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In the Crosshairs: Missouri’s Judicial System Hanging in the Balance

Missouri’s methods of judicial selection have been questioned frequently throughout the state’s history. But that criticism has reached a new level in recent years.

Independent Courts — Accountable to Whom?

As recent events in Pakistan have demonstrated, checks and balances within a democratic government are essential to the preservation of civil liberties — a lesson all Americans would do well to heed.
Dear Precedent:

I read Professor Abrams’ article [“Those Pesky Footnotes – Part I,” Summer 2007] condemning footnotes in general—but lauding citation footnotes—with interest. I agree with Bryan Garner’s assertion that citations in the midst of text interrupt the natural flow of the writing. I do not, however, agree that putting citations in footnotes, even with the textual references that Garner advocates, makes reading the text easier.

When a reader, and like Prof. Abrams, I assume a trained legal reader, comes to a footnote, the reflex—born, no doubt, of reading dozens of law review articles—is to drop the eyes to the bottom of the page and read the footnote. Even if the footnote consists of nothing more than “Id.,” the damage has been done. The flow of the writing has been interrupted even more greatly than a citation within the text would have done.

No doubt defenders of Garner’s proposal will suggest that as readers become accustomed to citation footnotes, they will skip over the footnote, knowing from the text that it refers to a case introduced in the text. That argument sounds suspiciously like the argument that those who favor citations in the text use—as Prof. Abrams put it, “If they wish, readers know enough to pass over citations in the main text, which normally are italicized.”

Somewhat that argument was insufficient to overcome the deficiencies of placing citations in the text. That it should be the unspoken answer in the case of citation footnotes seems problematic at best. The bottom line, however, is that the judges I’ve talked to about the issue almost uniformly state that they prefer citations in the text. That is good enough reason for me.

David J. Weimer
Kansas City

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An Informed Citizenry . . .

By Keith A. Birkes

Democracy is dependent on an informed citizenry willing to participate in their government. As Thomas Jefferson insisted, “I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power.”

The Missouri Bar has always placed the highest priority on providing the citizens of Missouri with information about their legal system. We do this by distributing public information brochures on virtually every legal topic, and producing public service announcements that play on television and radio stations throughout the state. We also utilize the Internet extensively and our award-winning law-related education program interacts with thousands of teachers and students every year.

The Board of Governors of The Missouri Bar, in approving the bar’s 2008 budget, has directed the staff to double our efforts to inform the public about their justice system, how it operates, and why democracy depends on a fair and impartial judiciary. By virtue of this directive, The Missouri Bar will be producing and disseminating much more information about basic civics, and we hope to have a significant impact in raising the awareness of the public about their justice system. To accomplish this goal, we will work with teachers, students and the entire citizenry in all ways possible.

The greatest strength of The Missouri Bar is not in disseminating PSAs and public information brochures, however. The real impact the bar can have is through its 28,000 members, who have tremendous influence and access to the mechanisms through which the public learns and forms its attitudes. If every lawyer in Missouri offered to speak to students in a classroom about civics and the judiciary’s role in our democracy, the impact would be tremendous. Periodic letters to the editor of your local newspaper, talking about the role a fair and impartial judiciary plays in our form of government, would begin to better inform the public. A visit with your local legislator about how the judiciary is a separate, co-equal and impartial branch of government that must function with as little political influence as possible would be of tremendous assistance. Missouri lawyers are members of virtually every civic club in the state, and offering to present a program on the justice system would better inform some of the most influential citizens in the state.

The Missouri Bar has all of the resources, background materials and graphic assistance you might need to do the things suggested above. By contacting The Missouri Bar, we are happy to send you a wealth of materials on this topic or you may simply log onto our website and access virtually all of that information. Just go to www.mobar.org and click on “Court Advocacy Resources” to see various materials. Another great resource may be found at www.showmecourts.org.

By working together, the members of The Missouri Bar will cause our citizens to better understand and appreciate what is one of the best, fairest and most impartial justice systems in the nation. We can’t afford not to succeed.

Keith A. Birkes is The Missouri Bar’s Executive Director.
FEATURE ARTICLE

IN THE CROSSHAIRS:
MISSOURI’S JUDICIAL SYSTEM HANGING IN THE BALANCE

Missouri’s methods of judicial selection – particularly the Non-Partisan Court Plan – have been questioned frequently throughout the state’s history. But that criticism has reached a new level in recent years, with both merit-selected judges and partisan-elected judges feeling the heat.
By Gary Toohey

Born as the result of a congressional compromise and unable to declare itself as either a Union or Confederate state during the Civil War, Missouri has always had something of an identity problem. Thus, it surely came as a surprise to the nation when Missouri—a state whose “Show Me” motto indicates reluctance to embrace the unproven and untested—became the first jurisdiction to adopt a non-partisan form of judicial selection.

That initiative, so bold and innovative at the time, has been copied in some form or another by more than 30 other states. But now, after nearly 70 years of largely undisturbed operation, the Missouri Non-Partisan Court Plan finds itself under intense scrutiny.

Critics of the plan say it doesn’t provide enough accountability to the people, while supporters claim that it insulates judges from outside pressure—particularly political pressure—that could affect the impartial application of the law. While these arguments are nothing new, what has changed is both the intensity and rancor of the discussion. More alarming to many is the fact that this debate over the selection of state judges has resulted in personal attacks on individual non-partisan judges—and even judges elected in partisan contests.

“Just as Missouri lies near the geographic center of the country, it now lies at the center of the battle over the politicization of courts,” said Jesse Rutledge, director of field communications for Justice at Stake, a non-partisan partnership of more than 45 judicial, legal and citizen organizations working to keep politics and special interests out of the nation’s courts.

A Debate as Old as the Nation Itself

When Missouri entered the Union in 1821, its method for selection of judges emulated the federal model, with all judges appointed for life by the governor with Senate consent. However, within 30 years that system began to be modified, reflective of a national debate over whether judges should be appointed or elected to office. [See accompanying article, “Judicial Reform Efforts in Missouri: A Timeline.”]

Indeed, the debate over the best means for selecting judges stretches back to the very origins of the nation. “During the colonial era, [judges] were selected by the king, but his intolerably wide powers over them were one of the abuses that the colonists attacked in the Declaration of Independence. After the Revolution, the states continued to select judges by appointment, but the new processes prevented the chief executive from controlling the judiciary.”

“Gradually, however, states began to adopt popular election as a means of choosing judges. For example, as early as 1812, Georgia amended its constitution to provide that judges of inferior courts be popularly elected. In 1816, Indiana entered the Union with a constitution that provided for the election of associate judges of the circuit court. Sixteen years later, Mississippi became the first state in which all the judges were popularly elected. Michigan held elections for trial judges in 1836.”

“By that time the appointive system had come under serious attack. People resented the fact that property owners controlled the judiciary. They were determined to end this privilege of the upper class. . . .”

Judicial Reform Efforts in Missouri: A Timeline

1820 — All judges appointed for life by the governor with Senate consent.
1849 — Supreme Court and circuit court judges elected by the people to six-year terms.
1872 — Terms of Supreme Court judges extended to 12 years.
1875 — St. Louis Court of Appeals created by constitutional amendment. Judges elected by the people to 12-year terms.
1884 — Kansas City Court of Appeals created by constitutional amendment. Judges elected by the people to 12-year terms.
1909 — Springfield Court of Appeals created by constitutional amendment. Judges elected by the people to 12-year terms.
1940 — The Non-Partisan Court Plan was approved by the voters. The measure had been placed on the ballot through an initiative petition. The plan called for judges of the Supreme Court, courts of appeals, and circuit and probate courts in the city of St. Louis and in Jackson County (Kansas City) to be nominated by the governor from a list of three persons submitted by a judicial nominating commission. Judges would stand for retention in the first general election after 12 months in office.
1976 — The judicial article was amended but the Non-Partisan Court Plan was left intact.

