COLUMBUS BAR

Lawyers QUARTERLY

WINTER 2011

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Cheers

By The Honorable Stephen L. McIntosh,
Franklin County Common Pleas Court

To Alex Lagusch. If you remember the sitcom, *Cheers*, then you will know what I am talking about. As the lyrics to the show's theme song go…

Making your way in the world today takes everything you've got.
Taking a break from all your worries sure would help a lot.
Wouldn't you like to get away?
Sometimes you want to go
Where everybody knows your name,
and they're always glad you came.
You wanna be where you can see,
our troubles are all the same
You wanna be where everybody knows
Your name.
You wanna go where people know,
people are all the same,
You wanna go where everybody knows
your name.

Cheers was the neighborhood bar. It was a comfortable place where you could go to relax and be among friends. The CBA is your neighborhood bar, a place where you go to see your friends, renew acquaintances, talk shop (or not) and obtain all your educational requirements. For 33 years, the CBA "bartender" was Alex. Like any good bartender, he would lend his ear to listen and was always full of advice and occasional pearls of wisdom. He had a solution or suggestion for every problem, not necessarily one that actually worked, but a solution or suggestion nonetheless.

If you stopped into your neighborhood bar, you could saunter into his office. Unlike many bartenders, Alex was proactive. Even if you did not have a problem or concern, he still had advice or ideas for you to listen to - lots and lots and lots of ideas. He also was not bashful in sharing these thoughts with wit and wisdom.

Your neighborhood bar has a new "bar keeper" who will be at your ready to tend to all who walk off the elevator. While the bartender has changed, the cast of characters has not. During Alex's parting words at his retirement party at the Franklin Park Conservatory, he used a military metaphor to describe the Columbus Bar staff, "…their boots have been on the ground and they have turned great ideas into reality." That staff continues to march in step, but with a new commander leading the charge.

There is not enough time or space to recap what Alex's 33 years of "bartending" has brought to the Columbus Bar. Nor would he want the review. The beer mug has passed. We begin a new and exciting time for the association and the membership under the talented and capable leadership of Jill Snitcher McQuain, a barista familiar to us all.

(I will keep my words brief, as Bruce Campbell, Bar Counsel and author extraordinaire, follows with his essay introducing Jill, "Excalibur Changes Hands." I do not wish to compete. Those of you who have had the pleasure of reading Bruce's missives over the years, often with dictionary in hand, know what I mean.)

I am positive Alex will still be "tending" – albeit to a smaller audience. And he will always have a word of advice, an idea or two (or three) and a kind word. Cheers to you, Alex. Our neighborhood bar continues. You are always welcome…

…Where everybody knows your name,
and they're always glad you came.
You wanna be where you can see,
our troubles are all the same
You wanna be where everybody knows
Your name.

Stop in often and grab a stool. We are at your service.

Happy 2011.

Excalibur Changes Hands

Jill Snitcher McQuain

By Bruce A. Campbell

A weary King Arthur repaired to his barge. As he embarked, he told his worthy knight, Sir Bedivere, "the old order changeth, yielding place to new." The barge drifted away, and on the shore stood Sir Bedivere "revolving many memories, till the hull looked one black dot against the verge of dawn." *

Thus, the redoubtable King Alex sails away from the banks of the Columbus Bar leaving behind a worthy successor to head the round table in the corner office. While it is unlikely Alex will ever "be a dot on the verge" (or like Gen. McArthur "just fade away"), his absence from the daily affairs of this organization will occasion many "revolving memories" of his long and vital tenure here.

Jill Snitcher McQuain, recently tapped as major-domo of Fortress CBA, is the "new order" in every meaningful sense of these words. It is likely that anyone at all involved in the association's activities over the last dozen years will have encountered her in one of more of the myriad roles she has played over that span -- committee wrangler, membership expander, judicial campaign advertising ramrod, community outreach resource, communications overseer, marketing spark plug; leadership programs initiator, technology and web site specialist, revenue generator, to name but some of her functions. Her imprint is everywhere on the fabric of the enterprise. You might also know that she is famously organized (day planner always at hand) and driven to excel at whatever she takes on.

She has accumulated a barge load of friends around town and in bar circles (no, not that kind of bar) throughout the country. As one of those close to her put it, "Jill is one of those rare people that when you meet her you instantly like her and know that you can trust her. She's thoughtful to her friends and would do anything for them. Jill is a wonderful asset to our bar, and I can't think of anyone else better qualified to carry on what Alex has done as well as lead the bar in new directions."

The meat of her résumé is prime. A quick skim of the menu goes like this: scholarships to OSU; Dean's List; B.S. (Poly.Sci.) '93; four years at the Ohio Attorney General's Office; scholarships to Capital Law School; Dean's List; J.D. '99; admitted to the bar '99; Executive Assistant to the Director at the Wexner Center; Executive Assistant to the Director and Assistant Bar Counsel of Columbus Bar; President of the Women Lawyers of Franklin County, Executive Director of Ohio Association for Justice (fka Ohio Academy of Trial Lawyers), and finally back to the Columbus Bar as Assistant Executive Director.

It should be no surprise to learn that Jill was an early starter. Her parents, Al and Barb Snitcher, of Ashtabula report that she always wanted to be a lawyer and gravitated toward governmental affairs and politics early on. In high school, she was class president and "honorary city manager for a day." She was invited by a congressman to a D.C. conference on government. Subsequently, she served as a Senate page. She worked on several congressional and presidential campaigns. When President Clinton was elected, she attended an inaugural ball. No report is available on whether she danced with Bill.

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All was not law, politics and government. Along the way she worked in a cafeteria, a grocery store, Cedar Point and the Louis Vuitton section of Marshall Fields (where, perhaps, she acquired her taste for smart fashion). She played the drums. She took up skiing and surfing. Her dad recounts that she, having broken a leg the day before a family trip to Hawaii, was so intent on catching the waves that against all medical and parental advice, she wrapped the leg in a garbage bag and hit the boards. Dad now says that typifies her "determination," (although, at the time, he probably thought of it as "willfulness"). Later, on her way to take the first day of the bar exam, an errant driver crashed head on into Jill's car. Unruffled, she told the officer taking the accident report that the bar exam was way more important than filling out police paper work. Apparently, she was persuasive enough to escape a leaving-the-scene charge, and off she went to the exam, which, of course, she passed.

Another slippery slope Jill has negotiated with great aplomb these last eight plus years is that challenging trail called the "Mommy Track." Along with her groom Larry McQuain, (now Director of Real Estate for the Franklin County Auditor), she has negotiated the jagged brink between commitment to family and profession with notable success on both sides of that line. Sons Ryan (8) and Logan (2) show great promise and a healthy streak of independence (reminiscent of the leg in that trashbag thing). We await that time in ten years or so when Jill tries to "executive direct" two teenage renegades and can only hope she does not take out the inescapable frustrations of that futile enterprise on the CBA staff.

It has been de rigueur for at least the last thirty-three years, for a Columbus Bar E.D. to display quirky -- not to say bizarre -- behavior. With Jill's succession to the woolsack, that tradition surely will continue. She exhibits, among other clinically significant eccentricities, Mycophobia (strong aversion to mushrooms), Chromatophobia (irrational dread of the color pink) and Imeldamania (a compulsion to buy shoes). Although a certified and committed Yuppie, she has certain old fogy tendencies - for example, her desire, from a young age, to own a Cadillac. If she does get a new ride, it will certainly not be Mary Kay pink.

In an attempt to get a deeper look into the off-duty Jill, I called a number of her best buddies to see if they would provide some juicy tidbits for this article. To a person -- whether out of excessive loyalty to Jill or fear of being implicated themselves in some indecorous escapade or another -- they gave up diddly except for one that let slip that Jill mixes a margarita, that, "makes the world look good from any angle." Hummm! Stay tuned; eventually there have to be more leaks.

No doubt, there were other worthy individuals in the pool of applicants for the directorship of the Columbus Bar. This is organization that many would be pleased and competent to lead. That said, however, the final choice the Board made, in the opinion of this reporter, is one that will be looked back upon in years to come as eminently prescient -- just as was the choice made by the Board three-plus decades ago.

The new order most certainly will take different tacks and assume new riggings as the times and tides require. Under Jill's calm and resolute helmspersonship, the association's 141-year tradition of excellence will be vouchsafed, its Excalibur burnished.

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* Tennison, La Morte D'Arthur

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Bruce A. Campbell,
Columbus Bar Counsel

Reflections on the Meaning of Professionalism

By The Honorable James L. Graham

My love affair with the law began in the autumn of 1959 when I enrolled as member of the freshman class at The Ohio State University College of Law.

I think I was motivated to give law school a try by the Perry Mason television series starring Raymond Burr. Perry was a pretty good role model for someone aspiring to be a lawyer. He was ethical, polite, and always one step ahead of the opposition. The bad guy (never his client) usually confessed under his withering cross examination – not too realistic, but great entertainment!

I had never met a real lawyer, so my law professors were the first contact I had with members of the legal profession. There were some real greats among them: Bob Wills, distinguished in appearance, kind and gentlemanly in demeanor, who treated first year law students as respected fellow scholars of the law; Vaughan Ball, who made the study of evidence hilarious and proved that when grappling with the law it helps to have a sense of humor; Charlie Callahan, in class as skillful as a surgeon dissecting every nuance of property law, after class, a gifted jazz pianist; Bob Nordstrom, whose intimidating intellect and mastery of the Socratic method stirred me so much that I took every course he taught, regardless of the subject matter.

I was hooked! I thought, if this is what lawyers are like, I have surely chosen the right profession. My delight in the law has continued through 25 years in the practice and nearly another quarter century on the bench. It has been continuously nurtured by many of the outstanding men and women I have been privileged to call my colleagues. Some of them have occupied high public office or leadership roles in academia and major law

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firms, while others have quietly but effectively served their clients in small neighborhood law offices, or their communities in public service employment. But every one of them has shared a commitment to professionalism. In preparing these thoughts, I have reflected on the qualities these colleagues have displayed which tend to define what professionalism is.

Character

On the importance of character, Abraham Lincoln may have said it best in notes he made during the 1850s for a lecture to young lawyers: "Resolve to be honest at all events and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation."

Character is more than mere adherence to a set of rules and regulations, such as the Ohio Rules of Professional Conduct. It is much deeper than that. It is a complex of mental and personality traits that includes a broad spectrum of qualities such as truthfulness, openness, fairness, kindness, humility, generosity, compassion, and goodwill. These are the qualities that come to mind as I reflect on the character of the best lawyers I have known. I hasten to add that none of them were pushovers. Some were the toughest lawyers I ever met, so don't ever think these qualities are inconsistent with vigorous advocacy. In fact, usually it's just the opposite.

Ultimately, character becomes a part of a person's identity. Its habits become so ingrained that in the fullness of maturity, they come naturally and spontaneously. Character in the context of professionalism includes the important element of prudence. A negligent misrepresentation is usually just as destructive to a lawyer's reputation as intentional falsehood. A lawyer of character speaks on matters of substance only after careful research and investigation and never in haste or under the influence of emotion.

Young lawyers should never lose sight of the fact that their reputation for intellectual and ethical integrity will be either their greatest asset or their greatest enemy, and no job, no client, no fee, no courtroom victory, no advantage of any kind is worth the slightest blemish on their reputation. The development of character requires a continuous commitment to its goals, consistent practice of its qualities, and a healthy respect for the powerful temptations that can destroy careers.

Finally, the issue of character touches on more than the law or professional life. It includes a lawyer's personal life and nonprofessional relationships as well. As a member of a learned profession entrusted with special powers which can affect the lives and fortunes of other citizens, lawyers should expect public scrutiny and realize that their actions away from the office or off the bench affect not only their own professional reputations but the image of the profession as a whole. Professionalism is a 24/7 proposition.

Competency

By its very definition, a profession is a calling which requires specialized knowledge acquired through years of education and experience. Of course, it is the special knowledge of the law and the legal system that sets a lawyer apart from other members of society. A principal hallmark of professionalism is a reputation for superior skill and knowledge in the lawyer's chosen specialty. This can only be achieved through a lifetime commitment to learning. The old saying that a lawyer's license to practice law is but a license to learn is founded in reality.

True professionals continue to hone their skills throughout their careers and this is by no means limited to knowledge of the law. Indeed, every good lawyer I know has a rich skill set which equips him or her for a variety of shifting roles, including advocate, peacemaker, negotiator, mediator, arbiter, scrivener, teacher, and student. They were not born with these skills; they acquired them through hours, days and years of study, preparation, observation, experience, and plain hard work. We are not talking about drudgery here, we are taking about a lifetime of intellectual simulation and growth – what a privilege!

Service

The law is a helping profession – it deals with the problems of people. Lawyers are granted significant powers and privileges in exchange for their undertaking to fulfill important responsibilities of service to society and the administration of justice. Society exacts no such special pact from shopkeepers, labor unions or corporate America.

The best lawyers I know do not give lip service to these principles. They have adopted them as core beliefs. They have consciously dedicated themselves to transcendent concepts of truth, justice, and the public good. They regard the practice of law as more than just another business. They are truly committed to the rule of law and equal justice for all and regard their relationship with their clients as a sacred trust.

The service component of professionalism involves more than taking care of clients, it involves service to the community and the profession. The lawyers and judges I admire most are invariably involved in investing their time and talent in improving their communities and advancing the goals of the profession.

As I look back on a career which now spans almost five decades, I am very grateful that my youthful interest lead me to the law, and I marvel at how lucky I have been to have had outstanding role models who displayed the principles of professionalism at every stage of my career. I am convinced that a great amount of good comes from embracing these principles.

Society benefits, clients benefit, and so do we, the lawyers and judges who are the members of this ancient and honorable profession. I believe that lawyers who make these principles a part of their persona find a lifetime of joy and fulfillment in their work. They are healthier, live longer and continue serving their community for decades beyond normal retirement. If anyone has any doubt that true professionals lead incredibly productive and fulfilling lives, just take a look at some great examples in our midst, just to name a few, folks like Judge Bob Duncan, Sam Porter, Lloyd Fisher and Bruce Lynn.

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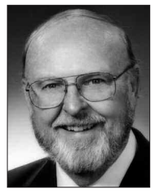

By The Honorable James L. Graham, U.S. District Court, S.D. Ohio

LAW FIRM WEBSITES AND ETHICAL CONSIDERATIONS

By Alvin E. Mathews Jr.

You've wanted to freshen up your law firm website for a while. So, you hire a self-proclaimed web designer/marketing guru to help you with branding and attracting clients. The guru promises to use internet marketing to drive the best client prospects to your law firm and convert them into profitable clients. You are a little concerned that the guru has never worked with a law firm. Yet, according to guru, "selling is selling." Besides, you are pleased you found someone to "cover all bases," both website design and marketing.

The guru starts off by drafting your biographical statement, a slogan and other web content that will most assuredly motivate new clients to hire you. You note, with some concern, that your biography, which will soon be viewable by the entire world population, embellishes your experience and qualifications. Yet, the guru stresses the need for you to sell yourself. The guru composes a slogan to post at the top of every page of the site: "When Hiring Legal Counsel, Why Settle for Less, When You Can Retain the Best?" To drive the point home, the guru urges you to highlight your experience by using actual client case examples, but only the "favorable ones." You give the guru a list of your victories over the past several years, including client names, and specific factual details, so the guru can build a page entitled "Randomly Selected Cases."

Next, the guru encourages you to post all the articles you have written over the past 20 years, even if they might be a little stale, and to utilize a customer "intake form" used by many of guru's sales customers, so prospective law firm clients, from near and far, can simply type the facts of their case into the form, giving you all the gritty details. You can exchange information with clients without lifting a finger. Through your articles, you can show potential clients everything you know about the law. Also, you can receive all the details about potential clients' cases before you even meet them. What a tremendous timesaver!

Both you and the guru really like the glossy pages and attention grabbing content. You can wait to launch the site, so all the new business will soon erupt. You give the guru the green light to "take the site live" after making a few corrections over the weekend.

Your plan to launch the site on Monday is derailed when you notice an article in the local bar association magazine discussing the topic of law firm websites. After reading the article, you conclude that much of the time consuming and quite expensive work guru did for you will have to be changed to comply with the rules of professional conduct. You feel like you dodged a bullet by not launching a website that was riddled with ethical red flags. Yet, you are a little embarrassed that you did not think about fundamental ethical considerations when you and guru were blindly devising ways to drum up new business:[1]

Information about the Law Firm, its Experience and Client Consent

Law firm websites may provide biographical information about lawyers, including their educational background, areas of practice, jurisdictional limitations, and contact information. A website also may contain information about the law firm's history, and experience, including general descriptions about prior engagements. With client consent, more specific information about a law firm's former or current clients might also be included.[2]

Information about the Law and Availability of Legal Services

Traditionally, lawyers have provided the public with information by publishing articles, giving talks, and the like.[3] Law firm websites also can assist the public in understanding the law and in identifying when and how to obtain legal services. Such information might include brochures, newsletters or blogs. To avoid misleading readers, lawyers should make sure the content is correct and current, and should include qualifying statements or appropriate disclaimers.[4]

Website Visitor Inquiries

Inquiries from a website visitor about legal advice or representation may raise an issue concerning duties to prospective clients. Rule 1.18 protects the confidentiality of prospective client communications, should they occur. The Rule also recognizes ways that a law firm may limit subsequent disqualification based on the prospective client disclosures when the firm decides not to undertake a matter.[5]

Disclaiming Law Firm's Obligations to Website Visitors

Cautionary statements on a law firm website may effectively limit, condition, or disclaim a lawyer's obligation to a website reader, such as (1) whether a client-lawyer relationship has been created; (2) whether the visitor's information will be kept confidential; (3) whether legal advice has been given; or (4) whether the lawyer will be prevented from representing an adverse party.[6] Such disclaimers will be effective only if they are conspicuously placed and understandable.

As ABA Opinion 10-457 states, law firm websites have become a primary way by which lawyers communicate with the public, including potential clients. Law firms must be mindful that their websites are subject to lawyer advertising rules, must not include misleading information on websites, must be aware of client expectations created by statements on websites, and must diligently manage client inquiries invited through their websites. Law firms that market their practices through website should not limit their consultations to those with web designers and marketing experts. Lawyers must themselves review legal ethics rules implicated by internet marketing and perhaps even consult with ethics counsel when they sense their law firm's marketing ideas might run the risk

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1. See, ABA Committee on Eth. and Prof'l Responsibility, Formal Op. 10-457 (2010) (Lawyer Websites).
2. Prof Cond. Rule 1.6.
3. Prof. Cond. Rule 7.2 and 7.4.
4. Prof. Cond. Rule 7.1.
5. Prof. Cond. Rule 1.18.
6. Prof. Cond. Rule 7.1.

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New Common Pleas Courthouse May Have Fewer Visitors

The local effort has been patterned after Montgomery County where mandatory E-Filing for civil cases in Common Pleas began on January 1, 2010. Judges and staff members here have made several visits to Montgomery County and plan to copy its Administrative Order to get started in Franklin County.

By The Honorable David E. Cain

The moving of Common Pleas Court to a new building will soon be followed by some new technologies, practices and procedures. They will actually make trips to the courthouse much less frequent for many attorneys.

Most notable is the advent of E-Filing which is scheduled to enter an official testing phase for civil cases in early March. E-Filing will save time and paper for law offices and the courts as well, Judge Guy Reece commented. Pleadings of all sorts will be filed instantaneously by hitting keys on a computer in a law office. And judges will be able to read all the documents and write orders without ever picking up a file. Furthermore, carpal tunnel syndrome will no longer be an occupational hazard for the judiciary as digital signatures will be affixed to routine non-substantive documents quickly and efficiently.

Reece began working on the E-Filing project a couple years ago when he was administrative judge and he now chairs the Governing Committee for E-Filing. Other committee members are Appellate Judge Gary Tyack, Domestic Relations Judge Dana Priesse, Probate Judge Alan Acker and Common Pleas Clerk Maryellen O'Shaughnessey.

Actual implementation of civil E-Filing in the General Division will occur in April or May, Reece said. The committee hopes to have it under way in all divisions about a year after that, he reported.

The local effort has been patterned after Montgomery County where mandatory E-Filing for civil cases in Common Pleas began on January 1, 2010. Judges and staff members here have made several visits to Montgomery County and plan to copy its Administrative Order to get started in Franklin County. After implementation, the order can be refined and adopted as a standard Local Rule, Reece pointed out. Some Montgomery County judges who were originally leery of E-Filing have had a change of heart after using it for awhile and now they warmly embrace it, he reported.

Reece said the court here will train its judges and staff and work with the Columbus Bar to train attorneys. It has to be mandatory to be effective, he added. Attorneys without Internet access in their offices will have to bring documents to the Clerk's office where they will be scanned into the system, he noted. The vendor, Tybera, installed the software application several weeks ago.

Each judge will need to designate a person – probably the bailiff or staff attorney – to review each new E-Filing and to decide to whom it should be forwarded, Reece said. Judges and staff attorneys will see two screens on their computers. One will function like an index and the other will display the documents being reviewed or created.

Judges, court staff and participants in cases will have instant and simultaneous access to the official case file and documents filed therein. More efficient and effective case management – with fewer interruptions by attorneys, runners and staff – should be the result.

CourtCall

A telephone sound system that makes physical presence irrelevant for many court events will also reduce the need for costly trips to the seat of justice.

A company named CourtCall says it "brings the courtroom to the lawyer's desk." It has installed the necessary equipment in the new building for its "Court Conference Telephonic Appearance Program."

This is the time to put it in and there is no capital or operating costs to the court, Administrative Judge Charles Schneider pointed out. By contracting CourtCall in advance and paying a fee - $60 per lawyer per call – an attorney can make a "CourtCall" appearance in conformity with a judge's existing calendar schedule, he said. "It's still cheaper than coming here," he added, "and can be used for such things as pre-trial and status conferences." Lawyers will be under no pressure to use it, Schneider assured.

He said it will be different from conference calls in that it will be less work for the court staff (or judge), the audio will be better, calls can be placed from home and attorneys can participate from anywhere in the country.

