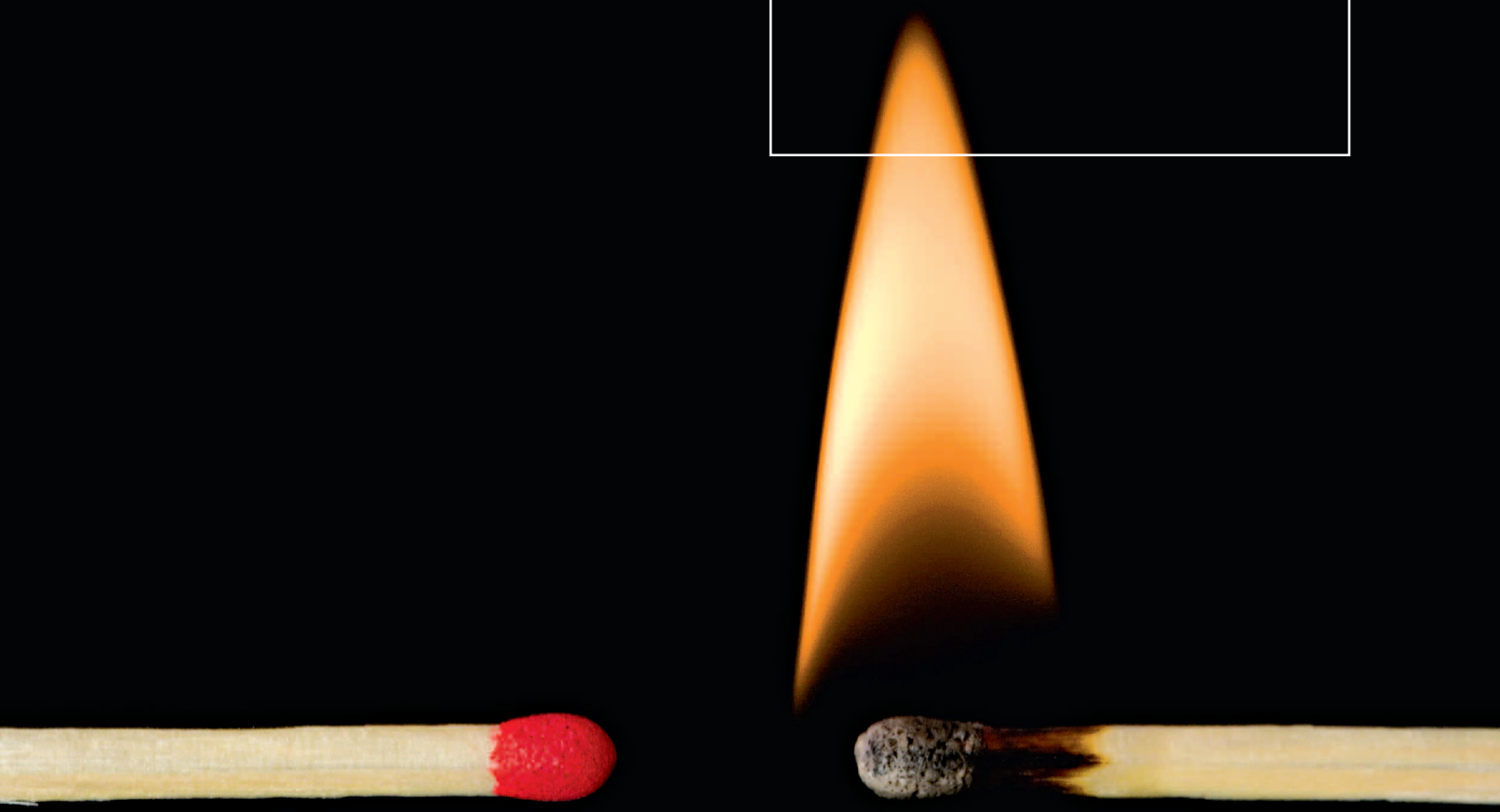

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