Altering Selection Methods

Selection methods and term lengths for Missouri judges are prescribed in the state’s constitution. Constitutional amendments may be proposed by a majority of the members of each house of the general assembly or by initiative petition signed by eight percent of the voters in each of two-thirds of the state’s congressional districts. Proposed amendments must be ratified by a majority of voters at the next general election or at a special election. The constitution also provides an initiative process through which the counties in each judicial circuit can adopt merit selection or return to partisan elections for circuit court judges.
“After New York’s change to election of judges in 1846, other states followed. By 1860 a majority of states changed to partisan elected judges, and all of the states admitted to the union thereafter provided for the election of judges.”

“Within a short time, however, it became apparent that this new system was no panacea, and the need for reform again was recognized. For example, as early as 1853 delegates to the Massachusetts Constitutional Convention viewed the popular election of judges in New York as a failure and refused to adopt the system. One delegate claimed that it had ‘fallen hopelessly into the great cistern’ and quoted an article in the Evening Post that illustrated that judges had become enmeshed in the ‘political mill.’ By 1867, the subject was a matter of great debate in New York, and in 1873 a proposed amendment to return to the appointive system gained strong support at the general election.”

“In 1888 James Bryce published the first edition of his … two-volume commentary, The American Commonwealth. His treatise praised the appointed federal judiciary; but he said that the change by the states to election of judges and limited tenure was ‘full of significance for the students of modern democracy, full of warning for Europe and the British colonies.’

“He wrote:

Popular elections throw the choice into the hands of political parties, that is to say knots of wire pullers inclined to use every office as a means of rewarding political services, and garrisoning with grateful partisans posts which may conceivably become of political importance.

“He wrote also that the necessities of running again for another term ‘sap the conscience of the judge, for they oblige him to remember and keep on good terms with those who have made him what he is, and in whose hands his fortunes lie.’”

“One of the main concerns during this period was that judges were almost invariably selected by political machines and controlled by them. Judges were often perceived as corrupt and incompetent. The notion of a judiciary controlled by special interests had simply not been realized. It was in this context that the concept of nonpartisan elections began to emerge.”

THE REFORM MOVEMENT GAINS MOMENTUM

The evolution of the judicial nomination, selection and retention system that was to eventually become known as “the Missouri Plan” can be traced back to the turn of the century. It was then – in 1906, to be precise – when Roscoe Pound, a young professor from the University of Nebraska and later dean emeritus of Harvard Law School, voiced a popular dissatisfaction with the administration of justice across the nation. “Putting courts into politics, and compelling judges to become politicians in many jurisdictions … [had] almost destroyed the traditional respect for the bench.” One of Pound’s suggestions for improvement involved a reform of existing judicial selection procedures.

Prompted by Pound’s recommendation, lawyer-newspaper editor Herbert Harley and Dean John H. Wigmore of Northwestern University joined other legal educators, judges and lawyers in forming the American Judicature Society (AJS) in 1913. This group was established to promote judicial reform and the efficient administration of justice.

In the next few years, the AJS placed its emphasis on research, providing model plans for statewide and metropolitan court organization; a model code of civil procedure; and a plan for the non-merit, non-political selection and tenure of judges.

It was in 1919 that the AJS’s mission was reinforced when former President William Howard Taft, who was to later accept appointment as Chief Justice of the United States Supreme Court, told the American Bar Association that the legal profession had to be responsible for finding a solution to the deterioration of judicial standards in the state courts resulting from the popular election of judges. President Taft claimed that it was “disgraceful” to see men campaigning for the state supreme court on the ground that their decisions would have a particular class flavor. It was “so shocking, and so out of keeping with the fixedness of moral principles,” he said, that it ought to be condemned.”

That such a deterioration was, in fact, underway was well recognized. Biting commentary, such as this editorial in the now defunct Detroit Saturday Night, sarcastically provided
advice on how to be elected a circuit judge:

Applicants for this position should possess the digestion of an ostrich, a firm right hand with a capacity of at least three thousand shakes a day, a keen memory for faces and names, dignity tempered by geniality and affability, a fluent tongue coupled with the ability to talk to all sorts and conditions of men – and women – and say nothing offensive and leave the listeners with an impression that the speaker is a person of vast wisdom, good humor and tolerance.

Applicants should also be able to attend a series of luncheons, club and lodge meetings, smokers, dances, a banquet or two, and several sports events in the course of a day and yet find time to attend to the exacting duties of the bench. This, of course, presupposes the physical strength to get along with little or no sleep.

Applicants should also possess a commanding presence, particularly because of the necessity of winning the confidence and esteem of the women. And, naturally, the applicants must possess the specialized education and training necessary for a circuit judge.

If you believe we have overdrawn the case, stir about town a little and observe the actions of the members of the circuit bench, all of whom are candidates for re-election this spring. None has yet blossomed out as a song and dance artist, but short of that they seem to be omitting nothing calculated to win the voters’ favor. We might imagine from the newspapers these days that they are everywhere but on the bench.8

A similar situation was noted by Judge John Perry Wood of Los Angeles, who described a judicial election campaign in that city before a meeting of the AJS:

At election time the judges of Los Angeles and the candidates for the bench spread their names over the county by every method known to advertising. They were billboarded like a popular soap, sidewalks and public halls were littered with cards extolling the merits of candidates asking to be permitted to sit in judgment over the lives and property of the people. Contributions were solicited from firms frequently in court. One candidate collected $50,000 for a position that paid $10,000 a year.

Some of the candidates degenerated to the depth of the promoters of cigarette sales campaigns. One candidate agreed to dispense “Justice With Mercy” if re-elected; however, the voters preferred the candidate offering “Even-Handed Justice.” Another candidate offered to conduct “A Fair and Friendly Court” if elected, but the voters turned him down for the judge offering to “Save a Life.” It was facetiously said that after this judge saved his own life by being re-elected, the campaign to “Save a Life” then and there terminated. Despite examples such as these and a general awareness of the problems that costly, time-consuming judicial election campaigns were causing, any proposals that suggested change were strongly resisted. Much of this sentiment stemmed from the natural tendency of citizens to question any selection method which removed from the people’s hands the opportunity for the direct election of officials.

A compromise of sorts was reached when Professor Albert M. Kales of Northwestern University, director of research for the AJS, advanced a plan providing for effective judicial selection reform while preserving for the voters an important role in the process. Simply put, Kales’ recommendation provided for the filling of judicial vacancies, by gubernatorial appointment, from a list of names submitted by a non-partisan nominating commission composed of lawyers, judges and members of the general public. Under this system, judges nominated and appointed would then go before the voters, not against competing candidates but based solely on their qualifications for office.

In spite of strong political opposition, Kales’ idea grew steadily in favor. In fact, California narrowly missed including all the features of Kales’ plan in a major reform measure adopted in 1934. Still, the effort did not gain a serious head of steam until 1937, when the American Bar Association voted to support it.

Missouri Takes the Next Step

The ABA’s action of 1937 was a shot in the arm for supporters of judicial reform, and only served to accentuate the inefficiencies of Missouri’s own judicial selection methods. “Missouri was ‘ripe’ for a change away from political selection of its judges. The state’s Su-
subsequent article

premature Court and three intermediate appellate courts were elected under a partisan political system. At times, the results flowing from this system ranged from the ludicrous to the near chaotic. No person aspiring to serve on the bench and who had to give up [a] law career to do so could be sure of tenure in office, regardless of one’s merit, ability or record of service as a judge. Likewise, judges running in partisan contests often found themselves at the mercy of national and state trends, subject to being swept out of office on the ‘coattails’ of strong national or state candidates. [In the 20 years between the end of World War I and the start of World War II, only twice was a judge of the state Supreme Court who had served a full term re-elected to that post.

“The situation was even worse in the state’s two largest metropolitan areas. Political machines and party bosses in St. Louis and Kansas City largely controlled the election of judges, including the selection of party nominees for judicial positions. Court dockets became congested as judges were forced to spend their time keeping their political fences mended and campaigning for re-election. In addition, the judges were beset with problems and outside influences. Many of those who had made contributions to a judge’s political campaign were not hesitant to remind the judge of that and attempted to influence the outcome of cases where they, their friends, or political associates had a personal, political or financial interest.”