CourtCall offers two service platforms: The "open court" platform which simulates the actual courtroom experience where all who are present hear the proceedings; and a "privacy" platform for judges who wish to conduct their CourtCall proceedings privately in their chambers.

Video Arraignments

Video arraignments might be another way to keep bodies out of the building. The possibilities have been under discussion for many years. But Schneider designated Judge John Bessey to check out the prospects for beginning such procedures in the new building.

The sheriff has everything that is needed at the Franklin County Correctional Center on Jackson Pike, Bessey reported. "The court needs a little more (equipment), but not much."

"We need to discuss the mechanics of who and where and how to transfer the forms," he added.

Defense attorneys have been somewhat resistant to arraignments with defendants off site. "But the attorneys don't talk to them much (at arraignments) anyway." Bessey noted. He said he will put a package together, pitch it, and see what happens.

Forwarding Address

The address of the new building is 345 South High Street. And in mid December the telephone and fax numbers changed (from 462 or 719) to the "525" exchange.

One Week or One Trial

In September, the court began a pilot program in which jurors serve for one week or one trial, whichever ends first. So far, jurors love it, according to Jury Manager Gretchen Roberts. Even the self-employed are more willing to serve, she said.

The average number of days on jury service has gone down from eight to less than four. Under prior practice, the managers summoned 240 prospective jurors each week. They are now sending summons to 400 each week and on an average week more than 160 are actually showing up. Juries were seated in eight different courtrooms on a recent Monday, Ms. Roberts reported. "And we don't have bailiffs standing in line at 6:30 a.m. to get a panel."

Judges had been putting off trying one week or one trial until moving to the new building where jury quarters will be much larger. But Schneider wanted to give it a shot by using the County Auditorium on the show up days (Mondays). He is glad he did.

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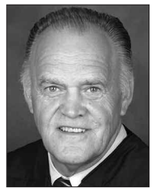

The Honorable David E. Cain, Franklin County Common Pleas Court

Civil Jury Trials

FRANKLIN COUNTY COMMON PLEAS COURT

By Monica L. Waller

Verdict: $913,796.58. Breach of Contract/Professional Negligence. Plaintiff ThyssenKrupp Safway, Inc. entered into a contract with Simon Compensation Services Co., whereby Simon undertook to serve as Safway's Ohio Worker's Compensation Third Party Administrator. Simon Compensation Services failed to properly audit and ensure that Safway was placed into the proper employer manual classifications when the Ohio Bureau of Worker's Compensation converted over from the Ohio BWC Manual Classifications to NCCI Manual Classifications, resulting in Safway significantly overpaying Ohio BWC Premiums. Plaintiff's Experts: Rob Kenny, KKSG and Jeff Kemo, Compensation Solutions, Inc. Defendant's Experts: None. Last Settlement Demand: $500,000. Last Settlement Offer: None. Length of Trial: 3 days. Plaintiff's Counsel: Douglas J. Suter. Defense Counsel: J. Miles Gibson. Magistrate Edward Skeens. Case Caption: *ThyssenKrupp Safway, Inc. v. Simon Compensation Services Co.* Case No. 08 CVH 16407 (2008).

Verdict: $140,643.70. Breach of Contract. Plaintiff Anamax, LLC (now known as Sanimax) entered into an asset purchase agreement to buy the businesses and assets of Defendants Inland Products, Inc., Environmental Pumping Services, Inc. and Inland Products Trucking, Inc. The Inland Products businesses were involved in the collection, processing and disposal of commercial and industrial oils and greases. Sanimax also contracted with Inland Products to lease 10 acres of land. Sanimax sought to enforce the purchase agreement and claimed damages because certain equipment in a rendering facility that it bought was not in the condition warranted, there were undisclosed environmental hazards at the facility and Inland had failed to complete a list of projects contained in the agreement. Inland counterclaimed asserting six claims including breach of contract, trespass and fraud related to a grease processing facility that Sanimax leased from Inland in Gallipolis, Ohio and claimed multi-million dollar damages. The Court dismissed all of Sanimax's fraud claims. Thereafter, Inland dismissed all of its counterclaims against Sanimax with prejudice. In post-trial proceedings, Plaintiff sought to recover over $1,200,000 in attorneys' fees under the contract between the parties, but the Magistrate Judge denied Plaintiff's request. Ultimately, the parties settled before they were required to submit objections to the report and recommendation of the Magistrate Judge. Plaintiff's Expert: None. Defendant's Expert: John Cihon, MPW Industrial Services. Last Settlement Demand: $1,000,000. Last Settlement Offer: None. The parties ultimately resolved the case. The terms of settlement are confidential under the parties' settlement agreement. Length of Trial: 10 days. Plaintiff's Counsel: Joseph W. Ryan, Jr., Molly S. Crabtree and Elizabeth L. Moyo. Defendant's Counsel: Gerald P. Ferguson and Martha C. Brewer. Judge Timothy S. Horton. Case Caption: *Anamax, LLC v. Inland Products, Inc., et al.* Case No. 07 CVH 11100 (2009).

Verdict: $70,124.00. Auto Accident. Plaintiff Lisa Green, 36-years-old, claimed Defendant Joel Murraya caused the automobile accident by failing to yield for a stop sign. Mr. Murraya, though admitting partial fault, alleged that Ms. Green was driving at an excessive speed. Ms. Green claimed a complete tear to the ACL in her right knee as well as cervical, thoracic, and lumber sprain/strains. Mr. Murraya alleged that the ACL tear was not caused by motor vehicle collision based upon testimony of his medical expert and an approximately three month delay in medical care for the knee. Plaintiff's orthopedic physician recommended surgery for the ACL tear but Plaintiff did not undergo surgery due to a lack of health insurance. Medical Bills: $5,524.03 for past medical bills and projected $15,000-$20,000 for future medical bills. Lost Wages: $12,000-$13,000 projected for future lost wages. Plaintiff's Expert: Keith Hollingsworth, M.D. Defendant's Expert: Joseph Schlonsky, M.D. Last Settlement Demand: $75,000.00. Last Settlement Offer: $4,181.00. Length of Trial: 3 days. Plaintiff's Counsel: J. Scott Bowman. Defendant's Counsel: Mona Fine. Magistrate Ed Skeens. Case Caption: *Lisa Green v. Joel Murraya* Case No. 08 CVC 12109 (2009).

Verdict: $12,960.63. Auto Accident. On January 14, 2005, 29-year-old Plaintiff Michelle Kerns was stopped at a traffic light on westbound Trabue Road when she was rear-ended by a vehicle driven by Defendant John Wilson. At the scene of the accident, Plaintiff and her passenger claimed no injury and declined an offer to call the police. However, later that evening, Plaintiff treated at the emergency room and filed a police report. She claimed that, upon impact, her face and chest struck the steering wheel and she suffered a stress fracture in her foot from slamming on the brakes. She also claimed soft tissue injuries to her neck and back. Defendant argued that Plaintiff's injuries were not the result of the subject accident, but were pre-existing. Plaintiff was involved in another automobile accident in 2004 and suffered a soft tissue injury to her lower back. At the time of the subject accident, she was still treating for that injury. Plaintiff was insured by American Family Insurance and asserted a claim against American Family for UM/UIM coverage. Medical Bills: $9,460.00. Lost Wages: unknown. Plaintiff's Expert: Edwin H. Season, III, M.D. Defendant's Expert: None; Last Settlement Demand: $25,000.00-$30,000.00. Last Settlement Offer: $5,695.00. Length of Trial: 2 days. Plaintiff's Counsel: Emmanuel Olawale. Defendant's Counsel: David K. Kostreva (Wilson) and Charity S. Sikora (American Family). Judge Stephen McIntosh. Case Caption: *Michelle Kerns v. John Wilson, et al.*, Case No. 07 CVC 600 (2008).

Verdict: $3,678.00. Auto Accident. On November 13, 2003, Plaintiff Charles Deems (44-years-old) was driving on East Campus View Boulevard when traffic came to a stop and he was rear-ended by a vehicle driven by Defendant Mindy Schmidt. Plaintiff sustained a minor visible injury to his forehead and claimed soft-tissue injuries to his neck and back. However, he did not seek treatment for nearly a month after the accident. The case went to trial in October of 2007 and Plaintiff moved for a directed verdict based on clear liability coupled with a visible injury. The Court denied the motion for directed verdict and on October 30, 2007, the jury returned a verdict in favor of Defendant. Plaintiff moved for a new trial again based on clear liability with a visible injury. The trial court granted Plaintiff's motion for a new trial. Medical Bills: $2,928. Lost Wages: None. Plaintiff's Expert: F. Paul DeGenova, M.D. (orthopedist). Defendant's Expert: Gerald Steiman, M.D. (neurologist). Last Settlement Demand: Policy Limits (exact limits unknown). Last Settlement Offer: $500. Length of Trial: 2 days. Plaintiff's Counsel Eugene L. Matan. Defendant's Counsel: Mona J. Fine. Judge Charles Schneider. Case Caption: *Charles N. Deems v. Mindy S. Schmidt*, Case No. 05 CVC 12745 (2009).

Verdict: $3,000.00. Auto Accident. Plaintiff Daniel L. Thoma was struck from behind at approximately 35 miles per hour by Defendant Richard P. Kearney while Plaintiff was waiting to turn left on a residential road. Plaintiff claimed he sustained a torn rotator cuff and cervical sprain/strain as a result of the accident. Plaintiff had a prior rotator cuff surgery to repair a tear in 2002. Plaintiff sued Mr. Kearney for negligence and Allstate on a claim for underinsured motorist coverage. Mr. Kearney's policy limits were $12,500. Allstate advanced the $12,500 which Plaintiff Kearney's insurer paid. Defendant Allstate claimed that the rotator cuff injury was not related to the accident due to a one week delay in the presentation of symptoms and treatment. Plaintiff Medical Bills: Approximately $35,000 (reduced through write-offs to $10,000). Lost Wages: Approximately $1,200. Plaintiff's Expert: Timothy P. Duffey, M.D. Defendant's Expert: Martin Gottesman, M.D. Last Settlement Demand: $87,500. Last Settlement Offer: No additional settlement offer was made above the $12,500 Plaintiff received from Defendant Kearney's insurer. Length of Trial: 4 days. Plaintiff's Counsel: John Alton. Defendant's Counsel: Jenifer A. French. Magistrate Michael Thompson. Case Caption: *Daniel L. Thoma v. Richard P. Kearney, et al.* Case No. 06 CVC 15640 (2009).

Defense Verdict. Medical Malpractice. In late 2004, Pearl Ernest Butterbaugh was diagnosed with a transitional cell carcinoma in a growth of tissue obstructing his urethra. The urologist who diagnosed the cancer recommended a radical cystoprostatectomy (removal of the bladder, prostate and seminal vesicles) but recognized that Mr. Butterbaugh's surgery would be complicated by scar tissue left from prior radiation therapy Mr. Butterbaugh had undergone for prostate cancer. The diagnosing urologist referred Mr. Butterbaugh to Defendant urologist George T. Ho, M.D. due to Dr. Ho's superior experience treating urinary tract malignancies. Based on further testing, Dr. Ho diagnosed Mr. Butterbaugh with stage T3 poorly differentiated transitional cell carcinoma of the bladder. The staging reflected that Dr. Ho believed the cancer had not metastasized to a structure adjacent to the bladder but that the cancer was aggressive with a high propensity to spread. Dr. Ho advised Mr. Butterbaugh that the only potential curative treatment was a radical cystoprostatectomy but that the procedure would be risky due to Mr. Butterbaugh's prior radiation treatment and overall health. It was Dr. Ho's opinion that Mr. Butterbaugh was not a candidate for chemotherapy because he suffered from poor renal function and that the chemotherapy would weaken Mr. Butterbaugh and could prevent him from undergoing the surgery. Dr. Ho performed the surgery in February 2005. Five months later a mass was found in front of the base of Mr. Butterbaugh's spine. Due to the location of the mass and Mr. Butterbaugh's poor condition, treatment of the mass and any recurrent bladder cancer was not an option. Mr. Butterbaugh died in October of 2005. The parties stipulated that the cause of death was bladder cancer. Plaintiffs claimed that Dr. Ho breached the standard of care in his treatment of Mr. Butterbaugh and did not obtain Mr. Butterbaugh's informed consent for the radical cystoprostatectomy. Plaintiff's expert opined that Dr. Ho improperly staged the cancer, failed to inform Mr. Butterbaugh of the option of neoadjuvant chemotherapy and failed to incorporate neoadjuvant chemotherapy into his treatment plan. It was Plaintiff's position that, with neoadjuvant chemotherapy, Mr. Butterbaugh could have lived many months if not years longer. Plaintiff also maintained that Dr. Ho did not perform the February 2005 surgery successfully because it failed to rid the patient of bladder cancer. Plaintiff's position was based on the findings of the pathologist who analyzed the tissues post-operatively. The pathologist staged the tumor as T4 because he determined microscopically that malignant bladder cancer tumor cells extended beyond the tissue excised and thus the bladder cancer remained following surgery. It was Plaintiff's position that Dr. Ho did not accurately report the pathologist's findings to the patient or his family. Defendant's expert agreed that Dr. Ho improperly staged the cancer, but testified that Dr. Ho's recommendations and ultimate treatment plan was appropriate regardless of the staging of the cancer. Defendants maintained that neoadjuvant chemotherapy was experimental and not the standard of care and particularly inappropriate for Mr. Butterbaugh due to his co-morbid conditions. Plaintiff's Experts: Ralph Roach, M.D. (medical oncologist) and Dudley Danoff, M.D. (urologist). Defendant's Expert: Michael Droller, M.D. (urologist). Last Settlement Demand: None. Last Settlement Offer: None. Length of Trial: 8 days. Plaintiff's Counsel: Phillip L. Harmon. Defendant's Counsel: Gregory B. Foliano, Patrick F. Smith and Karen L. Clouse. Judge Patrick

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Sheeran. Case Caption: Shelley R. Ellinger, et al. v. George T. Ho, M.D., et al. Case No. 06 CVA 5131 (2008). Plaintiffs filed post-judgment motions which were denied by the trial court. Plaintiffs subsequently appealed the trial court's judgment. The Tenth District Court of Appeals affirmed the judgment in Ellinger, et al. v. Ho, et al., 2010 Ohio 553. The Ohio Supreme Court denied Plaintiffs' petition for review in *Ellinger v. Ho* (2010), 125 Ohio St.3d 1463.

Defense Verdict. Breach of Contract. Plaintiff Bob Webb Acquisitions, Inc. claimed that Defendant 7664 Clark State Road Development, LLC breached a real estate purchase and sale agreement of 76 acres of farmland in Jefferson Township, Franklin County. Pursuant to the agreement, Plaintiff paid for and accomplished the re-zoning of the property for residential development, but was only successful in obtaining township approval for 63 residential lots instead of the 74 or more originally sought. Under the agreement, the purchase price was fixed for 74 or more lots. However, if fewer than 74 lots were re-zoned by the township, the parties were obligated to negotiate the purchase price of all 76 acres "in good faith." Plaintiff and Defendant were not able to reach an agreement and Plaintiff sent Defendant a letter terminating the contract. Defendant then sold all of the re-zoned property to another buyer. Plaintiff claimed Defendant breached that good faith negotiation obligation causing Plaintiff to lose its bargain. Defendant denied the breach and also asserted that Plaintiff had voluntarily terminated the contract due to changed market conditions for new homes. Plaintiff sought $1.5 million in lost profits. Plaintiff's Expert: Unknown. Defendant's Expert: Unknown. Last Settlement Demand: $750,000. Last Settlement Offer: $5,000. Length of Trial: 2 days. Plaintiff's Counsel: William J. Michael. Defendant's Counsel: Stephen J. Brown. Judge Richard Frye. Case Caption: *Bob Webb Acquisitions, Inc. v. 7664 Clark State Road Development, LLC,* Case No. 07 CVH 16679 (2009).

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BAD FOR BUSINESS

Ohio's Statute of Limitations For Written Contracts

By Mark A. Johnson and Rodger L. Eckelberry

Do you recall details of conversations and events from 15 years ago? Unless the event was personally significant or tragic, probably not. Too much happens in our daily lives to remember details from so long ago. But Ohio businesses have to defend breach of contract claims filed as long as 15 years after the alleged breach. Ohio Rev. Code Section 2305.06.

Suit on an oral contract must be brought within six years, and tort claims generally must be filed within four years.[1] Why, then, if the claim is upon a written contract, can suit be brought a decade and a half after the alleged breach? Surely if a written contract was breached in 1995, the nonbreaching party should know in fewer than 15 years.

From Pony Express to Email

In 1790, the Northwest Territory adopted a ten-year statute of limitations for "matters of record, and covenant," and six years for a debt upon "simple contract," but this Act was disapproved by Congress two years later.[2] In 1803, when Ohio achieved statehood, the legislature created a 15-year statute of limitations for "all actions of covenant or debt founded upon a specialty under hand and seal. . . ."[3] By 1824, the 15-year limitations period for "any agreement, contract or promise in writing" survived, while the condition that it be under seal was dropped.[4] Contracts under seal date back to early English common law, before the end of Edward I's reign.[5] Ohio eliminated any special significance to contracts under seal in 1883.[6]

Whatever justification existed over two centuries ago for adopting a 15-year limitations period for actions on a written contract have long passed. At that time, the primary mode of transportation was by horse, and communications took weeks to be delivered; 15 years to bring suit for a breach may have been reasonable at an early 19th Century pace. Today, with near instantaneous communications, a 15-year statute of limitations is an historical relic.

The Impact on Ohio businesses

Why should the legislature fix this embarrassing anachronism? Beyond increasing costs to businesses, allowing suits on stale claims makes cases difficult and unfair to defend and increases the burden on an overtaxed court system.

Take, for example, a run-of-the-mill class action founded upon a claim for breach of a written contract. If certified as a class action, the class period may include as class members all who were party to the contract within 15 years before the suit was filed. A business facing a class action for breach of contract and potential damages of $100 per class member over 15 years could face exposure of $10 million with a class of 100,000. However, with a six year limitations period (assuming all else to be equal), the class size would be only 40,000 and potential damages reduced to $4 million. This scenario in class actions asserting contract claims is real.[7] The impact is further compounded by the potential for 15-plus years of prejudgment interest on a contract claim.[8] The generous 15-year limitations period enables class counsel to use millions more in "damages" as economic leverage to force settlement of class actions simply because of an outdated statute of limitations from two centuries ago.

This statute of limitations affects businesses in more than just class actions, though. Document and data retention is a significant, ongoing business expense and maintaining paper and terabytes of data to be able to defend a contract claim 15 years later is costly. Even when documents still exist, those who drafted or performed the old contracts have often retired or even died by the time a complaint is filed – further complicating the defense. What's more, Ohio jurisprudence is rife with disputes over contorted attempts to convert time-barred tort claims into contract claims that unnecessarily burden dockets.[9]

Time for Change

Among all states, only Kentucky stands with Ohio in generously allowing 15 years to bring suit on a written contract. A plurality of states (22) provide for six years, 18 states have limitations periods between 3-5 years, while only eight provide limitations periods of eight or ten years.[10]

No sound reason exists for Ohio to maintain this 19th Century byproduct that does nothing but shock clients sued in class actions. Not only does this limitations period add fuel to the fire of class actions, it's an added, unnecessary expense of the cost of doing business in Ohio. Considering that the statute of limitations for a felony is only six years (albeit with many exceptions that may lengthen or obviate that time period),[11] 15 years to bring suit on a written contract is absurd.

It's time for Ohio to leave behind this statutory vestige of our wilderness days and join the 21st Century by adopting a statute of limitations for breach of written contract more suited to the world of today. Forty states have limitations periods between 3-6 years. Surely,

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1. Ohio Rev. Code Sections 2305.07, 2305.09.
2. Statutes of Ohio and the Northwestern Territory, adopted or enacted from 1788-1833, Vol. 1, at 102-03 (ed. Salmon P. Chase 1833)("Chase").
3. Id. at 392.
4. Chase, Vol. II. at 1768.
5. 3 Corbin on Contracts, §§10.2-10.18 (Rev. ed. 1996).
6. Revised Statutes § 4 ; see also Ohio Rev. Code §5.11 (private seals abolished and "shall not give such instrument additional force or effect").
7. See, e.g., Westgate Ford Truck Sales, Inc. v. Ford Motor Company (8th Dist.), 2007-Ohio-4013.
8. Ohio Rev. Code. Section 1343.03.
9. See, e.g., Creaturo v. Duko (7th Dist.), 2005-Ohio-1342.
10. A handful of states have a longer limitations period for contracts under seal, a distinction without difference in Ohio. Ohio Rev. Code Section 5.11.
11. O.R.C. Section 2901.13.

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Litigate the Merits – Avoid Spoliation Claims

Work with your client to understand who the relevant custodians are, what computer systems can reasonably expected to contain relevant information, and what the costs and burdens are of preserving relevant information.

By Rodney A. Holaday

Fair Warning

Developing case law indicates that attorney who fails to implement a careful written legal hold does so at substantial risk to their client.

Judge Scheindlin, the author of the seminal Zubulake decisions regarding electronic discovery, recently authored a separate decision styled *Pension Committee v. Bank of America Securities*. In Pension Committee, the Court identified certain minimum actions that should be taken upon becoming aware of litigation or the reasonable likelihood of litigation, and, indeed found that failure to take such actions likely constitutes gross negligence. Those actions include the:

Issuance of a written legal hold notice;

Identification of all the key players and ensuring that their electronic and paper records are preserved;

Cessation of the deletion of e-mail or preserving the records of former employees that are in a party's possession, custody or control; and

Preservation of backup tapes when they are the sole source of relevant information.[1]

Pension Committee has been cited within the Southern District of Ohio for the standard of spoliation based on the alleged failure to properly preserve information.[2] Because a client may be sued in a multitude of different jurisdictions, as a practical matter it may be a best practice to conform with the most stringent minimum acceptable standard for a proper legal hold.