“In the famous case of one judge, the politically dominant system had brought a person judged to be incompetent to the bench. The politicians selected him to run in the 1934 Democratic primary for nomination to the circuit court, despite the fact that in his eight years of so-called private law practice he had been the filing attorney in only nine law suits, eight for divorce and one for annulment. Actually, during that time, his chief occupation was as a pharmacist in a St. Louis hospital. In a pre-primary poll of lawyers conducted by the St. Louis Bar Association, he was ranked nineteenth out of twenty-one candidates. Because of the efforts of the political boss of his party, he was nominated at the primary and elected in the general election, despite a second bar poll ranking him last of the 18 candidates on the ballot. His record was what could have been expected. When he offered himself for re-election in 1940, the St. Louis Post-Dispatch characterized his six years on the bench as ‘a humiliation to the law and to the city,’ and had harsh criticism for his handling of a grand jury charged with investigating election frauds. A fellow member of the bench, Judge McAfee, had summarily discharged the grand jury when it failed to act and subsequently resigned, stating that he no longer wanted to remain a judge under the political system.

“In another pre-1940 Missouri case a supreme court judgeship became a political football for the Pendergast machine of Kansas City, and, as a result, a highly competent jurist was very nearly removed from the bench. In the 1938 Democratic primary, Judge James M. Douglas of the state’s supreme court was a candidate for renomination. Because of his vote in a fire insurance rate decision which offended Democratic boss Tom Pendergast, the politicians slated an opponent to run against Judge Douglas, even though he had shown himself to be well qualified and had an excellent record in office. The primary campaign became a spectacle of a knock-down, drag-out political fight in which both candidates campaigned in all counties of the state, an effort which required Judge Douglas to devote much time away from the bench. Though he was successful in the election, Judge Douglas was required to spend between $10,000 and $25,000 on the campaign, a very considerable sum in 1938.”

“Faced with these problems, bar associations and citizens’ groups around Missouri began pushing for a wide-ranging change in judicial selection procedures. An organization known as the Missouri Institute for Justice – composed of one-third lawyers and two-thirds lay members – set up statewide county organizations under the guidance of active county chairpersons, and began enlisting support for reform. Financed by the contributions of interested citizens, the group managed to obtain support from civic, labor, farm and industrial organizations throughout the state.

“Despite pressure from these groups and others, the Missouri General Assembly failed to implement any such reforms during the late 1930s. Instead, proponents of what was to eventually become known as the Missouri Non-Partisan Court Plan were forced to utilize the right of initiative petition – a right guaranteed by the Missouri Constitution – to place a proposed constitutional amendment on the 1940 election ballot. This amendment proposed the creation of non-partisan judicial selection procedures for the Supreme Court of Missouri, the three state courts of appeals and circuit courts in Jackson County (Kansas City) and the City of St. Louis.”
In advocating for the merit selection plan, the *St. Louis Post-Dispatch* in 1937 editorialized:

The reason [for the plan] is the bench in Missouri, particularly in St. Louis and Kansas City, has become so beholden to political bosses and bossism that it lacks the independence necessary for the impartial administration of justice.12

“On November 5, 1940, the voters of Missouri went to the polls to decide the fate of this amendment. Although final figures showed that the measure passed by more than 80,000 votes, opponents of the [merit plan] continued their fight.”13 They were perhaps spurred by the first few appointments under the system, which, according to a recent review by *Missouri Lawyers Weekly*, “smacked of continued partisanship to some. Gov. Donnell, a Republican, put Republican Laurence Hyde on the Supreme Court in 1942, the first appointment to the high court under the new plan. People granted Donnell that exercise in partisanship because the courts at that time were stacked with Democrats. But Donnell continued to send Republicans to some of the lower courts. Then Democrat Phil M. Donnelly, who succeeded Donnell, began appointing Democrats. News reports and editorials railed against the practice, as did lawmakers.”14

On the other hand, “[i]n the first four elections under the Missouri plan, it became clear that issues between political parties were no longer decisive on the tenure of judges. In the first election in 1942, the state went Republican, but two Supreme Court judges, both Democrats, were retained by two-to-one votes. St. Louis went Republican but retained by two-to-one votes six circuit judges who were Democrats and at the same time confirmed for a full term the first circuit judge, a Republican, appointed under the then new plan. In 1944, the state went Democratic, as did both Kansas City and St. Louis, but two supreme court judges, one from each major party, received substantially the same favorable vote, three-to-one for retention, and two court of appeals judges, again one from each major party, were retained. In Kansas City, the Republican probate judge was retained and, in fact, received fewer ‘no’ votes than any of the six circuit judges, who were all Democrats.”15

“Claiming that the voters had not clearly understood the significance of the changes made by the amendment, [opponents of the plan] managed to get the 1941 session of the Missouri General Assembly to place repeal of the . . . amendment on the 1942 election ballot. This repeal attempt was defeated by 160,000 votes – twice the margin of the 1940 vote.

“Another challenge to the plan came in 1944, when a constitutional convention met to draft a new constitution for the state. Again, an effort was made to leave the non-partisan selection procedures out of the new document, but the delegates to the convention repudiated the effort. The new constitution, containing the non-partisan merit selection procedures, was adopted overwhelmingly by the voters and went into effect in 1945.”16

Despite the initial success of the merit selection system, another serious challenge to the plan came in 1955, when a repeal measure was offered in the state

(Continued on page 24)
INDEPENDENT COURTS: ACCOUNTABLE TO WHOM?
By Cynthia K. Heerboth

As recent events in Pakistan have brought home, checks and balances within a democratic government are essential to the preservation of civil liberties. Since November 3, 2007, Pakistani President Pervez Musharraf has suspended Pakistan’s national constitution, detained eight members of the Supreme Court, and arrested more than 1,500 Pakistani lawyers. Musharraf’s actions have brought to light the fragility of the rule of law and the truth expressed by Montesquieu: “[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers.”

“Judges are the guardians of the Constitution,” noted Missouri State Representative Jim Lembke. “We are all part of some minority. And, we are dependent upon a judiciary to protect us in our status as a minority.” To ensure that all citizens continue to receive justice, our status as a minority. And, we are dependent upon a judiciary to protect us in our status as a minority.” To ensure that all citizens continue to receive justice, there must be judicial independence.

What is judicial independence? It does not mean that judges are unaccountable. In the United States, no branch of the government is beyond accountability to the people. Rather, judicial independence is the freedom of a judge to decide a case based on the facts and law, without outside pressure or special interests, thus providing continuity and stability in our legal system.

“Judicial independence is important because a fair and unbiased hearing is a basic foundation of American democracy. By and large, Americans believe that a judge’s decision, even if unpopular, should be reached by reasoned and unbiased analysis.”

“Judicial independence assures that cases will be decided based on their merits, not on what is popular at the moment. Judges are expected to make unbiased decisions based on their interpretation of the law without any outside influence. The [F]ounding [F]athers created the judicial branch so that it could operate fairly and impartially without fear of political retribution.”

But judicial independence, as defined by the Justice at Stake Campaign, means “that judges are free to decide cases fairly and impartially, relying only on the facts and the law. It means that judges are protected from political pressure, legislative pressure, special interest pressure, media pressure, public pressure, financial pressure, or even personal pressure.” United States Supreme Court Justice Anthony M. Kennedy stressed the importance of judicial independence when he said, “The law makes a promise – neutrality. If the promise gets broken, the law as we know it ceases to exist.”

Judge Roger K. Warren, president of the National Center for State Courts, asserts that judicial independence has two aspects. The first is “decisional independence,” which “provides that the judge should decide cases solely based on the law and facts that are applicable without regard to political or popular pressure, without regard to the fact that there are some who would corrupt the judicial decision-making process for their own advantage, without regard to partisanship, fear of intimidation, or special interests.”

The second aspect, according to Judge Warren, is “institutional independence.” In contrast to decisional independence, “[i]nstitutional independence seeks to ensure that the court, or judicial branch, or all judicial officers are free from improper influence and interference in the governance and management of the judiciary’s own affairs. Its aspects include judicial selection; judicial retention; judicial evaluation; judicial discipline; judicial compensation; the proper funding and budgeting of the judiciary; and legislative or executive branch encroachments into the power of the judiciary, or into the administration of justice or interference with personnel, facility, or internal financial management of the judiciary,” stated Judge Warren.

Former U.S. Supreme Court Justice Sandra Day O’Connor echoed that concept: “Addressing first the independence of individual judges, two avenues for securing that independence reveal themselves: First, judges must be protected from the threat of reprisals, so that fear does not direct their decision-making. Second, the method by which judges are selected, and the ethical principles imposed upon them, must be constructed so as to minimize the risk of corruption and outside influence.

“Judicial independence is not an end in itself, but a means to an end. It is the kernel of the rule of law, giving the citizenry confidence that the laws will be fairly and equally applied,” continued Justice O’Connor. “Judicial independence also allows judges to make decisions that may be contrary to the interests of the other branches of government.”

Recognizing that the executive and legislative branches can, at times, “rush to find convenient solutions to the exigencies of the day,” Justice O’Connor stated that “[a]n independent judiciary is uniquely positioned to reflect on the
impact of those solutions on rights and liberty, and must act to ensure that those values are not subverted. Independence is the wellspring of the courage needed to serve this rule of law function. . . . Let us keep in mind the importance of independence to the effective functioning of the judicial branch. . . . An independent judiciary requires both that individual judges are independent in the exercise of their powers, and that the judiciary as a whole is independent, its sphere of authority protected from the influence, overt or insidious, of other government actors.”

**The Origins of Judicial Independence**

The Founding Fathers “recognized that it is essential to the effective functioning of the judiciary that it not be subject to domination by other parts of the government,” stated Justice O’Connor. To accomplish this goal, the U.S. Constitution “established an independent federal judiciary by separating the law-making function of the legislative branch from the law-applying role of the judicial branch.”

The Constitution protects judicial independence because the founders had first-hand experience with persecution. They felt that courts were unfairly controlled by judges dependent on the will of King George III. The Declaration of Independence criticized the fact that the judges’ tenure of office and payment of salaries depended solely on the king. The consequence of overreaching government power supported by the king’s judges resulted in star chamber trials, unreasonable searches and other abuses. The founders knew that courts had to protect the rights of those promoting unpopular views, those representing minority factions or viewpoints, and even those accused of serious crimes.

“Alexander Hamilton, James Madison, and other American founders especially feared a tyranny of the majority, which was a peculiar threat to individual rights in a government based on the consent and will of the people. If not effectively checked, a majority of the people could exercise tyranny over unpopular minorities through their popularly elected representatives in government. . . . Hamilton wrote, ‘The independence of the judges is . . . requisite to guard the Constitution and the rights of individuals.’”

“The nation’s founders believed that a crucial element of a democratic society was the principle of judicial independence. This power frees judges from the political pressures that might prevent them from impartially enforcing the rights and principles guaranteed by the U.S. Constitution. Furthermore, without this principle, the system of separation of powers and checks and balances among the three branches of government cannot exist.”

Within the three branches of government, the judicial branch is “charged with ensuring that no branch runs afoul of the limitations the people have placed upon them, through the due process clause, the religious liberty clause, the free speech clause, and many others. . . . Whenever the executive or legislative branches exceed the authority granted to them by the people through the Constitution, the judiciary rightly steps in and strikes down those challenged actions.”

In defending the role of the judiciary in the Constitution, Alexander Hamilton, quoting Montesquieu in *The Federalist*, No. 78, wrote: “[L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments.”

“The Founding Fathers created the judicial branch so that it could operate fairly and impartially without fear of political retribution. . . . Judicial independence is important because a fair and unbiased hearing is a basic foundation of American democracy.”

Mirroring the U.S. Constitution, the Missouri Constitution states in Article II, Section 1: “The powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confined to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others.” Each branch of government has its own jurisdiction in terms of the powers it has, but they are held in place, in relation to one another, by the same system of checks and balances that was established on the federal level.

More than 200 years later, judicial independence is still an important issue. Indeed, the threat to fair and impartial courts – and judicial independence – is growing.

- Special interests are spending mil-
THREATS TO JUDICIAL INDEPENDENCE

In recent years, leaders of the bench and bar have decried what they describe as unprecedented assaults on judicial independence. Justice O’Connor stated that “the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history.” Former American Bar Association President Michael Greco, addressing the ABA House of Delegates, commented that the courts “are being threatened by extremists, who would tear down our courts for political, financial or other gain.” And Michael Traynor, president of The American Law Institute, wrote, “Judicial independence is especially important today because the judiciary and the rule of law are under relentless and severe attacks from various quarters.”

“There are many threats to judicial independence,” wrote Judge Warren. “There are those who would corrupt the judicial process for their own personal advantage, or the advantage of their party, family, or friends, or for revenge, or malice – in order to injure. There are those who offer money or promises, and those who threaten, or conduct ex parte communications with the court. There are those who would improperly seem to influence judicial selection, or the criteria and considerations that should be used in judicial evaluation. There are those who would deny sufficient funding to the judiciary, or seek to control its personnel, or seek to selectively fund only their own pet project, or fund the judiciary only on special conditions. There are those who would fail to support the judiciary’s efforts to improve its’ own performance.”

According to the Constitution Project: Court Initiative, “Courts are able to protect the basic rights of individuals and decide cases fairly only when they are free to make decisions according to the law, without regard to political or public pressure. … [T]he judiciary can maintain the checks and balances essential to preserving a healthy separation of powers only when judges are able to resist overreaching by the political branches. Indeed, the cornerstone of American liberty is the power of the courts to protect the rights of the people from the momentary excesses of political majorities.

“In recent years, the polarization and posturing that … characterize … politics have posed risks to the independence of the judiciary. Attacks on judges for unpopular decisions, even when those decisions are a good faith interpretation of the law, have become rampant. Politicians, both federal and state, are responding to unpopular decisions and litigants by attempting to strip the courts of their powers over certain kinds of cases. Efforts to politicize the federal and state judicial selection processes are increasing around the country, and campaign contributions to state court judges and candidates by litigants and their lawyers are escalating, raising concerns about fairness and impartiality.”

While serving on a panel during The Missouri Bar’s Annual Meeting in September, Missouri State Senator Jolie Justus stated, “One of the things that concerns me greatly as I see an increasing number of attacks on the judiciary is an erosion of that separation [of the branches of government]. And to me, it’s frustrating because it seems to be under the guise of giving more power to the people.”

The most damaging source of dissatisfaction with the courts is the perception of unfairness. “It is only dissatisfaction with regard to the fairness of courts that is directly linked to the level of public trust and confidence in the courts,” Judge Warren said. “When the people think that the courts are unfair, that the judges are not neutral, that the judges are not honest, that the judges are not trustworthy, that the judges do not have integrity, these are the issues of character, not competence – when the public feels that there are character flaws in the judiciary, that’s what undermines their trust and their confidence in the entire justice system. And this threat, I think, is our greatest threat in America, because the absence of public trust will inevitably result in persistent threats to judicial independence.”

Another threat to judicial independence is “irresponsible public criticism aimed at influencing particular judges by political pressure or intimidation. Attempts to turn public opinion against a
judge are especially threatening in states where judges are elected by voters or subject periodically to approval or rejection by the electorate.

Critics often respond to controversial decisions – or any decision they don’t like – by calling judges “activists.”

“Other threats to judicial independence may come from the legislative branch whenever most members are upset with the trend of judicial decisions. For example, the legislators may try to pressure judges by not approving judicial salary increases to meet rising costs of living. The legislature may also withhold funding from the judicial branch and thereby impede or prevent hiring of new staff or other actions needed to cope with annual increases in cases and workloads.”