Duty to Preserve

The duty to preserve information requires a party to take reasonable steps identify, locate and maintain relevant evidence under its possession, custody, or control "when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."[3]

The duty to preserve is owed to the court, not the adverse party, and may arise from statutes, regulations, ethical rules, court order or the common law.[4] The duty exists independent of whether the court declared such a duty or the adverse party requested a legal hold.[5]

Legal Hold

Once the duty to preserve has arisen, a party should implement a legal hold. A legal hold is the suspension of routine document destruction or other ordinary course of business practices that may result in the destruction of potentially relevant information.[6]

Legal Hold Best Practices?

The Sedona Conference, a not-for-profit organization composed of leading jurists, lawyers, experts, academics and others that is frequently cited by courts, including the Sixth Circuit,[7] recently issued helpful guidelines for legal holds.[8]

Guideline 8 states that: [9]

In circumstances where issuing a legal hold notice is appropriate, such a notice is most effective when the organization identifies the custodians and data stewards most likely to have relevant information, and when the notice:

Communicates in a manner that assists persons in taking actions that are, in good faith, intended to be effective.

Is in an appropriate form, which may be written.

Provides information on who preservation may be undertaken.

Is periodically reviewed and, when necessary, reissued in either its original or an amended form.

Addresses features of relevant information systems that may prevent retention of potentially discoverable information.

Have you received a multi-page preservation letter from adverse counsel demanding that your client immediately preserve all existing electronically stored information for a range of general subjects on any media over a wide timeframe, without reference to specific custodians or computer systems? Strict compliance with that kind of overbroad demand would literally require pulling the plug on every electrical device and closing the doors of a client's business. Clients understandably react negatively if their counsel send similarly overbroad preservation letters.

Instead, work with your client to understand who the relevant custodians are, what computer systems can reasonably expected to contain relevant information, and what the costs and burdens are of preserving relevant information. You can then work with your client to formulate a legal hold that takes reasonable steps to preserve relevant information without undue burden. As one court recently recognized, the legal hold process "requires nuance, because the duty 'cannot be defined with precision.'"[10] While there may never be a "perfect" legal hold, courts should assess your effort for "reasonableness and proportionality."[11]

Consider transparent disclosure to adverse counsel up front to explain what your client intends to preserve, and, more important, what information or data storage systems your client does not intend to preserve. Early resolution of preservation disputes reduces the likelihood of sanctions down the road.

While there presently is no Sixth Circuit decision requiring that a legal hold be in writing, your client could be hailed into a jurisdiction that has adopted the Pension Committee standard; put your legal hold in writing. Consider drafting a legal hold with the advance intent of producing it without claim of privilege to demonstrate the overall legal hold effort.

Disclose the custodians in your legal hold and actively solicit those custodians to add names to the list, if appropriate.

A legal hold is not a static, one-time obligation. It exists throughout the litigation and should be revisited as pleadings are amended, disputed issues shift or identified key players change.[12]

An attorney cannot simply ask a client, or a client's in-house counsel, to preserve, identify and collect relevant documents. Trial counsel must exercise oversight to ensure that the client's employees are acting competently, diligently and ethically in order to fulfill counsel's responsibility to the Court.[13] Applied to electronically stored information, counsel must affirmatively act to communicate with the client to identify all sources of information and to "become fully familiar with [the] client's document retention policies . . . and data retention architecture."[14]

Presently, there is no specific civil rule with best practices on how to meet the obligation of the duty to preserve information for anticipated or pending litigation. Developing case law indicates that a proper legal hold is an essential tool to avoid spoliation claims and, in turn, to litigate your client's case on the merits.

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1. *Pension Committee v. Bank of America Securities*, 685 F.Supp.2d 456, 482 (S.D.N.Y. Jan. 15, 2010, as amended May 28, 2010)(Scheindlin, J.).
2. See In re: Global Technovations, Inc., 431 B.R. 739, 459, 2010 Bankr. LEXIS 1948 (Bankr.E.D. Mich. 2010).
3. *Kemper Mortgage, Inc. v. Jeffrey P. Russell*, No. 3:06-CV-042, 2006 U.S. Dist. LEXIS 20729, *3 (S.D.Ohio Apr. 18, 2006)(Merz, M.J.), quoting Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003)(commonly referred to as "Zubulake IV")(Scheindlin, J.); see also John B. v. Goetz, 531 F.3d 448, 459 (6th Cir. 2008).
4. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644, **84-5 (D.Md. Sept. 9, 2010)(Grimm, J.).
5. *Ferron v. Search Cactus, L.L.C.*, No. 2:06-cv-327, 2008 U.S. Dist. LEXIS 34599, **9-10 (S.D. Ohio, Apr. 28, 2008)(Frost, J.).
6. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004)(Scheindlin, J.)(commonly referred to as "Zubulake V").
7. See *John B. v. Goetz*, 531 F.3d at 459.
8. See Commentary On Legal Holds: The Trigger & The Process, The Sedona Conference, Working Group 1, 11 The Sedona Conf. J. 265-287 (Fall 2010).
9. Id. at pps. 282-283.
10. Victor Stanley, Inc., 2010 U.S. Dist. LEXIS 93644, *88.
11. Id. at 88-9.
12. Zubulake V, 229 F.R.D. at 433 & n. 79 (internal citation omitted).
13. *Bratka v. AnheuserBusch Co., Inc.*, 164 F.R.D. 448, 460-461 (S.D. Ohio 1995).
14. Zubulake V, 229 F.R.D. at 432; see also In re A&M Florida Properties II, LLC v. GFI Acquisition LLC, 2010 WL 141881, **12-4 (S.D. N.Y., Apr. 7, 2010)(Gonzalez, J.)(Monetary sanctions imposed against counsel and client for counsel's failure to properly gain nuanced understanding of client's electronically stored information or data storage systems or to pose appropriately detailed questions on the subject to employees of the client in searching for responsive records).

Rodney A. Holaday, Vorys Sater Seymour and Pease

Winning Trials

with Audio-Visual Evidence

As an audio-visual experience washes over a listener and observer, the person's brain consolidates information for storage.

By Frank A. Ray

"At critical points in the trial of a lawsuit, the trial lawyer should validate the advocated message by display of compelling visual images. Through this technique, the trial lawyer produces an event sustained in jurors' memories."

For the last ten years, I have conveyed the foregoing message as if it qualified as "gospel" to my students in the Trial Practice course during Fall semesters at the Moritz College of Law at The Ohio State University. I believe that optimum advocacy before judges and juries requires artful integration of an "audio-visual experience."

In truth, I have preached this central theme on effective advocacy in the courtroom based largely on my anecdotal experience as a trial lawyer.

Most lawyers, particularly trial lawyers, readily employ their gifted verbal communication skills. With the opportunity to use ever-improving technology in the courtroom that can project visual images, most of my adversary counsel shun the use of such technology. Most of my adversary counsel have relied almost exclusively on presentation of an "audio experience" for the finder-of-fact. Opening statement, direct examination, cross-examination, and summation have proceeded with "talking heads."

Have verbal-exclusive trial lawyers ignored a fundamental tool that would increase the opportunity to excel as advocates at trial? Do not trial lawyers perform as a combination of "educators," "choreographers," and "sales people"? As I have morphed from a talking-head trial lawyer to a proponent of the audio-visual experience in the courtroom, I have embraced a fundamental thesis. I operate on the premise that learning by jurors and enhancement of jurors' memory best materializes when visual images selectively and dramatically meld with commentary by trial lawyers and with testimony by witnesses.

The more that I have uttered this thesis, I have embraced the thesis as if it were unassailably true. Does my thesis hold credible validity? Rather than relying on my repetitious harangue, I decided to conduct a review of educational and psychological studies that would pass the test of the Daubert case – deemed generally accepted and reliable within the scientific community.

Educators and psychologists have referred to straight-verbal teaching processes as a "neutral" experience for a listener and observer. On the other hand, educational endeavors that employ visual aids can qualify as "stimulus-driven."

Stimulus-driven teaching experiences create two important results for a trial lawyer as he or she presents a case to jurors. First, the stimulus produced by a memorable visual aid enhances memory. Secondly, a visual aid coupled with supportive verbal commentary combines to intensify the attitude and judgment of the listener and observer.

These cognitive influences resulting from "emotional arousal" correspond with biological processes. As an audio-visual experience washes over a listener and observer, the person's brain consolidates information for storage. This process materializes through complex neurobiological events. Studies have demonstrated that during or shortly after learning occurs through elevated stimuli, a person releases stress hormones. Those stress hormones modulate memory consolidation.[1] As the person learns and retains information based on recognition from a stimulating event, the person releases chemicals into the blood stream as the stimulus occurs. These chemicals include glucose and adrenal hormones – epinephrine, norapinephrine, and cortisol.[2] Studies indicate that memory enhancement is linked to these biochemical processes.[3] Experts in biomedical chemistry generally agree on the underlying biological effects of these adrenal hormones as objective indicators of response to stimuli.[4]

As another message that I regularly offer to my students, I recommend targeted pauses between an effective event in the courtroom and the initiation of the next event. This intentional moment of inaction provides the finder-of-fact a greater opportunity to recognize (encode) and retain (consolidate) the importance of the just-offered evidence. In support of my belief in the favorable effect of artful use of the pause in the courtroom, a recent study has demonstrated that the delay interval between the presentation of an audio-visual stimulus and a memory-inducing biochemical response may require a few seconds for completion.[5]

Psychologists generally agree that memory transpires in a sequence of three phases. Those phases are as follows: encoding, consolidation, and retrieval. The opportunity for enhancement of a listener and observer's memory best occurs at the phases of encoding and consolidation.[6] In other words, if the stimulus did not serve effectively to produce encoding and consolidation, the person's ability to retrieve memory has evaporated.In the courtroom, "timing is everything" for effective advocacy. The quality and timing of the stimulus, for example, a compelling visual aid, fails unless the stimulus produced by the visual aid advances a meaningful purpose within the courtroom.

To underscore the importance of employment of selective, powerful, and targeted visual aids to create memory-producing stimuli, one study has demonstrated that people's recollections do not necessarily form the basis for their judgments. The study concludes that judgments and perceptions quickly occur as lasting impressions.[7] We often take for granted that the visual system of humans offers a powerful tool for recovery of enormous detail about our environment. So, I stand by my thesis. The most effective trial lawyers create a targeted audio-visual environment for their jurors and judges.

If a trial lawyer displays a visual aid to enhance memory and retention for listeners and observers in the courtroom, the trial lawyer should also endeavor to admit the same images into evidence. In other words, the trial lawyer should ensure that these same visual images remain in front of jurors throughout the full process of deliberation.

As the choreographers and presenters of evidence at a trial that will shape the outcome of cases, conscientious trial lawyers should consider the thesis advanced by this article – an audio-visual experience in the courtroom creates an optimum environment for a winning presentation with judges and jurors.

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Frank A. Ray, Chester Willcox & Saxbe

ON DEFENDING THE DEFENDERS

Expanded Legal Assistance Program for Military Attorneys in Ohio

By Steve Lynch[1]

A proposal to allow military attorneys licensed in other states to represent military clients in Ohio's courts will soon be presented to the Supreme Court of Ohio for its consideration. Known as the "Expanded Legal Assistance Program" (ELAP for short), the proposal, if adopted, will help military personnel and their spouses find in-court representation for cases that typically are not handled by the local bar or legal aid. Similar proposals have been adopted in at least eleven states.[2]

With more than twenty thousand military personnel serving in Ohio, and tens of thousands more from the Buckeye State deployed around the globe,[3] there is a strong need for competent counsel to meet the legal needs of a highly mobile population subject to significant occupational, financial, personal and familial stress. Many legal needs that do not require litigation already are met by military attorneys, known as Judge Advocate Generals (JAGs). Under 10 USC §1044 and implementing regulations,[4] JAGs are authorized to help troops and their families with a wide-range of civil legal matters, such as probate, family law, consumer law, income tax, citizenship, landlord-tenant disputes and estate planning – at no cost to the client. This service is referred to as "legal assistance."

For clients who need in-court representation, it is a different matter. Unless a JAG is admitted to practice locally, he or she is not authorized by statute or regulation to represent a legal assistance client in-court. In many cases, this is not a problem because the local bar does an excellent job of providing quality representation at an affordable rate to military personnel.

However, there are cases for which the local bar may be unable or ill-equipped to help. For example, thousands of junior enlisted personnel with legal problems do not earn enough to afford competent counsel, yet earn too much to qualify for legal aid. More senior personnel are able to afford counsel, but amounts in dispute may not justify the cost of counsel. In addition, soldiers set to deploy on short notice or those who already have deployed often have trouble finding local counsel.

The legal picture is complicated by federal laws that can have a direct bearing on seemingly routine cases where one of the parties is a member of the Armed Forces. For example, the Servicemembers Civil Relief Act (SCRA)[5] allows for reopening default judgments, mandatory stays of at least 90 days, tolling statutes of limitation during periods of military service, and early termination of vehicle and residential leases without penalty. Unfamiliarity with the SCRA and other military specific federal statutes, such as the Uniformed Services Former Spouses Protection Act[6] and the Uniformed Services Employment and Reemployment Rights Act,[7] can serve as an impediment for local counsel to take a case – particularly on short notice.

One case from my own experience illustrates the need. It involved a Marine Corps recruiter and his family. Prior to the Marine's return from a combat zone, his wife signed a multi-year lease for a home in one of Ohio's larger cities. The Marine's name was not added to the lease once he moved into the home with his wife and children. Midway through the lease term, he received military orders to move with his family to a large military installation on the East Coast. When he advised the landlord of this and sought to assert the protection of the SCRA,[8] the landlord advised the Marine that he had nothing to worry about because his name was not on the lease. On the other hand, his wife DID have something to worry about because her name WAS on the lease, and the landlord intended to fully enforce its terms, and seek damages in court if necessary.

With less than two weeks to go before he and his family were scheduled to move, the Marine contacted me for help. My research showed that IF the Marine's name HAD been included on the lease, early

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termination without penalty was mandated by the SCRA. In fact, the landlord risked criminal prosecution if he failed to comply.

However, SCRA protection was not as clear with only the civilian spouse's name on the lease. In such a case, protection could be extended to her only "upon application to a court," whereupon a judge would determine if the spouse's ability to comply with the lease was "materially affected by reason of the servicemember's military service."[9] Presumably, a court would have ruled in her favor, but the costs associated with asserting her rights at trial could easily have exceeded the amount in dispute, particularly if she and her family had already moved to the East Coast.

Fortunately, the landlord was persuaded to relent without resort to litigation.[10] But what if he had insisted on a trial? Certainly any number of attorneys would have volunteered to take this case pro bono. Even so, this would have been an ideal case for a JAG to handle. Serving as both a commissioned officer in the Armed Forces of the United States and as an officer of the court, a JAG would be well-versed in the SCRA and able to speak with authority on the rigors associated with military service and the reasons why SCRA protection should be extended to a military spouse. In addition, there would be no charge to the military client or to the court for the JAGs services.

In states with an ELAP program, JAGs have distinguished themselves in handling a variety of cases. For example in Florida, Navy JAGs assisted families of servicemembers killed in the line of duty with probate matters. They also used the SCRA to reopen default judgments in a dozen paternity cases. The cases came to light only after wage garnishments for child support had begun. In 9 of the 12 cases, the servicemember was excluded as the father.[11] In North Carolina, Army JAGs from Ft. Bragg have successfully stayed foreclosures and evictions, and obtained money damages on behalf of soldiers and family members.[12]

Who are these JAGs? All are law school graduates admitted to practice in at least one state. They also must complete several months of basic officer and JAG training at one of three military service schools. Their training includes extensive mock trial work. During their first two years of active duty, most will become certified as a "trial counsel" based on their experience as military prosecutors. Others get extensive litigation experience as defense counsel, and some even serve as Special Assistant U.S. Attorneys – prosecuting cases at the federal magistrate and district court level.[13]

How likely is it that JAGs assigned to Ohio are now licensed to practice in Ohio? It depends. All JAGs with the Ohio National Guard are members of the Ohio bar. However, my experience is that those JAGs serving in Ohio on active duty or in the reserves typically are not members of the Ohio bar. For example, the Coast Guard legal office for the Ninth Coast Guard District (which encompasses the Great Lakes) is located in Cleveland. Of the four active duty JAGs assigned to that office, only one is licensed in Ohio – the others are licensed in Florida, California and Massachusetts. A fifth JAG who is in the reserves is licensed in New York. I would expect a similar mix to be found among the dozens of JAGs assigned to Wright-Patterson Air Force Base (WPAFB), the largest military installation in Ohio.[14] I also expect that many would avail themselves of the chance to help fellow servicemembers in court should the Supreme Court of Ohio approve an ELAP program.

There are strong reasons to establish an ELAP program here in Ohio. In fact it is fully consistent with a long-standing tradition of support to the military here. Ohio is one of the few states to fully fund and staff Veteran Service Commissions in each of its counties. Since 9/11, the Ohio legislature has passed numerous bills that enhance protections and services for military personnel and their families.[15] The Ohio Attorney General offers extensive free legal services to deployed military personnel as part of the Ohio Patriot Program.[16] In 2008, the Ohio Department of Veteran Services was established; and in 2010 Ohio awarded financial bonuses to veterans. The list goes on. My hope is that ELAP will soon be added to the list in 2011.

ELAP has received strong support from the American Bar Association (ABA) and the senior JAGs for each branch of the Armed Forces. Former ABA President William H. Neukom highlighted the need for ELAP in an open letter to ABA membership on May 20, 2008.[17] In a letter to State Bar Presidents and Executives, senior military attorneys encouraged state bar associations to adopt an ELAP program.[18] The ABA has promulgated a Model ELAP Rule.[19]

If approved, the ELAP proposal for Ohio will require an amendment to the Rules for the Government of the Bar. One option under consideration is an amendment to Rule IX[20] which currently allows temporary certification for attorneys to practice law when affiliated with legal services, public defender and law school programs. Like attorneys in each of those programs, JAGs granted temporary certification under an Ohio ELAP program will perform a significant public service by helping to protect and defend in court those who have sworn to protect and defend each of us on battlefields around the globe.

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1. Mr. Lynch has served as the military legal assistance attorney for the Ninth Coast Guard District (encompassing the Great Lakes) since 2001. Prior to his current duties, he served on active duty in the USAF for twenty-one years, much of it as JAG.
2. Alaska, California, Florida, Hawaii, Mississippi, Pennsylvania, Rhode Island, South Carolina, Utah, Virginia, Washington. For a summary of the rule for each state, see Major Joshua Berger, The Expanded Legal Assistance Program, ARMY LAW., May 2010, at 8-11.
3. More than 8,000 active duty personnel serve at WPAFB, and the Ohio National Guard has more than 15,000 members. Additionally, thousands of Ohioans serving in all branches of the Armed Forces are stationed or deployed at any one of a hundred locations around the United States and overseas. Thousands more serve in a reserve component of the Armed Forces.
4. E.g., U.S. DEP'T of ARMY, REG 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM
5. 50 USC App. §§501et seq.
6. 10 USC §1408
7. 38 USC §4312
8. 50 USC App. §535 allows a servicemember to terminate a residential lease early without damages or penalties, if military orders require a move to another location.
9. 50 USC App. §538.
10. The landlord was ready to litigate until I provided him with a copy of the complaint filed by the Department of Justice (DoJ) against a landlord in northern Virginia for violation of the SCRA. Although not on point, it was pointed enough to get the job done. See U.S. v. Ferdows Akhavan (E.D. Va.) which is found on the DoJ website: http://www.justice.gov/crt/housing/documents/casesummary.php#akhavan
11. See Kevin Patrick Flood, Expanded Legal Assistance Revisited, DIALOGUE, Spring 2007, at 25-26
12. See Berger, supra note 2, at 12.
13. E.g., I now work in an office with four JAGs – all of whom have been appointed Special Assistant U.S. Attorneys, and all of whom have assisted in the prosecution of cases in federal courts around the Great Lakes.
14. This is impression is based in part on my experience serving at WPAFB for four years as a JAG on active duty in the Air Force. Most of the JAGs with whom I worked were not members of the Ohio bar, nor was I at the time.
15. E.g., Ohio Rev. Code §1349.04 requires the Ohio Attorney General to appoint a member of the staff of the consumer protection division to expedite cases or issues raised by a person, or the immediate family of the person, who is deployed on active duty. Ohio Rev. Code §4933.121 prohibits a utility from cutting off service to residential premises owned or leased by a person deployed on active duty.
16. For a list of services, see: www.ohioattorneygeneral.gov/ServicesforVeterans
17. See, http://www.abanet.org/legalservices/lamp/downloads/neukomletter.pdf
18. See http://www.abanet.org/legalservices/lamp/downloads/jagletter.pdf
19. The MODEL EXPANDED LEGAL ASSISTANCE PROGRAM RULE FOR MILITARY PERS. §(1) (2003).
20. Gov Bar R IX

Steve Lynch

Dodd-Frank Wall Street Reform and Consumer Protection Act

By Jeffery E. Smith

Drafted against a backdrop of intense political and industry pressure, the Dodd-Frank Wall Street Reform and Consumer Protection Act was signed into law on July 21, 2010, and represents a plethora of concepts and processes intended to address perceived shortcomings in regulation and oversight of a broad array of financial institutions, products, and services, as well as concerns regarding shareholder access to, and disclosure by, public companies in general.

The Act is really incomplete in that much of it serves to instruct various federal regulatory agencies to develop and implement rules consistent with the intent of the Act, making any precise and detailed predictions of its actual impact difficult at the present time. Estimates include 243 required rulemakings, 67 one-time reports, and 22 new periodic reports for 11 federal agencies (one of which is in the process of creation). As with most such legislation, the "devil is in the details" and until the regulations are proposed (some have been), commented on, and adopted, significant uncertainty remains.

What is certain is that the Act will result in profound immediate changes for some organizations as well as perhaps some unintended consequences. Many provisions of the Act and subsequent regulations which may not directly apply to certain institutions and organizations may well become "best practices." Likewise, regulations issued under the Act may become de facto applicable across the board through "trickle down" regulatory practices. It's impact on the historic "too big to fail" concept is unclear. Certainly there will be a number of unintended consequences that arise as the details of implementing regulations come to light and are addressed by impacted organizations.

The result is significant remaining uncertainty in an already uncertain market.

The Act itself is nearly 3000 pages in length, and therefore the following are, of necessity, highlights of the Act.

Financial Stability

The Act creates a "Financial Stability Oversight Council" composed of representatives from federal regulatory agencies such as the Federal Reserve, the FDIC, the Office of the Comptroller of the Currency, the SEC and the CFTC. The Council is charged with identifying "systemic risk" to U.S. financial stability, promoting market discipline, and responding to emerging threats to financial stability of U.S. financial markets. The Act also enhances Federal Reserve authority to identify and respond to "systemic risk" issues and to regulate nonbank companies involved in financial transactions. It is likely to result in increased minimum capital levels for financial companies as part of its directive to establish heightened prudential standards.

The Office of Thrift Supervision (OTS), the primary federal regulatory agency for federally-chartered thrifts and savings and loan associations, as well as the holding companies for both state and federal thrifts and savings and loan companies, is to be abolished and its functions absorbed by the Office of the Comptroller of the Currency (OCC), the primary federal regulatory agency for national banks. The impact on thrift and savings and loan organizations remains unknown, however

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many industry participants are concerned that the oversight by the OCC will be substantially different from that of the OTS.

Private fund advisors to hedge funds and other "private funds" will now be subject to SEC registration and oversight.

While state-based chartering, oversight and regulation of the insurance industry is not eliminated by the Act, a Federal Insurance Office is created by the Act to monitor the insurance business for "systemic" risk and collect information about the industry.

OTC derivatives will be subject to further SEC-CFTC oversight with respect to systemic risk, and the Act provides a general strengthening of SEC authority and enforcement activities.

Executive Compensation and Governance

The Act initiates a variety of executive compensation and governance reforms, including new requirements for proxy disclosures and other initiatives, with the intent of further enhancing a focus on long-term growth and stability. Whether that occurs or whether these serve to simply further complicate matters and provide fodder for shareholder attacks on corporate entities based on less relevant concerns remains to be seen. The Act includes a "say on pay" directive which mandates a non-binding shareholder vote on compensation plans and packages as well as on "change of control" payments in acquisition proxy materials. It also provides greater shareholder access to proxy materials to nominate directors, as well as compensation "clawback" policies to recover payouts where there has been inaccurate financial reporting. The Act also includes enhanced independence for compensation committees and enhanced compensation disclosures including comparisons of executive management compensation with other employees.

Consumer Finance: the Bureau of Consumer Finanical Protection (BCFP)

One of the most controversial aspects of the Act involves the creation of an entirely new federal agency charged to "…regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws." The BCFP will regulate not only traditional consumer lenders, but virtually all entities which provide financial products and services to consumers. The implications of starting such an agency from scratch and its potential impact are staggering, and the potential reach extremely broad. It includes all nonbank mortgage lending organizations and individuals associated with such mortgage lending organizations, but in the case of smaller lending institutions the primary responsibility for oversight of rules issued by the BCFP will remain with the institution's primary federal regulator. The BCFP will be the primary regulator for consumer lending matters for institutions in excess of $10 billion in assets.

Exclusions from BCFP supervision and regulation apply to auto dealers, real estate brokers, merchants and retailers that self-finance (in most instances) the purchase by consumers of own products and services, accounts, and attorneys.

The BCFP will share enforcement authority over "unfair and deceptive acts or practices" as well as "abusive acts or practices."

The Act calls into question long-standing precepts in the area of preemption for federally-chartered institutions, creating uncertainty in an area which has had a long history of court-reinforced protection for multi-state operations, and provides state attorneys general with power to enforce the Act and BCFP regulations in state or federal court. All of which provides further uncertainty and concern for institutions and organizations that operate in a multi-state environment.

The Act includes extensive mortgage reform and anti-predatory lending provisions that impact all participants in the mortgage lending industry, from prohibiting "steering" for creditors to rules with regard to compensation of mortgage originators. It also impacts mortgage standards through a required determination of ability to repay, standards for points and fees for certain types of mortgage products, and escrow and appraisal activities. An "Office of Housing Counseling" is established within the Department of Housing and Urban Development, and the director will have comprehensive authority with regard to home ownership matters as well as rental housing counseling. Funding for "Emergency Mortgage Relief" for jobless homeowners is also established by the Act.

While the Act covers a wide variety of areas within the financial services industry, important portions of the Act such as those pertaining to all public companies are not limited to the financial services industry. It is in reality the first inning in a game which is likely to stretch on for some time. The multitude of impacted agencies will consider the requirements of the Act and issue proposed regulatory guidelines to implement the Act and its purpose, as those regulations are considered, commented on, and implemented.

The financial services industry in particular, and financial markets in general, require relative certainty and direction in order to function properly. Until all aspects of the Act are fully addressed and implemented, uncertainty will continue to be the watchword for financial services as the industry makes its way through a continually troubling time.

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An Adoption and Surrogacy Law UPDATE

By Susan Gerner Eisenman

Summer 2010 – a busy time for adoption and surrogacy practitioners. There were a number of important cases that impact the practice of adoption and surrogacy law. The Ohio Supreme Court decided three adoption cases,[1] and the 10th District Court of Appeals interpreted another recent Ohio Supreme Court case in regard to assisted reproduction technology.[2]

Surrogacy –*S.N. v. M.B.* and *J.F. v D.B.*

Approximately one percent of all births now occurring in the United States are the result of assisted reproduction technology. This is approximately the same percentage as the number of infants placed for adoption. However, Ohio has no comprehensive assisted reproduction technology legislation.

In May, the Tenth District Court of Appeals continued a string of Ohio case law decisions and upheld the validity of a surrogacy contract.[3] The intended mother having used both an ova donor and a sperm donor hired a surrogate mother to gestate the created embryo. When the child was born, the non-genetically-related surrogate decided to attempt to parent the child personally to the exclusion of the non-genetic and non-gestational intended mother. The appellate court upheld the decision of the trial court, which gave the effect to the surrogacy agreement placing the child with the intended mother.[4] The appeals court cited the previous 2007 Ohio Supreme Court decision of *J.F. v. D.B.*, which held surrogate contracts were not against public policy. This decision has been well received by assisted reproduction advocates.There remain for judicial resolution in Ohio other assisted reproduction technology issues. For example, what happens to cryo-preserved embryos when intended parents divorce? Alternatively, what happens to stored embryos or gametes when the unmarried person who stored them dies without instructions for their disposal upon his death? What if the decedent's next of kin wish to change the agreed upon disposition? The existence of viable frozen embryos also pose difficulties for courts in determining heir-ship. Do post-mortem children share in their progenitor's estate if they were still used frozen embryos at the time of death? Likewise, if a child is born using sperm extracted postmortem without an expressed intent on the part of the progenitor to parent, is the child an heir?

Ohio does not have an ova donation statute. Medically supervised sperm donors are specifically exempted from child support.[5] The Ohio donor insemination law is specifically restricted to sperm donors.[6] The Ohio Supreme Court has held that ova donors must be served in post-birth parentage actions unlike sperm donors.[7] It is therefore logical that ova donor may also have possible financial responsibility for future children, unlike sperm donors.

Guidance from the Ohio legislature in the form of a comprehensive ARTS law would be most helpful.

Putative Fathers – *In re G.V.* and *In re P.A.C.*

Last July, the Ohio Supreme Court decided two putative father cases[8] that allow non-marital fathers who do not register with the putative father registry within thirty days of birth and who fail to support prior to placement, to file a parentage action more than thirty days post-birth and block a potential adoption of the child.

This decision sets aside the clear statutory law. The statutory putative father law required the non-marital and non-adjudicated fathers to both register within 30 days of birth and support prior to adoptive placement in order to have rights.[9] The Supreme Court (*In Re Pushcar*) based its July decision on a previous case. *Pushcar* turned on the conflict of jurisdiction between the probate courts and juvenile courts.[10]

As a result of this summer's decision, the adoption community is in a state of confusion. Unregistered unidentified fathers may now have up to six months post-birth to object to an adoption and up to twenty-four months post-birth before they can be found to have abandoned the child. Unregistered fathers may be able to file a paternity action up to one year after the finalization of an adoption .

It is expected that this will cause future adoptive placements to be at risk for up to nineteen months post-birth. It may also mean that adoptions finalized within the past year could be set aside. Older adoption decrees will be "saved" by the Ohio adoption statute of repose.[11]

Adoption of Children from Public Agencies – *In re J.A.S.*

In 2001, the federal government implemented an adoption initative based upon early permanence for children in public custody. States were mandated to enact legislation which required that children be moved into a permanent setting within eighteen months of entering agency custody. This meant that a child had to be returned to the parent, placed for adoption or placed in the legal custody with a non-parent within eighteen months.[12] The Ohio Legislature enacted a provision outlining the parameters of legal custody stating that legal custody was intended to be permanent.[13]

Since 2001, legal custody has become an expedited means resolution for resolving dependency, neglect, and abuse cases. However, legal custody was not intended to improve the functioning of parents. For the most part parents who were neglectful prior to the granting of legal custody continued to be neglectful. Many parents failed to contact or support the children for more than one year. Some legal custodians then felt it was in the child's best interest to move to adoption. If the legal custodians were grandparents, stepparents, or custodians they could present a case for parental abandonment in a contested adoption without having a formal adoption placement under R.C. 5103.16. If the legal custodians are other relatives, they can present the matter for a contested relative placement hearing under

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a two-hearing adoption process. Non-relative custodians were not statutorily allowed to utilize this two hearing process[14] and could not proceed to adoption without parental consent.

A number of Ohio probate courts permitted "legal custodians" an exemption from the placement requirements of R.C. 5103.16. The reasoning for the exemption was that a legal custody was like a probate guardianship.[15]

The Ohio Supreme Court last July held that adoption statutes were to be strictly constituted and that formal adoptive placement procedures were necessary for all adoptions that were not grandparents, stepparent, or guardian adoptions.[16] As non-relatives cannot apply for a contested probate placement, these custodians and the children in their care are greatly impacted by this ruling. The option of obtaining an alternative disposition in juvenile court is extremely lengthy, cumbersome and potentially costly. Unfortunately, these non-relative legal custody children are now trapped in a permanent limbo. They are unable to become full members of their new families.[17]

For the last several sessions of the Ohio legislature, there have been attempts to amend R.C. 5103.16 to allow for adoption by non-relative legal custodians when the birthparent has failed to contact or support for one year under the probate court procedures. None of these efforts has been successful.

As with many fields of the law, surrogacy and adoption law form a rapidly evolving body of law. Prior mandates for early permanence seem to be replaced with additional concerns about birth parent rights.

The recent cases reflect, and will cause, a variety of ripples within child welfare and adoption law. The Ohio legislature may well be besieged with requests for legislative action. Attorneys will need to be alert to these trends in order to successfully represent their clients.

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1. In re J.A.S. Slip Opinion No. No 2010-OH-3270, In re P.A.C. Slip Opinion No 2010-OH-3351, In re G.V. Slip Opinion No 2010-OH-3349
2. S.N. v. M.B., 2010-OH-2479
3. S.N. v. M.B. supra, J.F. v. D.B. 116 Ohio St. 3d 363 (2007-OH-6750), Belsito v. Clark 67 Ohio Misc. 2d 54 (Ohio com. Pl. 1994)
4. Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, I.C.P.C. No. 08 Ju – 08 – 11395)
5. R.C. 3111.95B
6. R.C. 3111.02A
7. J.F. v. D.B. 116 Ohio St. 3d 363 (2007-OH-6750)
8. In re P.A.C. supra, In re G.V. supra
9. In re P.A.C. supra
10. R.C. 3107.07 and R.C.
11. R.C.3107.16
12. R.C. 2151.42
13. R.C. 2151.42
14. R.C.5103.16
15. In re Adoption of A.W.K., Montgomery County App. No 2248. 2007-Ohio-6341
16. Id.
17. In re J.A.S. supra

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FORECLOSURE DEFENSE

WHERE DO WE STAND ON STANDING?

By Tamara R. Parker

In 2008, when the Ohio Supreme Court put out the call for private attorneys to assist legal aids in providing *pro bono* representation in foreclosure cases, it sponsored a two-day foreclosure defense training in conjunction with the Ohio State Bar Association, The Ohio Legal Assistance Foundation, and the Ohio Attorney General's office. One seemingly "knock it out of the ballpark" defense covered in that training was real party standing.

Ohio Civil Rule 17 (A) states "every action shall be prosecuted in the name of the real party in interest." In cases to enforce an obligation to pay mortgage debt, the party who owns the note would be the real party with standing to sue. With mortgage debt so frequently sold and securitized, the party foreclosing is rarely the one originally named on the note. Foreclosing plaintiffs in a rush to foreclose often file the complaint before the note has been negotiated to them in what one judge called "putting the cart before the house."[1]

The note, as a negotiable instrument, must be properly negotiated to transfer the right to enforce. Ohio's uniform commercial code at R.C. 1303.21(B) governs note transfer and provides that " * * * if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its endorsement by the holder." Anyone who has heard Professor Doug Whaley speak on the Uniform Commercial Code knows "*only the current holder in physical possession of the original promissory note can file the lawsuit*."

Attorneys defending foreclosure cases, armed with statutory support and Ohio Civil Rule 17, were admonished to review the note and mortgage attached to the complaint to determine if those documents demonstrated that the Plaintiff had standing to sue either by being the original named lender on the note, or by endorsement on the note or allonge prior to the filing of the complaint. When this defense was raised, the foreclosing plaintiffs would scurry in to file notes and allonges executed post filing and argue this was a mere "technical" defense. Who cares so long as the documents eventually catch up with the litigation?

Federal courts in Ohio cared. They routinely dismiss foreclosure actions where the note transfer is post complaint filing, but Ohio Courts of Appeal are split on whether this "technical" defense is viable. In 2007 the Ninth District reasoned real party status could be acquired by assignment while a foreclosure case is pending so long as the after filing assignment does not "prejudice" the defendant. *Bank of New York v. Stuart*, 9th Dist. No. 06CA008953, 2007-Ohio-1483 ¶ 13 (March 30, 2007). The First District Court of Appeals in *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285 (Sept. 12, 2008) disagreed with the Ninth District's reasoning and instead declared:

> There is little case-law guidance on the issue whether Wells Fargo, which was clearly not a real party in interest when the suit was filed, could later have cured the defect by producing an after-acquired interest in the litigation. We hold that the defect could not have been cured in that way. (emphasis added)

Since the *Byrd* and *Stuart* decisions initially created the split, other Ohio Courts of Appeal have weighed in.

The Eighth District followed *Byrd's* reasoning in *Wells Fargo Bank v. Jordan*, Cuyahoga App. No. 91675, 2009-Ohio-1092 (March 12, 2009), holding that unless a plaintiff holds the note at the time the complaint is filed it cannot invoke the jurisdiction of the court, and cannot cure its lack of standing by subsequently obtaining an interest in the mortgage.

The Fifth District however took the opposite view, reasoning that Rule 17 only requires that the real party of interest prosecute the claim, even if it was initially filed by a party without real party status. *U.S. Bank Natl. Assn. v. Bayless*, 5th Dist. No. 09 CAE 01 004 (Nov. 13, 2009).

This summer's Tenth District decision in *Wells Fargo Bank, N.A. v. Sessley*, 935 N.E.2d 70, Franklin App. No. 09AP-178, 2010-Ohio-2902 (June 24, 2010) acknowledged *Byrd* reasoning that a party had to have real party standing to even invoke the jurisdiction of a court and even reasoned that the plaintiff, lacking real party standing when it filed the foreclosure suit because it obtained the assignment after filing, could not "cure" by ratification since it filed the action on its own behalf. Nonetheless the Court allowed standing to be cured by the subsequent joining of the real party via a third party complaint. Had the real party not been joined by the third party complaint, seemingly, the Tenth District would have followed *Byrd* and dismissed the case.

The Ohio Attorney General took a stand when the issue came before the Second District Court of Appeal, and along with several legal aid organizations filed amicus briefs supporting the homeowner's standing defense. The Second District sided with the *Byrd* line of cases, detailing how the obviously flawed affidavits, note and allonges failed to comply with note transfer requirements under Ohio's uniform commercial code, and therefore affirmed dismissal of the foreclosure action for lack of standing. *HSBC Bank USA v. Thompson*, 2010 WL 3451130, *7, 2010-Ohio-4158, 4158 (Ohio App. 2 Dist. Sep 03, 2010).

Until the Ohio Supreme Court decides where we stand on real party standing, the ability to defeat foreclosure due to after filing note transfers will depend on where the case is filed. With media attention and the Ohio Attorney General's amicus brief in *Thompson* urging the Courts that these are not mere "technical defenses" but rather that documentation of standing goes "to the heart and integrity of the legal system"[2] perhaps Ohio court will look more critically at the practice of putting the cart before the house.

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1. *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 287 (1st Dist. Sept. 12, 2008).
2. Merit Brief of Amicus Curiae Ohio Attorney General Richard Cordray in Support of Defendant Jamie Thompson in *HSBC Bank USA v. Thompson*, CA 023761 (Ohio App. 2 Dist.) p. 1.

By Tamara R. Parker, Litigation Director, Legal Aid Society of Columbus

No Place Like Home

Voucher Termination and Due Process

By Dianna J. Parker

Ms. Thomas[1] sat in my office at the Legal Aid Society of Columbus (LASC) in mid-April with tears in her eyes, a small child on her lap, and a very clear message: "If you do not help me, we will be homeless." At the age of thirty-one, she was a single mother with an eleventh grade education, raising three children without the assistance of child support. Her only household income consisted of food stamps and a small unemployment compensation payment. Ms. Thomas and her three children rented from a private landlord with the assistance of a Section 8 tenant-based voucher. Her reason for visiting our office in April was the impending loss of her Section 8 voucher.

Section 8 tenant-based vouchers enable low-income families to live in private housing with rental assistance ("vouchers") based on their household income. Due to a scarcity of resources, applicants sit on a waiting list for years, and once chosen they must maintain eligibility under strict program reporting rules enforced by local housing authorities.

Ms. Thomas explained that the public housing authority had recently terminated her voucher because she had allegedly failed her program obligation to timely report a change in income, and she was being accused by the housing authority of engaging in fraud. She had already received her notice of proposed termination from the housing authority, requested an informal administrative hearing, and unsuccessfully represented herself at that administrative hearing. She now faced termination of her Section 8 voucher and would soon be obligated to begin paying all of the fair market rent to her landlord—an absolute impossibility in her case.

Section 8 program participants are required to meet with their housing advisors annually to recertify household composition and family income. In addition to their annual obligations, participants must also notify the housing authority on an interim basis when they experience certain changes in household composition or income. Such fluctuations are common for low-income families as a result of job loss, divorce, reduction in hours, or change in benefits. Ms. Thomas's financial history was no different from other participant families, struggling to make ends meet by alternating amongst paid employment, welfare assistance, and unemployment compensation.

In addition to the underlying factual merit in her case, Ms. Thomas's voucher termination had been procedurally deficient—most notably because of the vague notice of proposed termination. The notice merely restated her family obligations and set forth no factual allegations whatsoever, thus impairing her ability to prepare an adequate defense and falling short of minimal due process standards.

Ms. Thomas's experience highlighted the procedural necessity for specific termination notices. Upon receiving her cryptic notice in early 2010, she requested an informal administrative hearing, completely confused as to why she faced termination and thus unable to do anything to prepare for her hearing except wait and hope that the issue would be resolved in her favor. At her hearing, Ms. Thomas learned for the first time the true basis for her proposed termination: an allegedly inaccurate form she had signed in 2008. Stunned, Ms. Thomas attempted to recount the events of almost two years prior. Nervous, she submitted her only exhibits, which consisted of recent income verification documentation. Confused, she explained that she had reported all income changes and could not fathom why she was facing termination for fraud.

The housing authority supported its termination with testimony from an employee lacking any personal knowledge who presented third-party documents without foundation. Although administrative termination hearings are not governed by the strict rules of evidence, case law also disfavors decisions based solely on unreliable hearsay. Nonetheless, in violation of Ms. Thomas's right to a fair hearing, a decision was rendered, and she faced a lifetime ban from the Section 8 program for fraud based solely on the housing authority's hearsay testimony and evidence.

When informal efforts to resolve Ms. Thomas's case were unsuccessful, LASC filed a §1983 complaint in Federal District Court against the housing authority, setting forth violations of Ms. Thomas's constitutionally and statutorily protected rights to adequate notice and a fair hearing. In the face of an impending motion for a temporary restraining order, the housing authority reinstated Ms. Thomas's voucher and paid her private landlord retroactively for rent he was owed as a result of the subsidy termination. Fortunately, Ms. Thomas obtained part-time employment and at the conclusion of LASC's representation, she was preparing to work full-time. Several months after her first visit, she was employed and stably housed.

Low-income families like that of Ms. Thomas face a critical problem most recently termed the "justice gap." The Legal Aid Society of Columbus endeavors to fill that gap by representing indigent clients in housing, consumer, public benefits, tax, and domestic cases. However, with our failing economy, that gap has grown astronomically for low-income individuals and families who desperately need legal assistance. LASC's ability to meet the needs of these individuals and families has suffered dramatically in recent years with catastrophic reductions in state funding due to plunging interest rates on Interest on Lawyer Trust Accounts (IOLTA)—one of LASC's primary sources of funding.

Despite the diligent efforts of LASC's staff, and the private bar through its pro bono commitment, LASC continues to fall short of meeting the growing legal needs of the low-income communities in Columbus. For every Ms. Thomas we serve, we face the possibility of turning away a child improperly denied Medicaid coverage, an elderly victim of predatory lending, or a quadriplegic renter with obstructed egress from his rental unit.

For more information about Ms. Thomas and the plight of others like her, you can contact Attorney Dianna Parker at 737-0184 or dparker@columbuslegalaid.org. To find out how you can help the Legal Aid Society of Columbus through these difficult times, contact Maria Soto at 737-0158 or msoto@columbuslegalaid.org.