As the judicial branch does not control the power of the purse, the adequacy of its resources depends upon the action of the other branches. The other branches, therefore, exercise primary control over the number and compensation of judges and most other court resources that are needed to support a judge’s constitutionally based works – law clerks for legal research; case management personnel to ensure the speedy handling of cases; staff to coordinate adjunct support functions such as guardians ad litem, ADR (alternative dispute resolution) programs, and law libraries; staff and equipment to carry out essential support functions such as planning, budgeting, and automation; facilities; and security.

Appropriations for the judiciary tend to lag behind the growth of judicial branch workloads. This compromises the ability of the judiciary to perform its mandated functions. The number of positions necessary to accomplish work becomes insufficient, or the compensation necessary to attract and retain qualified personnel ceases to be competitive. This is sometimes a result of an inadequate appreciation for the importance of the court system relative to other government functions. Occasionally, however, individuals in the other branches have withheld funds from the court system as retribution for decisions by the courts that were either unpopular or embarrassing to certain politicians.

Attempts to limit the jurisdiction and discretion of courts are also viewed as a threat to the effective functioning of the third branch. Jurisdiction stripping and reduction of judicial discretion – The powers of the federal and the state legislatures vary with respect to the judicial function, but many have some statutory authority to affect the existence or jurisdiction of state courts (particularly the trial courts), the nature of the disputes that may come before the courts, and the range of remedies or sentences that the courts may impose in conjunction with civil and criminal decisions. When exercised properly, such legislative authority can be beneficial to the operation of the justice system; however, such changes have sometimes been motivated by a misunderstanding or a lack of appreciation for the proper exercise of judicial power. For example, legislatures have restricted judicial sentencing discretion via the imposition of mandatory sentencing structures, motivated by false impressions that judges are “soft on crime,” resulting in too many instances in which severe sentences are imposed for comparatively minor offenses.

**CROSSING THE LINE**

“I have no objection to healthy criticism,” said ABA President Jerome Shestack in 1998. “Every lawyer who appeals is criticizing a ruling.” But “[w]hen public criticism takes the form of uninformed rhetoric about a particular judge or decision, the danger that the judge will suffer adverse consequences … becomes a problem. When politicians, lawyers, or citizens publicly criticize a judge or decision, the judge is generally precluded from responding by ethical rules.”

“Attacks on judges for unpopular decisions, even when those decisions are a good faith interpretation of the law, have become rampant.”

Jesse Rutledge, director of field communications for Justice at Stake, stated that it is important to “acknowledge that criticism of the courts is acceptable, and the automatic response should not be to muzzle someone who tries to speak up or speak out. But all things should come in moderation. Attacking a judge for one decision, out of literally thousands that are issued, is inappropriate.”

“Each one of us,” said Missouri Bar
President Charlie J. Harris, Jr., “by virtue of living in this society, has the opportunity and the obligation to launch constructive criticism as it relates to any public official, judges included. The issue for The Missouri Bar is not whether there is criticism of the judiciary, but whether there is unfair or inaccurate criticism that distorts a judge’s record and misleads the public.”

In 2005, the Commission on the Im partiality of the Judiciary, co-chaired by former Missouri Supreme Court Judge Ann K. Covington and Kansas City attorney R. Lawrence Ward, made a report to The Missouri Bar’s Board of Governors that, in part, dealt with identifying appropriate involvement of The Missouri Bar in defending the judiciary and/or the individual judge who, from time to time, may be subject to unfair or inaccurate criticism. The following guidelines were developed:

**Guidelines to Determine When the Bar Should Respond**

1. The following are the kinds of cases in which responding to criticism is appropriate, except in unusual circumstances:
   - When the criticism is serious and will most likely have more than a passing or de minimis negative effect in the community; and
   - the criticism displays a lack of understanding of the legal system or the role of the judge and is based at least partially on such misunderstanding; or
   - the criticism is materially inaccurate and the inaccuracy is a substantial part of the criticism so that any response does not appear to deal with inconsequential issues.

“I agree with the fundamental premise that our society demands that everyone be open to having their decisions evaluated, and judges are no different from the other members of the three branches of government,” said J. Dale Youngs, president of the Missouri Institute for Justice. “[T]here is fair criticism and there is unfair criticism, which borders, frankly, on a smear campaign. That’s what we saw with Judge [Richard B.] Teitelman back in 2004 and Judge [Thomas J.] Brown [III] in 2006.”

In 2004, Supreme Court Judge Teitelman was on the ballot for retention. A few weeks prior to the election, Missourians Against Liberal Judges “started a nasty, misleading, under-thetradar campaign to block the retention.”

In a mailer, Kerry Messer, president and founder of the Missouri Family Network, described Judge Teitelman as “much more liberal than most” and said the judge had “written several activist decisions.”

F. William McCalpin, who spent 12 years on the board of the Legal Services Corporation, said “the real issue is ideology: ‘This is less a campaign against Rick, it is more a campaign for their agenda.’” “[J]udges are chosen to uphold the law, not cater to certain ideological tests.”

The attack against then-Cole County Circuit Judge Thomas J. Brown, III started a mere week before election day. The Jefferson City-based Committee for Judicial Reform received $175,000 from a Chicago-based group called Americans for Limited Government. According to the paperwork filed by the committee with the state Ethics Commission, the committee’s “only campaign interest [was] to oppose the re-election” of Judge Brown. The ads mailed to voters whereby judges allow their personal views about public policy, among other factors, to guide their decisions.”

There was very little time to rebut the ad campaign. Judge Brown stated that those responsible were “not interested in any honest debate of the issues, because their point is not whether these things are true or not.”

“This is frightening,” said Cole County Senior Judge Byron L. Kinder at the time. “[I]f they succeed (in defeating Brown), then they will be able to go around and their minions will be able to say, ‘Well, if you don’t go our way, then look what happened in Cole County.’”

Brown was defeated in that election.

“He was politically executed by political groups coming into Missouri and unseating him with their money,” stated Youngs. “Those are the kinds of situations that call for organizations like the Missouri Institute for Justice.”

“There is very clearly a sophisticated and well-connected network of political operatives who see . . . political benefit in attacking courts and [judges].”

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on the ability of the judiciary to continue its function. The framers naturally intended that there be tension among the three branches of government, and there is a good reason for that – they’re supposed to act as a series of check and balances on each other,” added Youngs.

“The federal system and state systems are set up to have checks and balances,” stated Malia Reddick, director of research and programs with the American Judicature Society. “There are valid powers that the executive and legislative branches have in relation to the courts. I think you cross the line when there is an attempt to exercise those powers in response to a particular decision the court has made. I think that judges should be accountable, but not for the unpopular or controversial nature of their decisions.”

Missouri Supreme Court Judge Michael A. Wolff expressed it well when he said, “Judges have to make decisions. Half the people that come into our courtrooms leave without being winners. And, some of the winners don’t get everything they want, so they’re not happy either. So, we’re not in the happiness business.”

Accountability

Some people refuse to use the words “independent judiciary” because they think it connotes a lack of accountability. When critics disagree with a decision, judges are often accused of being unaccountable. “Judges are not accountable in the same way that the other two branches of government are. They serve a different purpose and a different role, and I think that is where judges, lawyers and non-lawyers have to get the word out and educate not only the general public because there is a role to that – but in having conversations with the other two branches of government.” Youngs said.

Courts are accountable to the law and the Constitution – not to politicians with an eye on the next election. Established mechanisms of accountability – appeals and judicial review – have worked well for hundreds of years. Politicians who think they can decide which cases courts may hear threaten everyone’s rights.

“There must be an attitude of mutual respect,” writes Judge Warren, “between the branches of government: of cooperation, dialogue, and effective communication. The judiciary cannot operate in a vacuum. Judicial independence is not judicial isolation or judicial separation. Separation begets suspicion; suspicion begets mistrust. Independence is served through interdependence.”

Rutledge expressed the same idea concerning educating the general public. “The public is much more interested in hearing how judges are accountable than how they are being independent. Defenders of the courts have focused on the independence message and not on the accountability message. It’s important for us to realize that we can talk about judicial independence until we’re blue in the face, and the public doesn’t really have any idea what that means. For them, it comes down to a matter of trust. They translate independence into a lack of accountability.