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1. The name of the client has been changed to protect her privacy.

dparker@columbuslegalaid.org

Dianna J. Parker, Legal Aid Society of Columbus

PACO AND LASC JOIN FORCES

By Teresa Scharf

Does the thought of volunteering for *pro bono* work frustrate you and seem like an attempt to complicate your already busy schedule with obligatory activities you really are not interested in?

Do you perceive that you are "not qualified" to provide legal advice and services in a particular area of law, say, preparing simple wills and advance directives, because you have not had training or much experience with those types of documents since law school?

Does the idea of having to expose your personal and/or law firm malpractice insurance carrier to coverage for your *pro bono* activities outside of your office cause you to shutter and withdraw the notion to participate?

If your answer is "yes" to any of these questions the Paralegal Association of Central Ohio and the Legal Aid Society of Columbus have a solution for you!

Last summer, PACO's *Pro Bono* Committee collaborated with LASC in conducting *Pro Bono* Wills Clinics across the Central Ohio area. Together, we have been able to broaden our scope to reach and to provide free legal services for people who do not have the means to secure private legal counsel. This partnership has not only been beneficial to the clients we serve, but just as important, it now affords the benefit of providing malpractice insurance coverage to all attorneys who participate in our clinics through LASC.

In 2010, we conducted six wills clinics in communities around the I-270 Outer belt, including Hilliard, Dublin, Westerville, Groveport, Grove City, and an inner-city community center in Columbus. We reached out primarily to senior citizens on low / fixed income who do not have substantial wealth or other holdings and cannot afford to retain private legal counsel. We have generated simple wills, powers of attorney, medical care directives, and organ donor documents at these clinics. Each event was well-received and successful – such, that we have wills clinics scheduled through April 2011 and a waiting list that is long enough to conduct one or two clinics every month for the remainder of the year.

Our clinics have been staffed with several paralegals and attorneys who have volunteered their professional expertise and sacrificed their personal time to make them such a success. To enhance and strengthen our commitment in providing Wills Clinics, a training class was conducted in November which has encouraged and equipped attorneys and paralegals alike to avail themselves to volunteer even more. The course earned three credit hours of CLE for those in attendance and is a requirement for all paralegals and attorneys who wish to volunteer at the PACO / LASC *Pro Bono* Wills Clinics in the future. As an added bonus, the fee for completing the CLE is waived if you have previously volunteered at one of our Wills Clinics or any other *pro bono* program through the Legal Aid Society of Columbus, Southeast Ohio Legal Services Association, or the Columbus Bar. If you have not yet done so but will commit to volunteering at one Wills Clinic in 2011, the fee be waived.

Plans are under way to offer and present another of these free CLE courses in the near future. In the meantime, the November course was videotaped and is available on DVD for those who would like to complete the instruction and volunteer at any of our upcoming *Pro Bono* Wills Clinics. Contact JoAnne Roots at Legal Aid to obtain a copy.

We have also enjoyed the good fortune of receiving support from PACO's Sustaining Members who have provided wireless laser printers, paper, toner cartridges, and other supplies needed to effectively conduct these Wills Clinics. When we arrive at a location, we have all the equipment needed to conduct a complete and professional Wills Clinic.

Plans are also being discussed for PACO's *Pro Bono* Committee with LASC to come alongside the Columbus Bar's *Pro Bono* Committee in its partnership with IMPACT Community Action to facilitate Wills Clinics and other legal services quarterly to their constituents. There are many, many needs and equally as many opportunities for us to step up and meet them.

Now, let's restructure the scenario.

Does the thought of volunteering for *pro bono* work now interest you and sound like an opportunity to compliment your busy schedule?

Do you now recognize that you can be "qualified" to provide *pro bono* legal advice by taking advantage of a free CLE?

Does the idea of malpractice insurance coverage being provided bring an air of excitement to your thoughts about becoming involved in *pro bono* activities?

Are you intrigued with the idea of volunteering in an atmosphere of camaraderie that also brings opportunities to meet other legal professionals you may not otherwise meet?

If you have answered "yes" to any of these questions and want to be involved in *pro bono* activities and/or would like more information, send an e-mail to me at probono@pacoparalegals.org.

I'll look forward to working with you!

tscharf@nplmlaw.com

By Teresa Scharf, Chair, PACO Pro Bono Committee

UNRAVELING THE WEB 2.0

Recent Developments in Social Media and the Law

By Joseph Fungsang

If you've updated your Twitter feed, posted a video on YouTube, or "friended" someone on Facebook lately, you are undoubtedly aware of the way social media has permeated many aspects of day-to-day life. Indeed, Facebook now counts over 500 million active users,[1] and Twitter has over 165 million registered users.[2] The explosive popularity of social networks and blogging, and the corresponding increase in available information, has both redefined contemporary communication and had an increasing effect on the practice of law. Here are two developing topics illustrating the impact of social media on the legal practice.

Is My Client's Facebook Profile Discoverable?

Several recent court decisions make it clear that traditional principles of discovery will apply to social media. As a result, personal blog posts, Facebook profiles, and YouTube videos may be discoverable, depending the facts and claims at issue.

For example, in *EEOC v. Simply Storage Management,* LLC, 2010 U.S. Dist. LEXIS 52766 (S.D. Ind. May 11, 2010), two plaintiffs alleged severe emotional distress, including post-traumatic stress disorder, due to alleged sexual harassment in the workplace. In search of information regarding the plaintiffs' emotional lives, the defendant company sought discovery of the contents of both plaintiffs' complete Facebook profiles, including (among others) status updates, groups joined, and wall posts. In the ensuing discovery dispute, the court established that social media information is not protected from discovery simply because it is set to a "locked" or "private" setting, and must be produced when it is relevant to a claim or defense. The EEOC argued that the plaintiffs should only be required to produce communications directly referring to the allegations in the complaint. The court rejected this argument, noting that the EEOC's proposed standard was too restrictive and would exclude clearly relevant communications. However, the court narrowed the scope of the request to communications and images on Facebook that could refer to the plaintiffs' mental or emotional states.

In contrast, the court in *Romano v. Steelcase Inc. et al.,* 2010 N.Y. Misc. LEXIS 4538 (N.Y. Sup. Ct. Sept. 21, 2010) granted the defendant's request for the *entirety* of the plaintiff's present and historical Facebook and MySpace pages. Although the plaintiff claimed to have suffered permanent injuries, photos on her public social media profiles suggested that she was not (as she claimed) confined to her home and bed. The court held that the content on the plaintiff's private Facebook and MySpace pages was material and relevant to the case, and that the plaintiff could not claim a "reasonable expectation of privacy" for "private" pages where privacy policies of both Facebook and MySpace stated that "private" information could potentially be shared with others.

Procedurally, it appears that the most effective way to obtain discovery of social media information is to request it directly from the party. Pursuant to the Stored Communications Act (SCA), attempts to subpoena social media services may be thwarted by restrictions requiring user consent to disclosures. Recently, in *Crispin v. Christian Audigier, Inc.,* 2010 U.S. Dist. LEXIS 52832 (C.D. Cal. May 26, 2010), the court quashed subpoenas served on Facebook, MySpace, and a web-based email provider, holding that the SCA prohibited the services from disclosing opened and unopened private messages and emails, posted comments, and wall postings. In contrast, the Romano court ordered the plaintiff to execute the applicable consent forms to allow Facebook and MySpace to disclose the information.[3]

Can I "Friend" An Opposing Party or Witness?

Social media platforms generally offer the user a choice of posting "public" content, which may be viewed by anyone, and "private" content, which may only be viewed by certain individuals. Typically, a social media user must approve a "request" from another user before the latter may view private content posted by the former. Given the potential breadth of information available on an individual's non-public pages or postings, an attorney may be tempted, for example, to "friend" an opposing party on Facebook in order to access the individual's otherwise restricted content.

Although the Supreme Court of Ohio Board of Commissioners on Grievances & Discipline has not issued an advisory opinion addressing this issue, opinions issued by other state and city bar associations show that the answer remains far from clear. In a March 2009 opinion, the Philadelphia Bar Association determined that the Pennsylvania Rules of Professional Conduct would be violated where an attorney enlisted a third party agent to "friend" an adverse witness using the agent's real name, but without disclosing that the agent was seeking information on behalf of the attorney.[4]

In contrast, New York City Bar Association stated in a September 2010 opinion that under the New York Rules of Professional Conduct, an attorney (or the attorney's agent) *may* ethically use her real name or profile to "friend" an unrepresented party in order to obtain information for use in litigation, without disclosing the reason(s) for making the request.[5] Finally, the New York State Bar Association determined in a September 2010 opinion that while an attorney (or the attorney's agent) may ethically view and access the *public* social networking profiles of a party to litigation, the attorney or agent may not "friend" the party for the purpose of gathering information to use in litigation.[6]

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1. Facebook Press Room: Statistics, http://www.facebook.com/press/info.php?statistics (last visited October 25, 2010).
2. Twitter Blog: #newtwitterceo, http://blog.twitter.com/2010/10/newtwitterceo.html (last visited October 25, 2010).
3. In some instances, consent forms may not be necessary to obtain the information. For example, on October 6, 2010, Facebook introduced a feature allowing users to download everything they have ever posted on their Facebook account. See The Facebook Blog: Giving You More Control, http://www.facebook.com/blog.php?post=434691727130 (last visited October 25, 2010).
4. Philadelphia Bar Ass'n, Prof'l Guidance Comm., Op. 2009-02 (2009).
5. Ass'n of the Bar of the City of New York Comm. On Prof'l Ethics, Formal Op. 2010-2 (2010).
6. New York State Bar Ass'n Comm. On Prof'l Ethics, Op. 843 (2010).

Jfungsang@gmail.com

Get Started in the *"Cloud"*

By Ken Kozlowski

Some people know about cloud computing, some don't care. However, the time has come for lawyers to see just what the cloud is and how they can take advantage of it. If you've ever used Google Docs, you've used the cloud. If you have online storage that can be accessed by multiple devices, you're using the cloud.

My understanding of the cloud is that the data you produce lives on someone else's server, and you and others can access it in a number of ways – laptop, pc, smartphone, etc. This might create security problems for lawyers and firms who handle confidential materials on a daily basis. Even if you're a little antsy about housing your work in the cloud, there are still ways to take advantage of it.

Before we start looking at a few cloud products, here's an example of what I think the cloud can accomplish. Take Google Docs for example. It's free. I can upload a Word document to Google Docs and view/edit it online. I can access it during presentations, I can download it back to Word and edit it on my computer, or my smartphone (Motorola Droid at the present time). I can also simply create documents online and share them with others in a collaboratory effort. All of the formatting from a Word document may not transfer over to Google Docs, but it's good enough for what most people want to accomplish. However, in fairness to software-based products like Microsoft Office, you may want to read a PC World Review of Google Docs that calls it "no threat" to Office (http://tinyurl.com/39b2uqn).

Calling it "no threat" does not prevent Microsoft itself from introducing a similar product called Windows Live and its online repository SkyDrive that offers the ability to create Word, Excel, PowerPoint, and OneNote documents online:

As a test, I uploaded a Power Point presentation I created for a December 2009 CLE program. I was able to open it, edit it, play it as a slideshow, or I could even open up the online file in my software-based Power Point program residing on my laptop. Because I was able to play it as a slideshow, I could walk into a presentation without any equipment of my own and teach a class – as long as I trusted the site's Internet connection enough to do that. The battles between Microsoft and Google are really heating up, and Windows Live v. Google Docs is one of the big ones. Google seems to be winning the hearts and minds of most people, mostly due to the fact that I couldn't find too many people who have used Windows Live, or even heard of it.

You can't look at the cloud without mentioning online storage and backup. I've used Mozy (http://mozy.com/) and iDrive (http://www.idrive.com/) in the past. For

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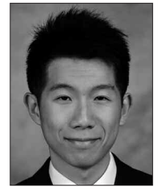

Joseph Fungsang, Vorys Sater Seymour and Pease

My understanding of the cloud is that the data you produce lives on someone else's server, and you and others can access it in a number of ways – laptop, pc, smartphone, etc.

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free, you can usually expect to get about 2GB of space and some way to automatically back up certain files. I now use a full-blown product, Carbonite (http://www.carbonite.com), that I pay for and have access to real-time backup features. A recent blog post I found was called *4 Best Sites To Get 10GB Free Online Backup & Storage* (http://www.makeuseof.com/tag/4-best-sites-10gb-free-online-storage/). The list included the SkyDrive (25GB), iDrive (2GB which can be bumped up to 10), and two other sites I hadn't heard of before, Humvo (10GB) and Binfire (10GB).

For further tools and information on collaboration in the cloud, check out the article *Online Collaboration on the Cheap* (http://tinyurl.com/28pxfx6). The piece offers pointers to and reviews of 20 free and low-cost tools. A very informative article concerning how some Florida companies are using the cloud to trim technology costs, share files from remote locations, and even run their phone systems can be found at

Florida Firms Embrace Cloud Computing (http://tinyurl.com/23bbb57).

Another document/site to keep in mind when looking into the cloud is the American Bar Association's Commission on Ethics 20/20 (http://www.abanet.org/ethics2020/). The Commission recently released a few papers for comment, one of which is the *Issues Paper Concerning Client Confidentiality and Lawyers' Use of Technology* (http://www.abanet.org/cpr/cct.pdf).

The paper states that although lawyers in different practice settings have taken advantage of cloud computing's many benefits, the practice raises several specific issues and possible concerns relating to the potential theft, loss, or disclosure of confidential information. Those issues include:

- unauthorized access to confidential client information by a vendor's employees (or sub-contractors) or by outside parties (e.g., hackers) via the Internet
- the storage of information on servers in countries with fewer legal protections for electronically stored information
- a vendor's failure to back up data adequately
- unclear policies regarding ownership of stored data
- the ability to access the data using easily accessible software in the event that the lawyer terminates the relationship with the cloud computing provider or the provider changes businesses or goes out of business
- the provider's procedures for responding to (or when appropriate, resisting) government requests for access to information
- policies for notifying customers of security breaches
- policies for data destruction when a lawyer no longer wants the relevant data available or transferring the data if a client switches law firms
- insufficient data encryption
- the extent to which lawyers need to obtain client consent before using cloud computing services to store or transmit the client's confidential information

The Commission has asked for comments concerning the above to be submitted by mid-December, 2010. As that timeframe has passed, check the Commission's web site for more information.

Finally, two other resources to check include an article from the Albany Law Journal of Science & Technology entitled *Cloud Computing: Privacy Storm on the Internet* (20 Alb. L.J. Sci. & Tech. 365); and *Legal Implications of Cloud Computing -- Part Five (Ethics or Why All Lawyers-Not Just Technogeek Lawyers Like Me-Should Care About Data Security,* authored by Tanya Forshett at http://www.infolawgroup.com/articles/special-series/cloud-computing-series/.

The privacy issues concerning lawyers operating in the cloud are obviously very real, and the ABA should be providing some real guidance in the next calendar year.

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

I PASSED THE BAR EXAM — *Now What?*

By Derek Andrew DeBrosse

"Nothing in the world can take the place of persistence. Talent will not; nothing is more common than unsuccessful men with talent. Genius will not; unrewarded genius is almost a proverb. Education will not; the world is full of educated derelicts. Persistence and determination are omnipotent. The slogan "press on" has solved and always will solve the problems of the human race."

— Calvin Coolidge

It has not been an easy road and it appears to keep getting harder, but in the end through perseverance I know that opening my own law practice right out of school was the right decision. I'm now in my third year as a solo practitioner, and while it has not always been easy, it has been an exciting ride – one that I hope will continue. I want to share some of the lessons I've had to learn the hard way so any of those who finds themselves in my shoes might (hopefully) have an easier go.

Sell a Product

One lesson I learned early on is that while lawyers are in the service business, we are still selling a product. When I first opened shop, I offered free consultations. Dozens of clients – crazy and irrational clients – took me up on the offer. I met with clients who had no intention of hiring me, clients who had absolutely no case, and clients who had no money to pay my fee. For the most part, they wanted someone to talk to, someone to hear their story. They had plenty of time to talk and, because I had no other clients, I felt obligated to sit and listen.

I certainly offered a "service" to those early clients, but it was not the service I had gone to law school to provide. Perhaps more important, it was not a service that paid the bills. I quickly realized that getting paid meant *selling* a *product* to my clients. Today, I still occasionally find myself in a consultation with a less-than-premium client. But now I evaluate their needs quickly, state my fee up-front, and explain my payment options.

If the client has a question, I offer to answer it in the form of a legal memorandum. For impecunious clients, the memorandum is a way for them to get an answer to their question, to get a physical product in their hand, and for me to profit from sharing my legal knowledge. Learning how to limit my time with clients who didn't really need or want a lawyer, and how to offer a different kind of service to clients who couldn't pay to retain me for larger projects, quickly contributed to my bottom line. Today, I spend much more time actually practicing law and much less time trying to sell my services to clients who have no intention of buying them.

Keep Overhead Low . . . To A Point

When I started my practice, I hesitated to commit myself to a long-term commercial office lease. The plan was to keep overhead low by running my practice out of my home. At the time, however, I rented an apartment in a blighted part of the city. Soon, I realized that I could never bring a client to my "office." A client who feared for his personal safety at his lawyer's office could never turn into a long-term business prospect.

Financially, things got much worse before they got better. After months of working from my home, I had only a few hundred dollars left to my name. It was time to put it all on the line – make my business a success or move back home with my parents. I rented an office but, by setting up shop away from the courthouse and the downtown businesses, I kept my rent low. Having an office where I can focus on work and meet clients was a turning point in my young career. It showed my clients that I was a "real" lawyer, and it reminds me every day that my business is real.

Be Prepared

Like most new solo practice attorneys, I found that court appointed work is a steady stream of revenue. I quickly made sure I was on every list I could find. In addition to regular business, indigent work is an excellent learning opportunity – I got to see the inside of a jail for the first time! In addition to compiling a list of reasons not to commit crimes, the jail also taught me how to deal with career criminal clients who are more seasoned in their trade than I might ever hope to be in my own. Until that day, I had always dealt with petty criminals – people who had only run

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afoul of the law once or twice, and who really had no idea what to do or expect from the justice system. I prepared for my standard speech about how arraignments work, how bond could be obtained, and what a plea bargain was. This client, however, asked me questions that I was not prepared for and indeed could not answer. Soon, he was teaching me. He told me what the potential outcomes we might expect, what the different ranges of sentences he might expect, and the sorts of plea deals he anticipated. This was a truly humbling experience for me. All clients are not created equal, and given this man's record, I should not have allowed myself to get into a position where I knew less about my client's business than he did. Clients want to know they are in good hands. Today, I closely review my client's background – civil or criminal – before our first meeting so that I am able to understand and speak intelligently about any concerns that he or she might have.

Watch Your Time

For lawyers, time truly is money. It took me a matter of months to realize that time is an attorney's stock in trade. I am shocked when I think back on the number of hours I wasted by not charging clients appropriately or simply making poor use of my time. One major problem was that I felt like I needed to land every client that walked in my door, regardless of the individual's ability to pay. When they couldn't hire to litigate, I would offer to outline their case and options in a memorandum, which they invariably also could not afford. I would offer to do the work, for example, for ten hours at $150 per hour. They would offer me $200 total, and I would take it. I would then oftentimes proceed to spend, in some cases, twenty odd hours doing the work. With more business walking in the door today, I feel more comfortable letting some of it walk out. If a client can't afford to hire me, I try to be flexible with my payment options, of course. But I quickly learned the error of doing work for any amount that a prospective client was willing or able to pay. By accepting work at too low of a rate, a lawyer over commits himself to the exclusion of more profitable opportunities that may come down the road.

I made a huge number of business mistakes as a new lawyer, and I am still learning as I go. The solo and small practice learning curve is steep, but the rewards are substantial. Don't be frustrated by mistakes. Learn from your errors, become a better lawyer, and keep pushing forward.

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

What Clients Want In Tough Economic Times

By Jessika M. Ferm

It's a tough economy out there, especially for lawyers. Law firm leaders are struggling to cope with recession, technological change and a pressing need for business development skills that often goes unmet. A recent survey by the Ohio State Bar Association found that nearly one in five attorneys is ready to quit her/his job and anticipates practicing will be less satisfying in the future. So what are law firms and attorneys to do? Well, while you can't change the current economic situation, you can, and must, focus your attention on the following client-focused action steps.

Stop Thinking and Acting Like a "Billable-Hour Zombie"

During tough economic times, and from this point forward, your clients will re-evaluate your hourly rate systems. They will focus on what you can produce and how quickly you can do so. They don't care that you have built complicated tracking systems for measuring performance in 6-minute increments. All they care about is how quickly and accurately you can produce the results they are looking for. If you insist on billing per hour, the incentive for you is to take longer while your clients are looking for faster and more efficient results. Today's clients are more business-savvy and will use these facts to question your value. If you are not careful, you and your firm will find yourselves walking around like zombies in empty halls while your efficient, proactive, and business-minded competitors are thriving.

Start Creating Systems that Make You More Efficient and Client-Focused

If you have practiced law for more than two years, you probably know how long most of your repetitive processes take. There are certainly exceptions, but most people can produce a general estimate for tasks that they have done more than twice. When meeting with a client or a prospect about an engagement, ask targeted questions to get as much information as possible to produce a general timeline. Tell clients that you have systems and processes for managing your time efficiently and give them a low and high price range for the project. The low end can be used if you have over-estimated the project and the high end is there to protect you against unforeseen changes and additions.

The value of having a project range is that you have set up expectations with your clients in advance and they are less likely to get sticker shock if your project ends up being more than they expected. Your job is to effectively manage your time and to produce the results your clients desire. They should not have to pay for your inefficiencies or lack of skills. They are much happier and more likely to do repeat business with you if they believe that they are paying for your expertise and value.

Stop Expecting Clients to Fall From the Rainmaker Sky

Before the most recent recession, attorneys could rely on their firm's marketing strategies or firm-sponsored networking events to bring in business. Junior attorneys often received "spill-overs" from "rainmakers" and focused on producing high quality work instead of harnessing their business development skills.

In today's economy, senior attorneys are scrambling for their own business and tend to be protective of the clients they retain. The challenge for law firms is that junior attorneys weren't taught how to bring in new business and now it's too late to train them. Many fear being fired or hide in their offices hoping no one will notice them until times get better.

Start Harnessing Your Client-Development Skills

If you are waiting for your firm to pick up the expenses of your professional development, you are going to be disappointed. In today's economy, firms are unfortunately cutting professional development and marketing budgets and it's up to you as an individual to continue developing your skills and talents. If you want to be seen as key talent or a future leader, you will need to learn how to attract and retain clients.

Luckily, there are many low cost options that offer tactical and strategic advice that you can implement right away. Investigate what your local bar association is offering and pick up some CLE credits while you're at it. Research online programs where you can team up with other attorneys and split the cost. And for a free and powerful option, seek out a mentor in your firm and interview him or her about the techniques and strategies they use to make "rain."

Stop Assuming That Being a Great Attorney is Enough

While the field of law is one of our most revered learned professions, in today's world it isn't enough to be a content matter expert. Today, attorneys must also be able to think like business owners and know what it takes to run a firm to maintain their value. Clients expect attorneys to understand how their businesses work and be able to relate to their challenges.

Start Thinking of Yourself as a Self-Employed Business Owner

Ask yourself "If I were self-employed (you may already be) what would I need to do to meet clients?" "If I ran my own firm or practice, what business-building skills would I need to learn to be successful?" "Who within my firm could I meet with to learn what it takes to run a law firm?" "Do I know how to read financial statements and make smart decisions about hiring, firing, cash management, etc. based on the numbers?" If you can show your management team and your clients that you get what it takes to run a business, you will never need to look for another job or worry about getting laid off. People who know how to bring in, keep, and grow revenue are always in demand.

Jessika M. Ferm,
J•Ferm, No Frills No Fluff®

The Choice

By Alan T. Radnor

It is not the best day in a father's life when his only son announces, "Dad, I want to be a professional actor." He was 15 years old, a good student and an athlete. He would later become president of his high school class – a perfect profile for a trial lawyer, my profession.

My mother was a first generation immigrant. If I had told her that I wanted to be a professional actor, she would have fainted dead away. Growing up I had two choices: I could be either a doctor or a lawyer. There was no third choice. While I was thinking about this, my son added, "I don't want to be forty and not have tried this."

Now there were three choices presented. I could say no and start World War III. I could cross-examine him then or later about the impossibility of that future. At the time, there were 100,000 actors in New York, and only 1% worked fulltime as actors. There were 300,000 actors in California, and again only 1% made a living at it. Thus, in a pool of 400,000 actors, 4,000 had fulltime jobs. Good material for a cross-examination. But there was one thing I had learned as a parent: the skills of cross-examination are ill suited for parenting. You can cross-examine your child and, like Captain Queeg in The Caine Mutiny, prove "with geometric logic" that they are wrong, all to no effect. The problem is that your "witness child" gets to make his own decision on the matter, not a third party juror or judge. The "witness child" always decides that you're an overbearing nut; you're in the wrong forum.

The third choice? Stall, temporize, string it out. Eventually circumstances will change, reality will set in, and I will be there to pay for law school.

In reconstructing these events, I remember being struck by two things. My son did not say "Dad, I want to be an actor." He said "Dad, I want to be a professional actor." Maybe we could work with that. He also said, "I don't want to be forty and not have tried this." To that I had a ready response: "I don't want you to be forty and not have a college education."

We both knew there are several paths professional actors take: drop out of school, go to New York or Hollywood, and hope to win the "actor's lottery;" get a Bachelor of Fine Arts degree and concentrate only on acting in college; or get a Bachelor of Arts degree and possibly remain qualified to take the LSAT even if he majored in drama. We negotiated the latter path (though I didn't mention the LSAT part).

I immediately went to my spouse who, of course, already knew. She agreed with our approach, but, to this day, I don't know if I had an ally or my son had a double agent.

My next step was to get him a summer high school internship at my law firm. In the autumn, he acknowledged he had a great summer and enjoyed everyone at the firm. He told me, "If I was going to be a lawyer, this is the kind of place where I'd like to work – but I'm not going to be a lawyer." This young man had skills. He didn't deprecate my choice, it just wasn't his.

He chose to attend my alma mater, where, as a drama major, he studied and analyzed texts and became an excellent writer – useful skills for a lawyer. What he didn't get there was any actor training apart from some extra-curricular college plays, so each summer he would approach me about expensive acting internships in New York. My plan was to pay for these so he would come up against the reality of all those New York kids with more acting experience and begin to see the real difficulty of this choice. At the first summer internship he was cast as Macbeth in Macbeth. My plan was not working so well.

As college graduation approached, the choices were to start his acting career or to go to graduate school and get a Master of Fine Arts. My vote was for graduate school. I reasoned that if acting did not work out he could teach acting in college with an MFA. I also pointed out that in graduate school he could act ten hours a day for three years, but otherwise he would be very fortunate to be cast in one or two plays a year in New York. He said he would apply to graduate school but would attend only if he got into Yale, Columbia or NYU – the three top programs at that time. Nine hundred applicants applied that year at NYU. They took 17 students. He was one of them. His plan was working much better than mine.

As his final graduation approached, I realized that I had become a modern day Lorenzo de' Medici, supporting a creative artist. Should I now withdraw my support? I felt a real panic about his future. We decided on three years of further patronage. (It would still not be too late to apply to law school.) Within a year and a half, he was cast as one of Sally Field's Supreme Court clerks in an ABC television series called "The Court." He called me and noted wryly, but I think not without affection, "I guess I've gone further in my legal career than you have." I agreed. Although the show was cancelled after three episodes (ABC made a terrible mistake), he earned enough money to be on his own and has been ever since.

My son and I remain close.

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Alan Radnor is Josh Radnor's father. Josh Radnor appeared on Broadway as Benjamin with Kathleen Turner in "The Graduate," he is now entering his sixth season as an actor on the CBS sitcom, "How I Met Your Mother," and he wrote, directed, and starred in the movie, "happythankyoumoreplease," winner of the 2010 Sundance Film Festival Audience Award.

Josh & Alan T. Radnor, Vorys Sater Seymour and Pease

DEATH WHERE IS THY SLANG?

By Lloyd E. Fisher Jr.

As an estate planner and trust and estate lawyer, I've spent years dealing with the event that most Americans try to ignore -- death. As a culture, we are so uncomfortable with our own mortality that we go to great lengths to avoid even the words "death" and "die."

American "slanguage" must have more euphemisms for death and dying than any other tongue. A review of the *Columbus Dispatch* obituaries reveals that many of our citizens don't die. Like a football quarterback, they "pass on." Like magazine subscriptions, they "expire."

Or we say:
Bit the dust

Cashed his chips
Crossed the bar
Gave up the ghost
Gone to his reward
Is no longer with us

Joined the choir invisible
Kicked the bucket
Met her maker

Pushed up daisies
Rang down the curtain
Read the final chapter
Shuffled off this mortal coil
Slept the big sleep
Turned up toes
Went to a better place
Went to the big --- in the sky

Occasionally, a piece of creative writing will find its way to the obituary page. For instance, a 2007 *Dispatch* entry suggested that perhaps the subject "just decided to pass away on Halloween to 'freak out' those who would be 'freaked-out.'" The woman was described as a life-long hippie and listed among her many survivors: "a few ex-husbands." The obituary stated that she "chose to be cremated instead of being placed in a wooden coffin because she didn't want to harm any trees in the process of dying." The tribute closed with: " ... rarely took herself seriously and requests that you remember the joy with which she lived her life!"

In 2005, there was a *Dispatch* obituary that listed the honoree's nicknames – "Beef," "Pork" and "Bubba." He was described as a "devoted animal lover" with a long list of names of pets that had preceded him in death and many that survived him.

The paucity of obituaries with a light touch is matched by the rarity of tombstones with similar messages. But there are some that brighten a stroll through the cemetery. One in London, England, reads: "Here lies Ann Mann, who lived an old maid, but died an old Mann." In Ruidoso, New Mexico: "Here lies Johnny Yeast, pardon me for not rising." A stone in Boot Hill Cemetery in Tombstone, Arizona, is dedicated to Lester Moore, a Wells Fargo station agent of the 1880's: "Here lies Lester Moore, four slugs from a .44, no Les no Moore." And Margaret Daniels's grave in Hollywood Cemetery, Richmond, Virginia: "She always said her feet were killing her but nobody believed her!"

When clients are finally ready to focus on the inevitability on death, some of them exhibit great creativity both in the language of the estate planning documents and the distribution of assets. An Englishman with a literary bent and a disregard for legalese wrote this will:

"All my worldly goods, now or to be in store,
I give to my beloved wife, now and forevermore.
I give them freely, no limit do I fix,
This is my Will, she's executrix."

Calvin Coolidge, known as being a man of few words while living, was equally brief in death. His will, shortest of any U.S. president, simply said: "Not unmindful of my son, John, I give all my estate, real and personal, to my wife, Grace Coolidge, in fee simple."

At the opposite extreme, there was an Indiana woman who wrote a will containing over 95,000 words in four bound volumes. Her estate was small. Most of the will was commentary on friends and relatives.

Mary Grady was the last survivor of three siblings who lived in Delaware County. None of them ever married and they all lived frugal, reclusive lives. At Mary's death, she gave her substantial estate to a Roman Catholic order of nuns, on the condition that they build a hospital on the Grady family farm property, north of Delaware. If this order declined the gift, it was to pass to another group of Catholic sisters, under the same conditions. A final provision stated that if both Catholic organizations declined the gift, it was to go to a Methodist organization to build and operate the hospital! In a rare display of ecumenical cooperation, all of the organizations agreed that a second hospital in Delaware was not feasible. With the blessing of the beneficiaries and the Probate Court, the legacy passed to the existing hospital and the name was changed to Grady Memorial Hospital.

Jack Kelly, a Philadelphia contractor, Olympic rowing champion and father of Grace Kelly – movie star and Princess of Monaco, wrote his own will in green ink. The final words of the will could be a model for all of us:

"In this document I can only give you things, but if I had the choice to give worldly goods or character, I would give you character. The reason I say that, is with character you will get worldly goods because character is loyalty, honesty, ability, sportsmanship and, I hope, a sense of humor."

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

JOHN MAYNARD KEYNES, DAVID LLOYD GEORGE, ARTHUR KOESTLER, THE SNOWFALL, AND THE DOG WITH AN EAR INFECTION

By Jacob A. Stein

"There are strange coincidences in life: they occur so à propos that the strongest minds are impressed, and ask if that mysterious and inexorable fatality in which the ancients believed, is not really the law that governs the world."

—Alfred Mercier

When I picked up two tattered books at the Palisades Neighborhood Library book sale, I thought there would be no connection between them. They were just side by side, two for a dollar.

One of the books was a collection of John Maynard Keynes essays. Keynes (1883–1946) is remembered as the man who diagnosed and doctored capitalism's periodic illnesses. The other book was Arthur Koestler's summary of his own scientific writings. To try and describe Koestler (1905–1983) is to do the impossible. There is only one thing to do: Wikipedia. Then give me a call.

Keynes, in his book, reported on what he saw and heard at the 1918 post-World War I Paris Peace Conference convened to negotiate the Allies' terms with Germany.

President Woodrow Wilson led the United States delegation. Georges Clemenceau led the French delegation. David Lloyd George led the British delegation, which included Keynes. Keynes wrote up a comparison between Lloyd George and President Wilson that should be read by those who want a unique lesson in the art of negotiation at the highest levels.

What chance could such a man [President Wilson] have against Mr. Lloyd George's unerring, almost medium-like, sensibility to everyone immediately round him? To see the British Prime Minister watching the company, with six or seven senses not available to ordinary men, judging character, motive, and subconscious impulse, perceiving what each was thinking and even what each was going to say next, and compounding with telepathic instinct the argument or appeal best suited to the vanity, weakness, or self-interest of his immediate auditor, was to realise that the poor President would be playing blind-man's bluff in that party. Never could a man have stepped into the parlour a more perfect and predestined victim to the finished accomplishments of the Prime Minister.

Lloyd George has been the subject of more than 12 biographies. He is one of those who a biographer cannot catch in the net—people like Benjamin Franklin, Thomas Jefferson, Franklin D. Roosevelt, and, more recently, Ronald Reagan.

He commenced his career as a solo lawyer in Wales. His clientele was made up of the poor and neglected. His skill as an orator brought him into politics and, despite the rigidities of the English class system, into the House of Commons. He joined the newly formed Liberal Party and quickly rose as one of its leaders. During his career he had strong friendships and strong enemies. One of his enemies was quoted as saying that Lloyd George couldn't see a belt without wanting to hit below it.

The six or seven senses, the subconscious impulses, and the telepathic instinct that Keynes said Lloyd George displayed are the very things that Koestler believed exist, along with extra sensory perception (ESP) and improbable coincidences.

As lawyers, we cannot practice without the benefit of improbable coincidences. Such things as the book that happens to be on the law library table that falls open to the case we were looking for and could not find. There is the continuance we desperately need. The phone rings. It is a call from our opponent asking for a continuance.

Now let me report on three improbable coincidences of my own during the big February snowstorm. On one of the snowy mornings, I hitchhiked on MacArthur Boulevard (it had been cleared) to my office. At four in the afternoon, I took the K Street jitney to Georgetown where I expected to take a cab home. But when I got to Wisconsin Avenue and M Street, there were no cabs. I panicked. I would have to walk three miles home in the snowstorm. And just then, near 34th and Q Streets, a woman called to me from an antiquated SUV and asked how to get to Sibley Hospital. I live close by Sibley. (Improbable Coincidence One.) Here was my deliverance. I told her I knew the way to Sibley. She said she was going to a veterinarian near Sibley. She said there was a dog in the car. My response was to jump into the SUV right away and put the dog on my lap.

When we got to the vet's place, we saw a "Closed Because of Snow" sign. I then asked what was wrong with the dog. She said it had an ear infection. I said I have a dog with an ear infection. (Improbable Coincidence Two.) My wife, Mary, knows how to put ear drops in a dog's ear. I said if we could get the SUV up the hill near my house, we can help the dog. We made it. I walked through the snow and into my house with the SUV woman and the dog. When I told the story a few times, Mary understood and put the drops in.

As I walked with the SUV woman to her car, she asked what I did. I said I was a lawyer. She screamed, "I need a lawyer! What a coincidence." She had been fired from her job. Her employer was contesting the unemployment compensation. She needed a lawyer for the next hearing, a week later. I represented her at the hearing. We won. (Improbable Coincidence Three.)

I had other odd coincidences during the big storm, none of economic importance but valuable for someone who believes, as Koestler did, that the world is filled with mystery, medium-like sensibility, ESP, telepathic instincts, six and seven senses, and (now in a lower voice) much more.

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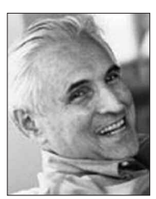

Jacob A. Stein

HIDE AND GO SEEK

Inventory Attorneys Chronicling Another's Cases

By Charles J. Kettlewell

Taking over a law firm from a suddenly disabled or deceased attorney can be a daunting proposition even if you are already familiar with the clients and cases. On this, I can speak from experience, and I assure you it can be overwhelming. Where do you begin? What needs immediate attention and what can wait? Although losing my father and law partner was obviously painful on a personal level, professionally speaking I have to acknowledge that I was fortunate. I had plenty of assistance from an outstanding secretary and an "of counsel" attorney who could help out. I also had familiarity with the files and existing relationships with the clients, opposing counsel, and judges.

But what happens when a solo practitioner becomes disabled, passes away suddenly, is suspended, or otherwise abandons the practice of law and there is no one positioned to take over representation of the affected clients? Gov. Bar R. V §8 (F) provides some guidance to address this question. It provides:

> (F) Appointed Attorney to Inventory and Protect Clients. Whenever an attorney is suspended for mental illness or pursuant to Section 5a of this rule, cannot be found in the jurisdiction for a period of sixty days or more or such shorter time as ordered by the Supreme Court, dies, refuses to meet or work with a significant number of clients for a period of sixty days or more, or fails to comply with division (E)[1] of this section, and no partner, executor, or other responsible party capable of conducting the attorney's affairs is available and willing to assume appropriate responsibility, the Disciplinary Counsel or chair of a Certified Grievance Committee may appoint an attorney or attorneys to inventory the files of the attorney and take action, including action set forth in division (E) of this section, as is necessary to protect the interest of clients of the attorney. Upon approval by the Secretary of the Board, reasonable fees may be paid to the appointed attorney or attorneys from the Attorney Registration Fund. Except as necessary to carry out the order of appointment by the Disciplinary Counsel or chair of a Certified Grievance Committee, the appointed attorney or attorneys shall not disclose any information contained in inventoried files without the written consent of the client to whom the files relate. An appointed attorney may not represent that client.

Strip away some of the legalese and the essence of the Rule seems straight forward enough: 1) If an attorney becomes unavailable for any reason, after sixty day the Disciplinary Counsel or a Certified Grievance Committee Chair can appoint an "inventory attorney" to take charge of the client files; 2) the inventory attorney may be paid from the Attorney Registration Fund; 3) the inventory attorney must follow Prof. Cond. Rule 1.6 regarding confidentiality, and; 4) the inventory attorney may not represent the affected clients. This is actually pretty simple stuff, and generally speaking, simplicity is a good thing.

However, upon closer examination the simplicity of Gov. Bar R. V §8 (F) raises as many questions as it answers. For example: If the overall objective of the legal profession is to protect clients, why delay sixty days (or wait for a Supreme Court order) to appoint an inventory attorney? In a litigation practice plenty of deadlines can be missed in sixty days, and the civil remedy of a malpractice claim is little comfort to a client whose case gets lost in the shuffle. Obviously, we cannot expect the practice of law to be like baseball with a bullpen of inventory attorneys warming up somewhere, ready to step to the mound at a moment's notice. But perhaps a solo practitioner could designate an attorney to be called upon if he or she becomes disabled, and thus streamline the process in an effort to reduce potential malpractice claims.

Speaking of malpractice, what happens if a deadline or statute of limitations is missed after the inventory attorney is appointed but before the inventory can be completed? Could this create a claim for malpractice against the inventory attorney? What exactly is the standard of care for conducting an inventory of hundreds of files when the person who created the files is suddenly unavailable? Even in an office with organized files it is no easy task to prioritize what needs the most immediate attention. Now visualize an office that more closely resembles an episode of "Hoarders" than something you might expect to see on "Law and Order," and the logistical problems of performing the inventory makes it nearly impossible.

Still speaking of malpractice, does an inventory attorney have immunity from potential malpractice claims by virtue of having been appointed by the Disciplinary Counsel or a Certified Grievance Committee Chair? Or does the inventory attorney have immunity from malpractice claims because of the prohibition against providing the clients with representation? If there is not immunity, why would anyone ever agree to be the inventory attorney when the Rule prohibits the inventory attorney from providing any representation in the underlying cases, potentially creating an "all of the liability for none of the clients" situation.

True, Gov. Bar R. V §8 (F) does provide that the inventory attorney may be paid a reasonable fee from the Attorney Registration Fund, and I imagine applications for reasonable fees are granted more often than not. But why is the inventory attorney prohibited from providing representation to the clients whose files were just reviewed if he or she is otherwise qualified and no specific conflict Rule prohibits the representation? Currently, one attorney must perform an inventory in order to locate another to provide the representation. Wouldn't it be in the clients' interests to permit the inventory attorney to go ahead and become counsel if the clients consent?

Obviously, there are many more questions that could be asked than I have addressed herein. Thankfully, the point of this article is not to provide answers, because I do not have them all. The point is to draw some attention to a problem that is in need of better and more flexible solutions. The good news is that there is a task force working on revising Gov. Bar R. V §8 (F) to improve how the system functions and better safeguard clients' interests. When one considers the statistics we all hear about attorneys grappling with substance abuse and mental health problems at higher rates than other professionals coupled with the fact that there is a baby boom generation of attorneys rapidly approaching retirement age, any and all solutions that can be implemented cannot arrive too soon.

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1. Subsection (E) addresses the Duties of a Disbarred or Suspended Attorney, but does not address how a missing attorney's files should be handled.

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The Election of 1960
Fifty Years Later

By David Stebenne

November 8, 2010 marks the fiftieth anniversary of the presidential election of 1960, which still very much interests those who care about disputed elections and how best to resolve them. The clearest sign of that continuing interest is the steady stream of new scholarly books on that subject. Some of the most recent include Gary A. Donaldson's The First Modern Campaign: Kennedy, Nixon, and the Election of 1960 (Lanham: Rowman & Littlefield, 2007); William J. Rorabaugh, The Real Making of the President: Kennedy, Nixon and the 1960 Election (Lawrence: University Press of Kansas, 2009); and Edmund F. Kallina, Jr., Kennedy v. Nixon: The Presidential Election of 1960 (Gainesville: University Press of Florida, 2010).

Why, one may wonder, does all this serious scholarly attention still get paid to a single electoral contest that ended half a century ago without (in marked contrast to Bush v. Gore in 2000) much in the way of recounts or lawsuits? There are several reasons for this. The 1960 presidential election was the first in which television can fairly be said to have been central to the result. By that year, most American homes had TV's for the first time. Richard Nixon's decision to accept John Kennedy's proposal for televised presidential debates meant that for the first time both major-party candidates appeared for a sustained period together on TV once it had become the nation's dominant medium of mass communication. The novelty of this in 1960 produced very high rates of viewership, thereby making the election memorable and altering its outcome. Simply put, this form of "free media" provided the oxygen for Kennedy's presidential bid that fall. Before the first televised presidential debate on September 26th most polls showed him behind. After it, most showed him ahead, a pattern that continued through Election Day.

Why, one may wonder, does all this serious scholarly attention still get paid to a single electoral contest that ended half a century ago without (in marked contrast to Bush v. Gore in 2000) much in the way of recounts or lawsuits? There are several reasons for this. The 1960 presidential election was the first in which television can fairly be said to have been central to the result. By that year, most American homes had TV's for the first time.