“It’s important for judges and bar leaders, especially in Missouri right now, to be speaking out and trying to educate the public about how the courts are accountable and that accountability is to the law and to the Constitution, as opposed to what the critics of the courts would like, which is accountability to political partisanship and special interests. … Trust in the courts is generally very high. The trouble…is…when faced with these attacks, we all sit back. It’s very clear that when the critics face some resistance, …the American public is with us. But the other side will win unless we speak up.”

A judge’s job is to “interpret the law,” added Reddick. “We wouldn’t need judges if the law wasn’t open to interpretation. [J]udges do the best they can to apply the law to a particular situation, and they are open to review by other courts.”

“The Missouri Bar has a speakers’ bureau in which judges are taking advantage of the opportunity to tell citizens what they do and why it is important to stay impartial and fair,” said Harris. “In addition, judges are encouraged to go out and talk about their role within society.”

Senator Justus concurred, stating, “[W]hat we have got to do is … get out beyond lawyer groups and start talking to the public.”

“Within the field of judicial administration, there has come to be an understanding that the independence of the judiciary from intervention – warranted or otherwise – by the other branches [of government] can be best assured by the
Courts’ effective management of their own operations. When courts establish and support effective leadership, operate cooperatively with the other elements of the justice system (law enforcement, the bar, probation and corrections staff, etc.), plan and secure the resources to implement those plans, measure performance accurately, and account publicly for their performance, they can earn credibility, secure the respect of the public and the other branches of government, and minimize grounds for criticism and interference.”

“Ultimately,” concluded Judge Warren, “judicial authority is a moral one, and public trust and confidence in the judiciary is the ultimate measure of our performance. This thought was expressed by another former justice of our Supreme Court in these words: ‘the court’s authority, consisting of neither the purse nor the sword, rests ultimately on substantial public confidence in its moral sanction.’ So in conclusion, it is we the judges who … must provide the vision; it is we who must set the standards; it is we who must lead the charge.”

“If citizens have respect for the work of their courts, their respect for law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts,” said Arthur T. Vanderbilt, former president of the American Bar Association, “their respect for law and order will vanish with it.”

**Endnotes**

1 Montesquieu, Spirit of Laws Vol. 1
4 “The Importance of Judicial Independence” remarks by Sandra Day O’Connor, Associate Justice, Supreme Court of the United States before the Arab Judicial Forum, Manama, Bahrain, September 15, 2003.
5 In modern usage, legal or administrative bodies with strict, arbitrary rulings and secretive proceedings are sometimes called, metaphorically or poetically, *star chambers*. This is a pejorative term and intended to cast doubt on the legitimacy of the proceedings.
8 Representative Jim Lembke, while serving as a panelist at The Missouri Bar’s Annual Meeting, Sept. 27, 2007.
14 Id.
16 “Misleading Criticism,” American Judicature Society.
17 Susan Block, Ouster Effort Harms Court Plan, St. Louis Post-Dispatch, October 29, 2004.
19 William C. Lhotka, High Court Judge Faces Ouster Effort, St. Louis Post-Dispatch, October 27, 2004, at D1.
22 Judicial Independence, National Center for State Courts.

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Those Pesky Footnotes — Part II

By Douglas E. Abrams

Part I contrasted citation footnotes and textual footnotes. The article identified important roles for efficient citation footnotes, but said that “[h]ardly anyone wants to read textual footnotes, and hardly anyone ever does.” The article ended by discussing footnoting in briefs, and Part II now discusses footnoting in judicial opinions, law reviews, and books.

Judicial Footnotes

Judges write opinions not as private citizens, but as public officers vested with constitutional authority to publish with the force of law. Judicial footnotes can be troublesome because stare decisis means that anything said in an opinion can later be cited as authority.

Footnotes may suggest that the court did not deem the footnoted material sufficiently important to warrant inclusion in the main text, but also that the court did not deem the material so unimportant as to warrant exclusion from the reporter. Lawyers and courts in later cases are left to grapple with the significance of the footnoted facts, law or citations.

Courts themselves have achieved no consensus concerning the precedential force of judicial footnotes. “Many legalists insist that footnotes are part of the opinion and entitled to full faith and credit,” Judge Abner J. Mikva found, but “others insist that they are just footnotes.” Judge Richard A. Posner, for example, says that “a court’s holdings are authoritative wherever they appear on the page.” Chief Justice Charles Evans Hughes, however, reportedly said (though not in a published opinion) that “I will not be bound by a footnote.”

The Supreme Court sets an example for the lower federal and state courts. Oliver Wendell Holmes, Jr. and Benjamin N. Cardozo secured their places in American jurisprudence by the force of their writing atop the page, without dependence on footnotes. By the mid-1980s, however, Milton Handler criticized the Court’s “addiction to . . . voluminous footnotes which seem to increase term after term.” The Justices’ majority, concurring and dissenting opinions carried 3,460 footnotes in the 1984 Term alone, leading Professor Handler to complain that “it is not the function of the highest court of the land to produce a new edition of Corpus Juris in its opinions.” In 1990, Judge Ruggero J. Aldisert called the Court “an institution that gorges on the unnecessary and spits out footnotes in a sort of postgraduate show-and-tell.”

Supreme Court footnoting conventions seem to have changed for the better in recent Terms. Justice Stephen G. Breyer has sworn off footnotes in his opinions because judges write “to explain as clearly as possible and as simply as possible . . . the reasons” for the decision. “[E]ither a point is sufficiently significant to make, in which case it should be in the text,” says Justice Breyer, “or it is not, in which case, don’t make it.”

Other Justices have resisted footnotes in recent years. Justice Ruth Bader Ginsburg, for example, has praised “opinions that both get it right, and keep it tight, without undue digressions or decorations.” Justice Sandra Day O’Connor once disparaged footnotes to her law clerk: “If you have something to say, just say it. Don’t weasel around down in the brush.”

Most lower court judges taking a position lately have also inched toward forgoing or resisting footnotes. Judge Mikva said that using footnotes often “perverts judicial opinions.” Judge Robert E. Keeton said that “drafting an opinion with no . . . footnotes is harder work,” but that “the result, if well done, is a clearer and more readable opinion, with fewer ambiguities.”

Judge Posner warns that judicial footnotes can cause mischief by retaining “some propositions that are superfluous or questionable or both.” “[O]ften, the opinion writer will have placed material in a footnote because he was not quite sure it was right and yet the material seemed in some way necessary to complete his argument or at least supportive of it.” Yesterday’s footnoted dictum can become tomorrow’s holding when a court cites it, sometimes with little or no further analysis.

Judicial footnotes, Judge Aldisert writes, generally “obfuscate as much as they illuminate, creating muddle and even generating additional litigation.” Judge Aldisert nonetheless finds limited roles for judicial footnotes, such as (1) to “dispose of collateral issues, controlled by precedent, that
would disrupt flow or organization of text,” (2) to “record related issues not reached,” (3) to “set forth trial testimony that supports facts in text,” or (4) to “respond to concurring or dissenting opinions.”

Writing in the Washington University Law Quarterly, Judge Edward R. Becker spiced the judicial debate with a pro-footnote stance. “[I]f the body of the text reads persuasively in its own,” he wrote, “judicious use of footnotes allows judges to communicate most effectively with their diverse audiences,” while omitting “material that is peripheral to the essential meaning of the case.” The primary audience, the litigants and their lawyers, can benefit from footnotes (1) demonstrating that the court considered collateral claims not discussed in the text, (2) “elaborating the reasoning stated succinctly in the body of the opinion,” or (3) “furnishing a fuller understanding of the background and nuances of the case.”

Judge Becker also approved of (1) footnotes containing citations, statutory quotations, historical matter or theoretical discourse that reduce the need to “guess about the building blocks of the court’s reasoning,” and (2) footnotes that “buttress the holding, qualify it, or otherwise reflect on its utility.” Footnotes may also question the state of the law, recommend law reform to the legislature, or respond to concurrences or dissents.

Judge Becker’s bottom line? “Moderation,” not “elimination.”