The impact of televised debates also showed immediately on the campaign trail. Following the first debate, the size of Kennedy's crowds roughly doubled. Even more noticeable was the change in energy. Prior to the first debate, the mood among onlookers at most Kennedy rallies had been friendly but no more. After the first debate, Kennedy campaign appearances acquired the kind of energy and enthusiasm one associates with an appearance in 1960 of a rock and roll star. Journalists assigned to cover his appearances came up with new terms to describe the behavior of Kennedy's young female fans. There were the "jumpers," who began jumping up and down as his car approached, the "double jumpers," who were pairs (usually sisters or friends) who jumped in unison while holding hands, and the "runners" who broke through the restraining line and pursued his car on foot.

The sharp increase in the size of Kennedy's crowds and their enthusiasm ultimately mattered because it motivated Kennedy campaign volunteers to work very hard and thus to drive up turnout among Democratic-leaning voters, in the nation's biggest metropolitan areas especially. The reaction to Kennedy's appearance in the televised debates also motivated most Democratic leaders, such as the heads of the urban machines, the chieftains of organized labor and the Southern governors, to work hard for his election. No one understood all that more than Kennedy himself. When asked after the election how he had managed to defeat Nixon, Kennedy replied crisply "television."

A second reason for the excitement then and interest later was the simple fact of Kennedy's Catholicism, which broke an unofficial but still very significant "rule" of the American political system as it was in those days. Until Kennedy won in 1960, the sense of most knowledgeable people was that only a white, male, Protestant could realistically aspire to serve as the head of the American government. Even many of Kennedy's liberal supporters firmly believed that, such as United Auto Workers union chief Walter Reuther, who had argued passionately during the 1960 primaries that no Catholic could be elected because anti-Catholic prejudice among Baptist and Methodist Democrats was too strong. A lot of older American Catholics with bad memories of Al Smith's presidential campaign in 1928 felt the same way. All that earlier effort had seemingly accomplished was to stir up anti-Catholic sentiment to no positive result; why go through the same thing all over again, many of them thought to themselves, and sometimes said out loud. For Kennedy's Catholic supporters in particular, the real "Massachusetts miracle" was not that state's economic comeback in the 1980s but rather Kennedy's victory in 1960, which altered assumptions about who could realistically hope to hold high public office in the United States and paved the way for the next person who was not a white, male, Protestant to win: Barack Obama in 2008. Kennedy's victory, like Obama's, also serves as a source of encouragement to many of those in the over seventy percent of the American population that is not white, male and Protestant.

A third reason for the continuing scholarly interest in the presidential election of 1960, closely related to the TV and Catholicism factors, was that the outcome was an upset. Until the televised debates, most knowledgeable observers of the American political scene had assumed that Nixon would ultimately prevail. Yes, Kennedy was young, handsome, well-spoken and had a lot of family money behind him, the pundits acknowledged. For those reasons, he would make the contest interesting, it was quietly thought, but in the end come up short, thanks to the extraordinarily broad popularity of Eisenhower-era Republicanism, with which Nixon and his running mate (U.S. Ambassador to the United Nations Henry Cabot Lodge) were closely identified. Thus, as the 1960s opened, the prevailing view among the experts was that Republicans would retain the White House and the country probably would not change very much. Kennedy's surprising victory helped alter that situation.

As important as those three factors are in explaining continued interest in the 1960 presidential election, others have intensified that curiosity. That electoral contest was truly remarkable in that it was both the closest of the twentieth century and the one with the highest turnout ever. Kennedy's margin of victory in the popular vote worked out to an average of one half of one vote per precinct nationwide, which is as close to a tie as we are likely ever to see. Even more striking was the high turnout. The most meaningful measure is the fraction of the adult population that cast ballots, and in 1960 that figure was the highest ever recorded. The national average was approximately 63.5%, but that figure is misleading in one important respect. On Election Day in 1960, the Jim Crow system still existed in the South and the Border States. That system's barriers to voting (poll taxes, literacy tests, intimidation and all the rest) seriously depressed voting in at least fifteen states. In the other thirty-five, however, turnout was typically well above the national average. For example, in Franklin County, voter registration as a percentage of all adults reached an all-time high in 1960, as did turnout: an astonishing 83% of all registered voters.

The closeness of the election combined with the record turnout to put the maximum possible strain on the nation's electoral apparatus, and ultimately led to problems in election administration. Those problems have also fueled continuing scholarly interest in the 1960 presidential election because of the difficulty in determining whether Kennedy really won through honest means or corrupt ones. Excessive partisanship on both sides has complicated that analysis. The first account of the election, Theodore White's classic entitled The Making of the President 1960 (New York: Atheneum, 1961) was written by a Kennedy partisan. The second account, the part of Richard Nixon's memoir entitled Six Crises (Garden City: Doubleday, 1962) that dealt with the election, was even more biased in favor of Nixon. Those two accounts helped create a partisan kind of debate on a serious issue, which has clouded clear thinking ever since.

Scholarly analysis of the question of how Kennedy won has focused, quite rightly, on administration of the electoral process in two crucial states: Illinois and Texas. Kennedy ultimately was credited with the electoral votes of both, which gave him victory in the Electoral College tally. The problem with answering the question of how he prevailed there is twofold in nature. In Illinois, the most recent and fair-minded study (Kallina's Kennedy v. Nixon) concludes that sufficient evidence does not exist to determine whether Chicago's Democratic machine stole more votes there than Republicans did downstate. Texas presents a different kind of problem. A system of free and fair elections in the modern sense had not yet taken hold on the ground there in 1960. Voter fraud was fairly common, safeguards to prevent it were few, and 1960 was no different in those respects. Thus, the most dispassionate analysis of this issue from the perspective of fifty years later is that we will never know whether Kennedy really "won," in the sense of what result an entirely honest and effective administration of the electoral process in Illinois and Texas would have produced on Election Day in 1960.

But if Kennedy's victory in a legal sense remains forever clouded, in a political sense there was no doubt, then or afterward. The GOP was much the weaker of the two parties nationally in 1960. In order for its presidential candidate to win then, he had to do so clearly or not at all. Those at the top of the nation's political system understood that hard fact. Compounding that sense of a decisive outcome politically if not legally was that most leading Republicans privately blamed Nixon's own mistakes, not Democratic cheating in Illinois and Texas, for his defeat. Even his own running mate thought so. Most decisive on that score was the attitude of outgoing Republican President Dwight Eisenhower. By Election Day Eisenhower had become certain of a Nixon loss and deeply angry with him for the way he had run his campaign. Eisenhower had urged Nixon not to debate Kennedy, predicting correctly that such extensive television exposure would ultimately help the lesser known Democrat. Nixon compounded that mistake in the eyes of Eisenhower and other leading Republicans by failing to prepare properly for the debates, which left him feeling and looking weak and tired for the crucial first one.

It was this divergence between legal and political factors more than anything else that explains why there was no Bush v. Gore type dispute after Election Day in 1960. Law and politics are closely related, but they are not the same. For Nixon to have mounted an effective legal challenge afterward, the two major parties in Illinois, Texas and nationally would have had to be in better balance, and his own leading supporters would have had to believe that Nixon had run the better campaign and so been robbed. Thus, the outcome in 1960 has had longer-term implications for disputed elections, but not very obvious ones to most students of that episode. The resulting confusion continues to drive research, discussion and debate, with no end in sight.

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What Every Lawyer Should Know About Ohio Bicycle Traffic Law

By John Gideon

Columbus is on the road to becoming a bicycle friendly community; whether it becomes the most bicycle friendly city in the country is up to us – all of us.

Over the last few years Mayor Coleman has expressed the commitment of the City of Columbus to become a bicycle friendly city on a number of occasions and in a variety of ways. In his State of the City address on February 24, 2010, he said he wants Columbus to become "Bike City USA." At the BikeColumbus Festival Twilight Ride he promised that "Columbus will become the most bicycle friendly city in the country."

Columbus is on the road to becoming a bicycle friendly community; whether it becomes the most bicycle friendly city in the country is up to us – all of us.

Portland (Oregon) is widely considered to be the most bicycle friendly big city in the United States. According to the Alliance for Biking & Walking's 2010 Benchmarking Report of Bicycling and Walking in the United States,[1] Portland enjoys the highest level of all trips by bicycle at 2.8%. Portland's level of trips to work by bicycle is also the highest in the country at 3.9%. According to the same report, Columbus has a "bicycling mode share" of all trips of 0.3%; 0.7% of trips to work in Columbus are by bicycle.

The level of bicycling isn't the only measure of how friendly a city is for bicycling. In its May, 2010 issue, *Bicycling* magazine rated Minneapolis 1st and Portland 2nd in its ranking of "America's Top 50 Bike-Friendly Cities." *Bicycling* ranked Columbus 34th. So, Columbus has a long way to go to become the most bicycle friendly city in the country. Portland and other cities recognized as being the most bike friendly have a head start on us.

But Columbus has a plan for becoming bike friendly. The Columbus Bicentennial Bikeways Plan was unveiled in May, 2008. The plan commits Columbus to implementing a policy of creating "Complete Streets"[2] and to investing in a comprehensive network of on-road bike lanes and off-road trails.

The bike plan states this near-term goal:

"By implementing the Bicentennial Bikeways Plan, Columbus can shift ten percent of the city's transportation to bicycling, walking, transit and other transportation options. Ten percent equates to biking to work just two days per month . . . '2 by 2012' will be a goal that citizens, government and the private sector can achieve together."[3]

Consider Biking, which led the campaign for a bike plan, embraced this goal and created its own "2 BY 2012" campaign. With the support of a major grant from the Columbus Foundation, Consider Biking is working to get "each citizen of Central Ohio to bicycle to work or school at least two days per month by the Columbus Bicentennial in 2012."[4]

If you've seen a presentation by the Bicycle Transportation Alliance, Portland's bike/ped advocacy organization, on how bike friendly Portland is you know that they attribute their success primarily to their network of bike lanes.[5] But there is a lot more to becoming a bicycling friendly city than just biking infrastructure.

If you look at the Columbus bike plan you will see that, like all comprehensive bike plans, it expressly employs the 4-Es: Engineering (e.g., bike lanes, bike parking), Education (e.g., BikeEd classes, Share-the-Road PSAs), Encouragement (e.g., bike map, Bike-To-Work-Week, EcoBucks, Bicycle Commuter Act tax benefit), and Enforcement (e.g., bicycle helmet or light give-aways, motorist & bicyclist "traps").

2 of the 4-Es: EDUCATION and ENFORCEMENT

The law enforcement community – and especially those of us involved in the administration of justice – can play a key role in both Education about and Enforcement of Ohio's bicycle traffic laws and in helping to speed Columbus along its way toward becoming more bike friendly.

In June, 2001 the National Highway Traffic Safety Administration (NHTSA), Federal Highway Administration (FHWA), Centers for Disease Control (CDC), and Pedestrian and Bicycle Information Center (PBIC), published "National Strategies for Advancing Bicycle Safety."[6] Among the goals stated in this guidebook was Goal #4: "The Legal System Will Support Safe Bicycling," with the explanation that "The rights and rules of the road apply to both cyclists and motorists. The rights of cyclists must be upheld through the legal system and the laws affecting safe bicycling must be fairly and consistently enforced."

To meet this goal we need to know the basics of Ohio bicycle traffic law.

Bicyclists' general right to ride on the road in Ohio

Bicyclists have the same right to the road and are governed (basically) by the same rules of the road as motor vehicles could not be any clearer from the overall structure of Ohio's traffic code as well as from numerous explicit provisions in the traffic code dealing specifically with bicycles.

Ohio's traffic code is contained in Ohio Revised Code Chapter 4511. ORC Sec. 4511.01(A) defines "vehicle" as used in the traffic code to mean every device, including a motorized bicycle, in, upon, or by which any person or property may be transported or drawn upon a highway, except that "vehicle" does not include any device, other than a bicycle, that is moved by human power.

It is clear just from this definition of "vehicle" that a bicycle is a vehicle and that a bicycle may be ridden on highways (roads). ORC 4511.06 declares that the traffic code "shall be applicable and uniform throughout this state and in all political subdivisions and municipal corporations of this state."

ORC 4511.07(A) specifies those activities which "local authorities" may carry out with respect "to streets and highways under their jurisdiction and within the reasonable exercise of the police power." Those activities include "regulating the operation of bicycles" with a very specific limitation in ORC 4511.07(A)(8): Regulating the operation of bicycles; provided that no such regulation shall be fundamentally inconsistent with the uniform rules of the road prescribed by this chapter and that no such regulation shall prohibit the use of bicycles on any public street or highway except as provided in section 4511.051 of the Revised Code [Prohibitions on use of freeways].

Nor does the express right of bicyclists to the road end there. ORC Sec. 4511.711(A) recognizes the right of a bicyclist to ride a bicycle on a sidewalk but prohibits "local authorities" from banishing cyclists to ride on sidewalks: (A) No person shall drive any vehicle, other than a bicycle, upon a sidewalk or sidewalk area except upon a permanent or duly authorized temporary driveway.

Nothing in this section shall be construed as prohibiting local authorities from regulating the operation of bicycles within their respective jurisdictions, except that no local authority may require that bicycles be operated on sidewalks. Thus, "local authorities" may not only not prohibit bicyclists from operating on the road but also may not require them to ride on sidewalks.[7]

And, as if it could not be any clearer, ORC 4511.52 drives home the point that bicyclists must obey – and may be cited for violating – all the same traffic rules as motorists, both on the road as well as on multiuse paths:

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(A) Sections 4511.01 to 4511.78, 4511.99, and 4513.01 to 4513.37 of the Revised Code that are applicable to bicycles apply whenever a bicycle is operated upon any highway or upon any path set aside for the exclusive use of bicycles.

(B) Except as provided in division (D) of this section, a bicycle operator who violates any section of the Revised Code described in division (A) of this section that is applicable to bicycles may be issued a ticket, citation, or summons by a law enforcement officer for the violation in the same manner as the operator of a motor vehicle would be cited for the same violation. ***

Finally, ORC 4511.55(A) explicitly says that bicyclists must obey "all traffic rules applicable to vehicles":

(A) Every person operating a bicycle upon a roadway shall ride as near to the right side of the roadway as practicable obeying all traffic rules applicable to vehicles and exercising due care when passing a standing vehicle or one proceeding in the same direction.

Despite all these provisions of the Ohio traffic code that overwhelmingly establish that bicyclists are entitled to use the roads of Ohio, there are those who maintain that because bicyclists cannot go as fast as cars (i.e., do the speed limit) or because bicyclists take up road space that motorists might otherwise use to get where they're going faster, bicyclists should get out of the way – and off the road – for the convenience of motorists.

Ohio's traffic code specifically deals with the issue of the slower speed of bicyclists as well as bicyclists' need to sometimes use a full lane.

Bicyclists' speed:
a reasonable speed for a cyclist

Ohio bicyclists had always thought that they had a right to ride on the road, even if at their own speed. But some motorists had made known to cyclists their impatience with getting "stuck" behind a cyclist not going as fast as a car. And, occasionally, police would cite a cyclist for "impeding" traffic. The issue finally came to a head when a police officer for the City of Trotwood (a suburb of Dayton) stopped and cited Steven Selz for impeding traffic:

On July 16, 1999, Trotwood Police officer Mary Vance was patrolling Salem Avenue when she "noticed vehicles traveling in the southbound lane in the 4800 block or slowing to a stop, and as [she] looked up Salem, Mr. Selz was driving in the middle of the traffic lane causing cars to stop and have to go over to the other lane to get around him." The posted speed limit was 45 m.p.h. Vance testified that Selz was traveling at no more than 15 m.p.h. *** Selz testified that at the time he was stopped he was going about 18 m.p.h., and that "that's about an average pace for a cyclist in a fitness training." Selz was cited for a violation of Section 333.04(a) of the Trotwood Municipal Code quoted above. Following a trial, he was found guilty, and fined $100.00 and court costs. From his conviction and fine, Selz appeal[ed].[8]

Section 333.04(a) of the Trotwood Municipal Code provides: No person shall stop or operate a vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic, except when stopping or reduced speed is necessary for safe operation or to comply with law.

ORC 4511.52 drives home the point that bicyclists must obey — and may be cited for violating — all the same traffic rules as motorists, both on the road as well as on multiuse paths

Road Rules

The Court of Appeals for the Second Appellate District of Ohio concluded: Selz was charged with violating Section 333.04(a) of the Trotwood Municipal Code, which is similar to O.R.C. 4511.22(A). This ordinance prohibits operating a vehicle at such a slow speed as to impede or block the normal or reasonable movement of traffic, but it excepts from its operation circumstances in which reduced speed is necessary for safe operation.

We agree with Selz that the ordinance cannot reasonably be read as prohibiting bicyclists from using a public highway.[9]

Following the decision in *Trotwood v. Selz* the Ohio traffic code was revised to clarify a number of provisions pertaining to bicycling. ORC 4511.22 was amended as follows: (A) No person shall stop or operate a vehicle, trackless trolley, or streetcar at such an unreasonably slow speed as to impede or block the normal and reasonable movement of traffic, except when stopping or reduced speed is necessary for safe operation or to comply with law.

In a case involving a violation of this section, the trier of fact, in determining whether the vehicle was being operated at an unreasonably slow speed, shall consider the capabilities of the vehicle and its operator.[10]

These changes to ORC 4511.22(A) incorporate the reasoning of the Court of Appeals that a bicyclist cannot reasonably be deemed to be "impeding" traffic if s/he is cycling as fast as s/he reasonably can.

The holding of *City of Trotwood v. Selz* was followed and applied by the Lawrence County Municipal Court in *State v. Patrick*.[11] Although Lawrence County Deputy Sheriff Charles Hammonds charged cyclist Anthony Patrick under ORC 4511.55 (requiring cyclists to "ride as near to the right side of the roadway as practicable") he testified at the hearing on the defense's motion to dismiss that his thinking was that ORC 4511.55 – by requiring bicyclists to obey the "rules of the road" – incorporated by reference the ORC 4511.22 prohibition on "impeding traffic."

The court concluded as to the ORC 4511.22 "impeding traffic" charge: According to the definition section of R.C. 4511.01, it appears to the court that a bicycle would be considered a vehicle under this statute [4511.22]. However, there would have to be a showing in this court's opinion that the cyclist was moving at a speed that was unreasonable for a bicycle in order for there to be a violation. This seems born out by the decision of the court in *Trotwood v. Selz* (2000), 139 Ohio App.3d 947, 746 N.E.2d 235. In Trotwood, the court of appeals overturned the conviction of a defendant under this section because there was no evidence that he was proceeding at a speed that was unreasonable for a cyclist.

In this case, the officer's testimony is that he felt that the defendant was impeding traffic and that is why he asked him to pull over. It is clear to the court that a bicyclist traveling at a reasonable speed for a bicycle cannot be convicted under R.C. 4511.22. There is no evidence that the defendant here was traveling at anything other than a reasonable speed.[12]

It appears that it is now settled, both in statute and in case law, that bicyclists are not subject to being chased off the road because they can't and don't go as fast as cars. But then there is the question of how much of the roadway a cyclist is entitled to.

Bicyclists' lane position:
"Bicycles May Use Full Lane"

Although the Court of Appeals in *City of Trotwood v. Selz* issued a landmark holding that a bicyclist is not in violation of ORC 4511.22 when s/he is traveling as fast as s/he reasonably can, the court said in *dicta* that "Selz may have been in violation of R.C. 4511.55(A), requiring a bicyclist to travel as far as practicable on the right side of the roadway."

What prompted the Court of Appeals to say that is the fact that "Selz was driving in the middle of the traffic lane causing cars to stop and have to go over to the other lane to get around him." But because Selz was not charged with a violation of ORC 4511.55(A) Selz had no opportunity to enlighten the courts as to why he needed to be "in the middle of the traffic lane" and why it was lawful for him to be there.

The court properly declined to rule on the issue of Selz's lane position because Selz was not charge with a violation of ORC 4511.55(A).[13]

ORC 4511.55 is another section of the traffic code that was revised by HB 389 in 2006. The statute was amended to clarify what "as near to the right side of the roadway as practicable" means. Sec. 4511.55. (A) Every person operating a bicycle upon a roadway shall ride as near to the right side of the roadway as practicable obeying all traffic rules applicable to vehicles and exercising due care when passing a standing vehicle or one proceeding in the same direction. *** (C) This section does not require a person operating a bicycle to ride at the edge of the roadway when it is unreasonable or unsafe to do so. Conditions that may require riding away from the edge of the roadway include when necessary to avoid fixed or moving objects, parked or moving vehicles, surface hazards, or if it otherwise is unsafe or impracticable to do so, including if the lane is too narrow for the bicycle and an overtaking vehicle to travel safely side by side within the lane.[14]

It's not too hard (at least for bicyclists) to understand that bicyclists need to ride away from the edge of the road to avoid being "doored" by parked cars or to avoid potholes and grates and other hazards. But what does "riding away from the edge of the roadway" mean when a lane is too narrow for a bicycle and another vehicle to share?

The Ohio Department of Transportation publishes "Ohio Bicycling Street Smarts: Riding Confidently, Legally, and Safely."[15] It is available free from ODOT and at many bike shops and libraries. In the chapter on "Where To Ride on the Road" Street Smarts tells bicyclists where to ride in the section on "Riding in a Narrow Lane."

It says: In a wide lane, there's room for cars to pass you. But in a narrow lane, cars have to move partway into the next lane to pass. *** On a narrow two-lane, two-way rural road *** take the first opportunity to merge safely to the middle of the right lane. ***

Understand that the law is on your side. The law gives you the right to use the road, the same as a motorist, and to make other traffic slow down for you sometimes. The driver approaching from the rear is always required to slow and follow if it's not possible to pass safely. *** Remember, the drivers behind you don't have room to pass you safely anyway. If you ride all the way over at the right, you're inviting them to pass you where the road is too narrow, and too often, you will get squeezed off the road. ***

On a road with two or more narrow lanes in your direction – like many city streets you should ride in the middle of the right lane at all times. You need to send the message to drivers to move to the passing lane to pass you. If you ride all the way to the right, two cars may pass you at the same time, side by side, and squeeze you off the road.[16]

In 2009 the Federal Highway Administration revised Section 9B.06 of the Manual on Uniform Traffic Control Devices to include a new road sign called

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"Bicycles May Use Full Lane."[17] (Sign R4-11). The MUTCD succinctly describes the purpose of the "Bicycles May Use Full Lane" sign – may be used on roadways where no bicycle lanes or adjacent shoulders usable by bicyclists are present and where travel lanes are too narrow for bicyclists and motor vehicles to operate side by side.