Amid the judges’ debate, the wisest approach may be a rule-of-reason grounded in stylistic judicial restraint. “No footnotes,” then-Judge Breyer promised when President Clinton nominated him to the Supreme Court in 1994. But then the nominee hedged: “Or as few as possible.”

**LAW REVIEW FOOTNOTES**

Law reviews have been criticized for holding only limited appeal to the bench and bar, a destructive disconnect caused at least partly by the “footnote creep” that infects so many of these journals. Efficient citation footnotes remain central to law reviews because readers need to know the writer’s sources and authorities, but dense textual footnotes distract and annoy because they merely continue the main discussion.

Law review writing is “no different from any other writing in its basic function: communication. But the geometric growth of footnote density is fundamentally at odds with that purpose.” When editors of the nation’s leading law reviews recently called for shorter manuscripts, I suspect that the editors conjured images of textual footnotes, whose sheer volume remains a major reason why so many articles are simply too long nowadays.

The apparent all-time winner of the “most footnotes in a law review article” sweepstakes is Arnold S. Jacobs, a securities lawyer whose 1987 New York Law School Law Review article was laced with 4,824 footnotes. One law school librarian anointed Jacobs “the Hank Aaron of footnotes,” though Jacobs had much more behind-the-scenes help than the slugger, who homered 755 times without help from the dugout. Dozens of Jacobs’ footnotes were variants of “See infra [or See supra] text accompanying note __,” the thoroughly annoying guideposts routinely added by student editors applying conventions which presume that law review readers, unlike readers of nearly all the world’s other literature for ages, need footnoted assistance to shepherd them through a text.

Some law reviews strive for pages containing one-third text and two-thirds footnotes. Footnotes sometimes consume an entire page, without a single line of text at the top. When footnotes subordinate the text, the tail wags the dog and readers inevitably lose confidence.”

“...
semirelevant material.”36 Or to “provide a citation for every proposition,” which “distracts the reader and may contribute more to form than substance.”37

Law review writers emotionally unwilling to let go of pre-publication research and prose may feel tempted merely to “drop it into a footnote,” though pressing the “delete” key might better serve the writer’s core aims – precision, conciseness, simplicity and clarity.38 “Discipline to delete” is particularly central for writers of law review articles, which, unlike judicial opinions, hold no binding legal force. Readers obligated to plumb judicial footnotes for precedential effect can ignore law review footnotes altogether, or even heed the advice of Stanford legal historian Lawrence M. Friedman, who urged “putting down that law review and picking up a good novel. It does wonders for the soul.”39

BOOK FOOTNOTES

Books are not extended law review articles. Efficient citation footnotes provide sources and authorities, but most readers do not want or expect textual footnotes from books. As a price for enjoying a good book, readers should not be coerced to play vertical “visual tennis” with textual footnotes, an irksome optical game that one writer aptly called an “enjoinable nuisance.”40

The injunction is particularly appropriate today, when book “notes” generally mean endnotes, which hold even greater potential for distraction than footnotes. “Reading endnotes,” Judge Becker observed, “involves fingers, mouth and neck – fingers for turning pages, mouth for licking fingers, and neck for head-twisting – an effort much more cumbersome than the head-bobbing that footnotes require.”41

Books offer writers flexibility in citation form normally unavailable in law reviews. Some authors helpfully omit endnote numbers from the text entirely, and then collect citations chapter-by-chapter in notes following the last chapter. Each note indicates the chapter, page and sentence to which its citations refer, but readers unconcerned with citations may ignore the notes entirely.

Other writers use only one citation endnote per paragraph, following the last sentence. The endnote collects all the paragraph’s citations, separated by semicolons. Each citation carries a parenthetical to indicate relevance.

Treating writers sometimes use textual footnotes because they know that most readers examine only a few paragraphs or sections, without proceeding from cover to cover. Even readers who choose such selective examination, however, need to know the importance the expert writer attaches to a proposition. If the proposition is worth stating, it belongs in the main text (with citation notes providing relevant legislative history, jurisdiction-by-jurisdiction decisional law or secondary sources). If the proposition is not worth stating, it should be omitted, rather than consigned to the “netherworld of footnotes.”42

CONCLUSION

More than 250 years ago, Enlightenment philosopher Jean-Jacques Rousseau candidly appraised the endnotes in his book, Discourse on the Origin and Foundations of Inequality Among Men. “I have added some notes to this work, following my lazy custom of working in fits and starts,” he wrote. “These notes sometimes stray so far from the subject that they are not good to read with the text. I have therefore relegated them to the end . . . . Those who have the courage to begin again will be able to amuse themselves the second time in beating the bushes, and try to go through the notes. There will be little harm if others do not read them at all.”43

I seek a reputation for candor but not laziness, so I close by reassuring readers about the footnotes that will accompany my future “Writing It Right” articles. I borrow from Professor David Mellinkoff’s preface to his classic book, The Language of the Law: “The footnotes are for reference only. Anything worth saying has been said in the body of the text.”44

ENDNOTES

4. Frederick Bernays Wiener, Briefing and Arguing Federal Appeals 154 n.73 (1967).
6. Id. at 20.
11. Ruth Bader Ginsburg, Workways of the
16. Id. at 352.
17. Ragguero J. Aldisert, supra note 7, § 12.1, at 177.
18. Id.
20. Id. at 1, 1.
21. Id. at 13.
22. Id. at 4-5.
23. Id. at 5.
24. Id. at 6-7.
25. Id. at 1, 13.
35. Id.

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In the Crosshairs
(From page 11)

attacks on the non-partisan court plan
began again in the early 1980s, with annual efforts by the Missouri General Assembly to modify or replace the non-partisan court plan. Not surprisingly, some bills were directed at the ethics of the nominating commission and the governor in judicial appointments. A bill introduced in 1989 would have prohibited the governor from communicating directly or indirectly with members of the nominating commission until the nominees for a judicial vacancy were submitted to the governor. In both 1988 and 1991, proposals were made to abolish the nonpartisan court plan. Between 1990 and 1993, measures were introduced that would alter the selection process for the non-lawyer members of nominating commissions; require senate approval of gubernatorial appointments; impose twelve year term limits on all judges; increase the affirmative percentage required for retention to 60 percent; and allow voters to petition for a special retention election for judges in their area. None of these bills were enacted.19

In 1999, a proposal that would have eliminated the non-partisan selection of circuit and associate circuit judges in the City of St. Louis and St. Louis County was introduced in the General Assembly, but failed to gain passage. Similarly, in 2004, some 57 lawmakers proposed a constitutional amendment that would have replaced merit selection of judges with judicial elections.

Meanwhile, in 2005 “[a] handful of bills were proposed to alter the way that judges are selected and retained. One would have required senate confirmation of supreme court nominees, while another would have required confirmation of both supreme court and courts of appeals nominees.”20

THE ATTACKS BECOME PERSONAL

While criticism of the Non-Partisan Court Plan has been heard since its inception, those discussions have typically focused on the mechanics of the selection and retention method. In 2004, however, that criticism took a new turn when a judge seeking retention under the plan was targeted for ouster.

Three weeks prior to the November 2004 general election, Missourians Against Liberal Judges – a loose coalition of groups and individuals including the National Rifle Association, Phyllis Schlafly of the Eagle Forum, the Missouri Family Network and others21 – went public with an attack on Supreme Court of Missouri Judge Richard B. Teitelman. Judge Teitelman, appointed to the Court two years earlier, became the target of accusations that he was representative of “liberal activist judges” – that is, judges “who are against traditional marriage, rule for abortion, rule against gun rights, reduce the sentences of brutal murderers, and side with trial lawyers whose law suits are driving doctors out of our state.”22 The messages said that by voting against Judge Teitelman’s retention, voters could “vote no on liberal activist judges.”23

Part of the campaign against Judge Teitelman was a complaint from Greene County Prosecutor Darrel Moore that the Supreme Court was failing to issue orders to carry out executions on Missouri’s death row inmates. “In retaliation, [he called upon] voters in the state to vote for non-retention of one of the judges that sits on the Court.”24

An editorial in the St. Louis Post-Dispatch called the attacks on Judge Teitelman a “nasty, misleading, under-the-radar campaign.”25 A member of the editorial board of the Kansas City Star
said the attacks consisted of “rumors, half-truths and character smears.”