In support of the inclusion of this sign the FHWA cites the Uniform Vehicle Code's definition of a "substandard width lane" as a "lane that is too narrow for a bicycle and a vehicle to travel safely side by side within the same lane."

In *State v. Patrick* the Deputy charged Patrick with a violation of ORC 4511.55. The court found that Patrick "was riding to the left of the juvenile cyclist more in the middle of the eastbound lane."[18] The court quoted the provisions of ORC 4511.55, including part (B) which says that cyclists "shall ride not more than two abreast in a single lane." The court concluded that the Deputy failed to show how Patrick violated any law.

In this case, the officer filed a citation against the defendant under O.R.C. 4511.55 and captioned it "Riding a bike in the Roadway." It is not illegal in this state to operate a bicycle in the roadway so long as one complies with the requirements of the statute. There is no evidence or testimony from the officer that would prove a violation of this statute, as the bicyclists were riding two abreast, which is permitted by this statute.

The fact that the defendant continued to ride two abreast even though there was traffic behind him is not a violation of the statute. There is no requirement in the statute that bicyclists go single file in order to allow traffic to pass, even though that is the common and best practice of bicyclists in this area.[19]

The outcome of *State v. Patrick* might be read as an anomaly due to the fact that two cyclists were taking the lane as expressly permitted by ORC 4511.55(B). The question is: what do courts do when a single cyclist uses a full lane?

In 2009, Michael O'Shaughnessy was cited by an officer of the Columbus Police Department for a violation of Columbus City Code Section 2173.04(A) for "failing to ride as far to the right side of the roadway" as practicable.[20]

Attorney/cyclist Doug Morgan represented O'Shaughnessy in a bench trial before Franklin County Municipal Court Judge W. Dwayne Maynard on January 14, 2010. The Columbus police officer was called to testify by the prosecution to give testimony in support of his citation. The officer testified that he cited O'Shaughnessy because he was riding his bicycle in the middle of the curb lane and was "impeding traffic." He conceded on cross-examination that there was not enough room in the curb lane for an automobile and a bicycle to travel safely side-by-side. In fact, the officer testified that when he passes a bicyclist he gives the cyclist six feet of space and that even if O'Shaughnessy had been riding his bike as far to the right as practicable he would have needed to go into the next lane to pass him.

At the conclusion of the prosecution's case Attorney Doug Morgan made a Crim. R. 29 motion for judgment of acquittal, which was granted.[21]

Ohio traffic law is clear: bicyclists are vehicles generally governed by all the same traffic rules as apply to motor vehicles.

1. Alliance for Biking & Walking, 2010 Benchmarking Report: Bicycling and Walking in the United States, January, 2010, http://www.peoplepoweredmovement.org/site/index.php/site/benchmarkingdownload/
2. A "Complete Street" is one that provides safe and accessible options for all travel modes -- foot, bike, transit, automobile -- and for all ages and abilities. FHWA, The National Bicycling and Walking Study: 15-Year Status Report, May 2010, http://drusilla.hsrc.unc.edu/cms/downloads/15-year_report.pdf.
3. Alta Planning + Design, Columbus Bicentennial Bikeways Plan, Executive Summary, page 1, April 2008, http://www.altaprojects.net/columbus/ColumbusBMPFinalApril2008.pdf
4. Consider Biking, "2 By 2012" Homepage, http://www.considerbiking.org/new-2-by-2012-website/
5. On April 18, 2007 Next Generation Consulting publicly released a report prepared for the Columbus Chamber of Commerce and the City of Columbus on Attracting and Retaining Talent to Columbus. The report says at page 25 that young professionals want a bike-friendly downtown and specifically "bike lanes throughout downtown and particularly High Street." http://www.columbuspartnership.com/files/library/chamber-attract-retain-talent.pdf
6. NHTSA/FHWA/CDC/PBIC, National Strategies for Advancing Bicycle Safety, page 13, June 2001, http://www.nhtsa.gov/people/injury/pedbimot/bike/bicycle_safety/
7. In fact, Columbus City Council adopted Ordinance No. 1987-2008 in December 2008 prohibiting anyone other than children from riding a bicycle on a sidewalk. City Code Sec. 2173.10(a) provides: "No person shall operate a bicycle upon a sidewalk, except for children's non-motorized vehicles as defined in section 2173.015(A)(2)..." "Children's non-motorized vehicle" is defined in City Code Sec. 2173.015(A)(2) as "any child's wheeled device, including a bicycle that is under thirty (30) inches of handlebar height and operating at less than five (5) miles per hour..."
8. City of Trotwood v. Selz (2d. Dist. Oct. 20, 2000), 139 Ohio App.3d 947, 746 N.E.2d 235. (NOTE: Steven Selz was represented at trial and on appeal by Steven Magas, "The Bike Lawyer.")
9. Ibid.
10. HB 389, 126th Ohio General Assembly: Signed into law by Gov. Bob Taft on June 17, 2006 at start of Great Ohio Bicycle Adventure, Effective September 21, 2006, http://www.legislature.state.oh.us/bills.cfm?ID=126_HB_389
11. *State v. Patrick* (Lawrence County Municipal Court Dec. 23, 2008), 153 Ohio Misc.2d 20, 2008-Ohio-7142.
12. Ibid. at ¶27-28 (Lawrence County Municipal Court Judge Donald Clapper dismissed all charges against Anthony Patrick because all evidence against Defendant Patrick was suppressed as a result of an unlawful arrest: "Here, the court does not find that the officer's request for the defendant to stop was a lawful order, because there is no indication that the defendant at that point had violated any statute.")
13. City of Trotwood v. Selz (2d. Dist. Oct. 20, 2000), 139 Ohio App.3d 947, 746 N.E.2d 235.
14. HB 389, 126th Ohio General Assembly, Eff. Sep. 21, 2006, http://www.legislature.state.oh.us/bills.cfm?ID=126_HB_389
15. Ohio Evid. R. 902, Self-Authentication: "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: *** (5) Official Publications. Books, pamphlets, or other publications purporting to be issued by public authority."
16. Ohio Department of Transportation, Ohio Bicycling Street Smarts: Riding Confidently, Legally, and Safely, by John Allen, published by Rubel BikeMaps and copyright 1988, 2001 Rodale Inc., printed with funding from FHWA.
17. FHWA, Manual on Uniform Traffic Control Devices, 2009 Edition Chapter 9B Signs, http://mutcd.fhwa.dot.gov/htm/2009/part9/part9b.htm
18. State v. Patrick at ¶14.
19. Ibid. at ¶¶23-24.
20. Columbus City Code Sec. 2173.04(A) actually contains no language like its counterpart in ORC 4511.55(A) requiring that "Every person operating a bicycle upon a roadway shall ride as near to the right side of the roadway as practicable..." but merely provides that "Persons riding bicycles or motorcycles upon a roadway shall ride not more than two (2) abreast in a single lane..." That is why the online docket for *City of Columbus v. Michael O'Shaughnessy*, Case No. 2009-TRD-213637, describes the charge as "Riding Bicycle/Motorcycle Abreast." However, Columbus City Code Sec. 2173.07(a)(1) says: "Any person operating a bicycle shall...ride as near to the right-hand side of the roadway as practicable..."
21. On May 21, 2010 (National Bike to Work Day) Brent Nimmo was cited by a Franklin County Deputy Sheriff for violating ORC 4511.55(A) for using the full lane on Alum Creek Drive as he cycled to a COTA bus stop. Based on the precedent of *City of Columbus v. Michael O'Shaughnessy*, on June 1, 2010 the prosecutor had the ticket dismissed in *State of Ohio v. Brent Nimmo*.

John Gideon,
Board Vice-President, Consider Biking,
Co-Founder, Bike, Walk Ohio!
Board Member, Alliance for Biking & Walking

Think Rome –
and what comes to mind?

By Janyce Katz

Romantic? Capital of Italy? Roman Empire? Ruins? Vatican? Eternal City? La Dolce Vita? Trip? "Expensive" is another word that could be used to describe a visit to this magnificent city.

Words alone cannot describe Rome, where history mixes with architecture and the ancient, medieval, Renaissance, baroque and modern merge.

My husband, Mark Glazman, and I wanted the romance, the beauty, the history, the adventure but we had to avoid the movie version of the "La Dolce Vita" life style that is supposed to represent the Rome experience.

In other words, we couldn't even think about staying at places like the glamorous Hotel de Russe, located near the Spanish Steps and frequented by multitudes of celebrities who can afford its elegant restaurant and its price tag for a classic double bedroom of about 630 Euros a night in May, with a junior suite about double the cost.

In addition to the very real pocketbook concerns, lounging in a sexy long gown or a tuxedo on a white divan, drink in hand, until the sun shows up or the money runs out, just isn't our lifestyle, at least not at this time. In addition, packing and carrying dry-clean-only-strapless evening gowns just seems like too much unnecessary work.

We needed a sensible, no-iron-easy-wash-clothes trip so that we could comfortably wheel all we carried with us in our small, skip-the-extra-fee-on-the-plane-sized suitcases.

We looked for plane tickets on the spur of the moment. With the help of the Internet, we found two round trips at a price that fit nicely into our budget. We grabbed them.

Once we had tickets we really started planning. We bought Rick Steves's book "Rome, 2010" and read it. We searched the Internet. Friends loaned us their travel books and told us about their favorite Italian sites, hotels and restaurants. We were flooded with ideas about places to see and things to do, all affordable, all interesting.

It became clear that the serious traveler could spend months in Rome and not see everything. But we, with far less time to spend exploring the city, had to find a spot from which we could see as much as possible in a short time.

We started our search for a nice, safe, conveniently located place to stay. We were told that bargaining for a better price at hotel or bed and breakfast is often expected in Rome and in parts of Southern Italy.

We looked at hotels in the travel books and on line at all the bargain and non-bargain sites. We discovered that bed and breakfasts could be interesting and often cost less per night than hotels. If we had been willing to share a bathroom with strangers, which we were not, the price of a night stay would have dropped even lower.

We also wanted the room to face a quiet courtyard rather than a noisy street. Years ago, during a late August trip to Rennes, in Brittany, we had had to choose between spending the night listening to the sounds of a lively, open-all-night French cafe and adjoining street or attempting to sleep in a quieter, but unbelievably hot room with a closed window. "Nevermore" quoth the husband (to paraphrase the raven).

After we limited our search to bed and breakfasts, we still had to locate in a district and neighborhood. Rome, the city allegedly founded by brothers Romulus and Remus (who were raised by a wolf and a woodpecker) is now a sprawling city of many neighborhoods or districts, each one with its own distinct characteristics. We chose a b&b near Stazione Termini, the main train station, because the area is conveniently located to everything. Also, the two metro lines intersected at Termini. Almost all bus lines stop at Termini – the area is relatively safe and housing is less expensive.

In Rome, or, as the natives call it – Roma, the ruins of an ancient Roman bath, Baths (Terme) of Diocletian, partially covered by an architecturally important church, Church of S. Maria degli Angeli, sit across the street from Stazione Termini. Every day in Rome, we walked out of our bed and breakfast and passed what remains of the Baths of Diocletian and then picked up the bus or metro – a view of modern and ancient.

After we landed at Leonardo da Vinci/Fiumicino International Airport, one of two airports serving Rome, we picked up a train that took us from the airport straight to Termini. At Stazione Termini, we purchased bus/subway ticket passes at a small store that allowed us unlimited access to public transportation while in Rome. The post office, a car rental (have a mental exam before driving in Rome-even crossing the street becomes a game of chicken and parking seems to be almost nonexistent) and a variety of stores are also conveniently located in Stazione Termini.

From Termini, we had a mere ten minute walk to our bed and breakfast. We unpacked, looked out the window at the quiet courtyard, took a quick shower and grabbed the Metro to the Vatican Museum.

The Vatican city/state, an ecclesiastical or sacerdotal-monarchical state, ruled by the Bishop of Rome (the Pope), came into being in 1929. While the Vatican encompasses an area in which Popes lived for many centuries, the current city/state is not considered the remains of the Papal State that ruled much of what is now Italy and beyond until 1870.

Arriving at the Vatican Museum at 3:30 pm, we walked up to the door without having to wait. Had we arrived earlier, we would have found a line that went almost to the subway stop. Our timing limited our visit to this magnificent museum because we had only two and a half hours to see everything before it closed.

We paid the 14 euro entry fee and entered a lavish palace decorated by famous artists such as Raphael and Michelangelo. Think walls painted with gold and turquoise. We wandered through room after room filled with hundreds of paintings and sculptures from every era in history and lavishly decorated. The Sistine Chapel's famous ceiling should not be minimized, but the spectacular art and decorated rooms elsewhere should also be studied closely.

After the museum closed, we explored the nearby St. Peter's Basilica, also a magnificent building. We listened to a Mass, the sounds reverberating off of the statutes of Popes and magnified by the design of the building. No building in Rome is to be higher than St. Peter's, which was clearly designed to awe the worshipers.

Early the next morning, we walked through Travestere, a neighborhood in which medieval architecture combines with modern night life. The Tiber River flows nearby, linking this area to the Mediterranean and making Rome an important trade center in ancient times. For this reason, according to legend, Romulus, after he killed his brother Remus for laughing at him, founded the city Rome near this part of the Tiber River.

Across the Tiber, in an area often flooded until the late 19th Century, Rome's Jewish populations lived in the Jewish Ghetto at the request of the Popes from about the 16th Century to 1870, with a small interruption during the period when Napoleon conquered the area. We attended the Synagogue of Emancipation, completed in 1904 on the site of the (by then) destroyed ghetto. Pope John Paul II visited this synagogue in 1986. To distinguish it from a church, the synagogue has a square dome. The dome symbolizes the story of Noah in that it was painted the colors of the rainbow, and stars dot the ceiling.

The destruction of the ghetto did not end problems for the Jewish community of Rome. Next to the synagogue, in Largo Square, on October 16, 1943, the Nazis demanded the community bring them 110 pounds of gold in 24 hours or be destroyed. Both Jews and non-Jews brought the gold, but the Nazis carted off the Jewish community from that square anyhow.

Walking back from the synagogue, we came to the historical center (centro storico). This district is extremely interesting, consisting of two separate areas – Old Rome, with Capitol Hill, Palatine Hill and the Forum, and Colosseo or the Coliseum. We had purchased a ticket that let us see all three sites, and, where the tickets were sold, we added a tour of the Coliseum. We had been warned to avoid the people selling tours on the street and also to avoid taking pictures with the men dressed as gladiators, because both could be unnecessarily expensive or total scams.

The Coliseum is a monument to cruelty. Built by slaves, it became one of the sites of the daily reality shows during the Roman Empire. In this facility and in others throughout the expanse of the Empire, thousands of men and hundreds of thousands of animals fought to the death to amuse the public. Producers brought in thousands of wild animals and gladiators for the daily productions of fights and hunts. The Coliseum still has some of the seats as well as part of the stage and the rooms in which the gladiators and animals waited for the shows.

Nearby, the Forum sits, reminding us that Rome had a Republic before an Empire. It sits next to the Palatine Hill, filled with buildings dating back to a period before Rome became a city. According to myth, the she-wolf who kept Romulus and Remus alive, did so in a cave under the Palatine Hill, one of the seven hills of Rome. During the era of the Roman Republic, affluent residents lived on Palatine Hill. Later, the Emperors had large palaces there from which they could easily go to their seats at the Coliseum.

We spent one day walking through the Modern Center of Rome, through the Via Veneto, Quirinale, Castro Pretorio, Repubblica, and Trevi neighborhoods. Via Veneto was immortalized in Fellini's La Dolce Vita and, in the '50s and '60s it was a hang-out for jet setting celebrities. The area still has clubs but not many of the glittery crowd go there these days.

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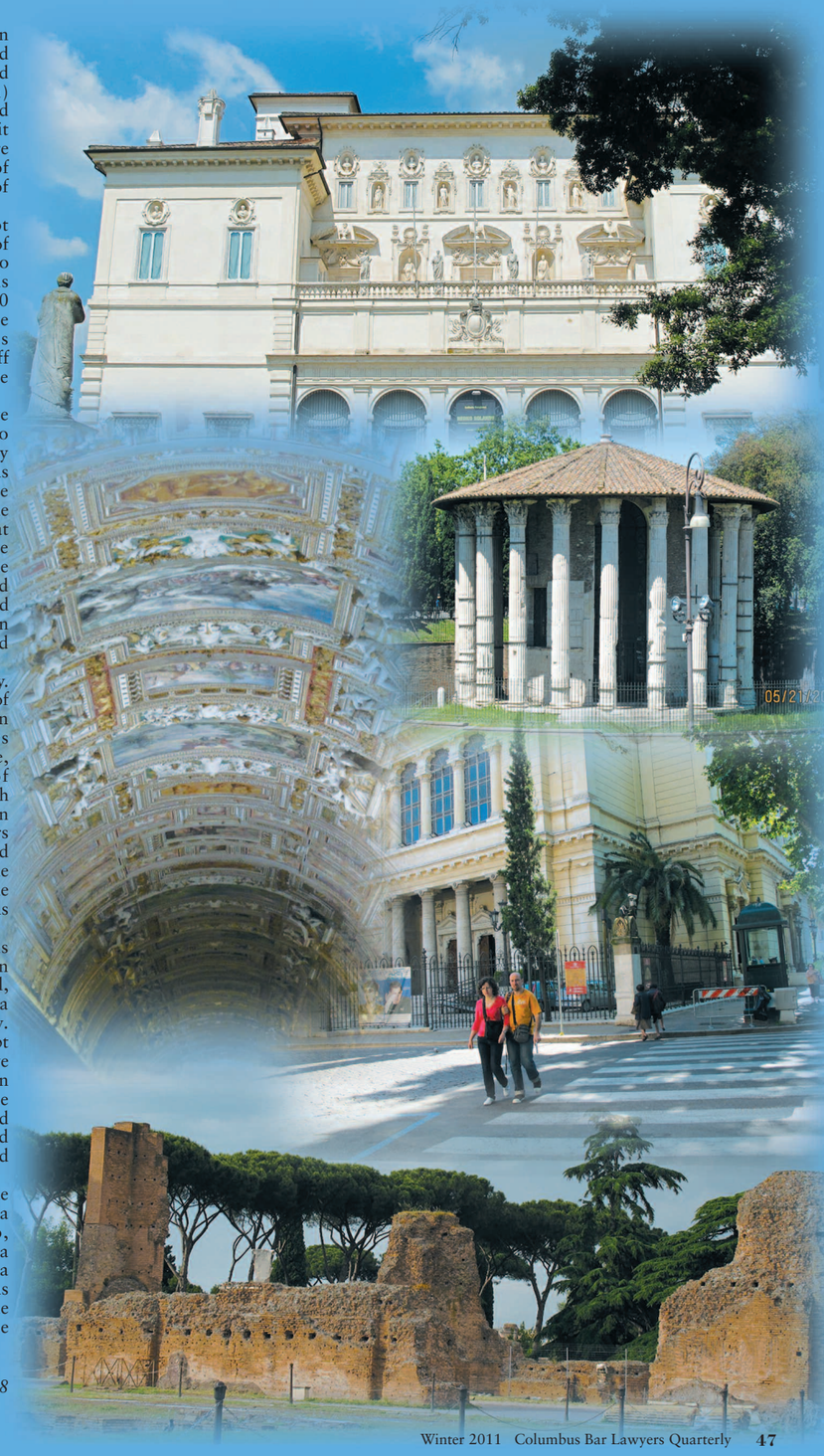

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We continued to the Villa Borghese, former home of Cardinal Scipione Borghese, who filled the villa he had constructed for himself with art treasures created by the greatest artists of his day. Today, it is a museum full of Baroque masterpieces. Luckily, we had purchased tickets for the Borghese Gallery before we left the U.S. as reservations are mandatory for the two-hour slots. People trying to purchase tickets at the door were turned away. Seeing the Gian Lorenzo Bernini statute of David and the other art made the visit worthwhile.

Villa Borghese and the park around it are located near the famous Spanish Steps and Trevi Fountain, a large spectacular fountain at the site of a Roman aqueduct, that was allegedly discovered by a virgin. People flood this area, looking at the buildings and visiting the designer stores and upscale restaurants located in this neighborhood.

We quickly toured the south part of Rome which contains the remains of the Appian Way, built about 312 B.C.

Around 430 miles, it was once the most significant road in the Roman Empire. The Pilgrims' area and the south part of Rome with the Appian Way, and the catacombs attract visitors interested in the religious aspects of Rome. Throughout Rome, pilgrims prostrate on the sidewalk pray for mankind, with jars for coins nearby. Monks, nuns, priests and believers are everywhere, visiting the sites they believe are holy.We wanted to stretch ourselves further and see more. But, the limited time we had in Rome and 95 degree weather meant we could not see everything. One afternoon, we ended up just taking a cold shower and a nap instead of touring.

We ate well and didn't break the bank doing so. The grocery store down the street from our bed and breakfast sold us bread, cheese, fruit and mineral water for picnic lunches. The overpriced bakery around the corner had tasty cannoli and we learned taking it back to our room quartered the price of bakery goods. The restaurants and pizza places we tried ranged from serving very good to excellent food. The Ristorante la Pentolaccia with Modigliani and other artists' works, only fifteen minutes from our bed and breakfast, became our favorite Rome restaurant. We are still trying to replicate the cod in cream sauce with raisins that we ate there.

Whoever said one can't do Rome and "la dolce vita" – the good life – on a budget was wrong. We enjoyed the city thoroughly without one night at a 600 euro hotel or spending even one minute with a celebrity.

We failed to throw coins into Trevi Fountain and wish for another visit to The Eternal City. We hope it will not prevent our return.

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