Likewise, an editorial in the Springfield News-Leader said “the effort by Missourians Against Liberal Judges seems not so much aimed at removing one judge as sending a message to the court: Adhere to our political ideology or risk our wrath. That is a dangerous message to send.”

Bar leaders from across the state also weighed in on the controversy. “Judges aren’t selected to be popular,” then-Kansas City Metropolitan Bar Association President Jay D. DeHardt said. “Our society depends on judges doing what they were appointed to do: weigh the merits of each case and reach a decision based on the facts and the applicable laws – not on political or ideological pressure.”

Citing a policy of responding to unfair criticism of the judiciary, The Missouri Bar contacted several of the attorneys for the inmates on death row, finding that they had not exhausted all their appeals. Then-Missouri Bar President Joe B. Whisler commented:

In America, we take pride – rightfully so – in having an open society, where all are free to express their opinion. But unfair or inaccurate criticism of the judiciary erodes confidence in the fairness of our courts.

We are concerned that by politicizing the retention of judges, interest groups could seriously damage the excellent judicial system we have enjoyed in Missouri for decades. We urge the citizens of Missouri to base their retention vote on the merit and performance of the judge up for retention rather than labels of conservative or liberal that might be imposed upon them by others. The integrity and independence of our judicial system literally hangs in the balance.

Although Judge Teitelman was retained at the general election by more than 62 percent of voters, the campaign against him prompted The Missouri Bar – through its Commission on the Impartiality of the Judiciary – to seek clarification as to when it is incumbent upon the organization to respond to unfair or inaccurate criticism of the judiciary and/or individual judges. [See accompanying article, “Independent Courts – Accountable to Whom?”]

Two years later, the issue of “judicial activism” was again raised as the rationale for attacks on a judge – but this time the target was not a judge serving under the non-partisan plan. A week before the 2006 general election, an Illinois-based group called Citizens for Judicial Reform spent $175,000 in a successful campaign to oust Cole County Circuit Judge Thomas Brown. The campaign consisted of flyers sent by direct mail, as well as radio and television advertisements.

“If you’re irritated by a local judge’s decision on an issue dear to your heart, a national group opposed to ‘judicial activism’ has a blueprint to ease your angst,” wrote The Kansas City Star in a post-election article. “Just bankroll a campaign against that judge or a fellow jurist right before voters cast their ballots. The target doesn’t have a chance to rebut the allegations before the election, and bingo, the judge is bounced from the bench.”

“Regrettably, this has become an ongoing struggle for this state’s courts, as extreme incivility has pervaded Missouri’s politics at every level,” wrote Supreme Court Judge Michael Wolff. “We in public life should expect our decisions to be scrutinized and, at times, criticized. This is what makes our system of government healthy. That said, what passes for criticism these days are not critiques of the merits of courts’ decisions but rather are personal attacks on the judges who make them.”

“‘Activist judge’ – a phrase whose meaning is not clear to anyone but the one using it – is one clichéd epithet used even when the judge strictly applies the
words of the constitution or statute. ‘Legislating from the bench’ is another bullying term used when one seems to disagree with a court’s legal conclusions,” he added.31

**The Legislature Enters the Fray**

As 2007 dawned, the focus shifted away from elections to the Missouri General Assembly, where no less than four House Joint Resolutions related to the courts were filed. Among them was HJR 1, which would have restricted state court jurisdiction in the areas of taxing, spending, and budgeting. Supporters of the proposal described it as a cautionary measure designed to prevent Missouri courts from raising taxes, as had allegedly been done in other jurisdictions. However, opponents of the proposal – including The Missouri Bar – noted that no Missouri state court has ever ordered a tax increase. In addition, opponents argued that, by stripping courts of their oversight of financial disputes, the measure would deny access to the justice system to any Missourian who wishes to challenge a local assessor’s valuation of their property or dispute the amount of compensation provided in an eminent domain case.

HJR 1 “would have stripped courts of the authority to hear cases involving taxing or spending decisions,” said Judge Wolff. “While I have found no case where a Missouri court ordered a tax to be imposed or increased, there are scores of cases where taxpayers challenged the legality of taxes imposed upon them. Measures that would strip the courts of authority over such cases would not punish the courts or judges, but they would take away the rights of citizens to challenge the legality of governmental action.”32

Ominously, the three other HJRs introduced during the 2007 legislative session took aim not at the jurisdiction of the courts, but on the Non-Partisan Court Plan itself:

- **HJR 31** proposed aligning the state with the federal model, resulting in judges being appointed by the governor, subject to confirmation by the state Senate. After 10 years on the bench, appointed judges would face a retention election before the Missouri General Assembly.

- **HJR 33** also suggested elimination of “the Missouri Plan” by giving the governor power to appoint judges, who would then require approval by a judicial confirmation commission. That commission would consist of seven members of The Missouri Bar – three appointed by the governor, two appointed by the Speaker of the House, and two appointed by the President Pro Tem of the Senate. The four members appointed by the leaders of the House and Senate would consist of lawyers currently serving in the legislature.

- **HJR 34** recommended transferring the power to retain judges to the Missouri General Assembly. It would also allow the governor to remove a judge from office, at any time, so long as two-thirds of the state legislature concurred.

The legislature’s consideration of these measures prompted considerable discussion and debate among concerned parties.

“Of late, the majority – and certain special interest groups – has attempted to undermine the courts’ ability to perform their intended function as the third branch of government. The result has been political attacks against particular judges and legislative proposals designed to limit citizens’ access to courts or to change the way judges are selected,” said Judge Wolff.33

“The people of the state voted for the plan we have now,” added Springfield attorney Steve Garner, a member of the Appellate Judicial Commission that selects nominees to fill vacancies on the Supreme Court of Missouri and the Missouri Court of Appeals. “The people do not want the judiciary to appear to be controlled by special influence, to appear to be controlled by politics.”34

Ultimately, none of the four HJRs introduced during this year’s legislative session gained passage. Had any of them cleared the legislature, they would have required statewide voter approval before taking effect.

**The Battles Lines Are Drawn**

Amidst the debate, several organizations – both old and new – began to pick sides in the battle.

In January 2007, the executive vice president of The Federalist Society, a nationwide group of conservatives and libertarians that advocates judicial restraint and limited government, told a meeting of the organization’s St. Louis chapter that “[s]urvival of the [non-partisan] plan requires modification.”35

In June, another group critical of the Missouri Plan was launched when the Adam Smith Foundation36 announced its formation with a press release saying the plan “is broken and controlled by liberal trial attorneys who want judges who will further their political agenda.”37

On the other side of the coin are such organizations as the Missouri Law Institute, “formed to promote public awareness and support for Missouri’s judicial system,” and Missourians for Fair and Impartial Courts, a “broad-based coalition of organizations and in-
individuals” devoted to protecting Missouri courts from attacks by politicians and special interests and preserving the Non-Partisan Court Plan.

Also making its presence felt, after a long period of relative dormancy, was the Kansas City-based Missouri Institute for Justice – the very organization formed in the late 1930s to advocate for what became the Missouri Plan. Revived in the wake of the 2004 campaign against the retention of Judge Teitelman, the organization positioned itself to address new threats, including special interest groups, one-sided blogs and out-of-state donors.

“We’re in a different world,” said Kansas City lawyer J. Dale Youngs, president of the Missouri Institute for Justice. “You’ve got how many blogs out there? You’ve got all kinds of changes that make it easier for people with an axe to grind.”

Little did any of these diverse groups know that fate – in the form of the resignation of a Supreme Court judge – would intervene and give them ample opportunity to make their influence felt so quickly.

**Supreme Court Vacancy Creates Firestorm**

On May 18, 2007, Judge Ronnie L. White announced that he would retire from the Supreme Court of Missouri effective July 6. Following its constitutional mandate, the Appellate Judicial Commission on July 25 announced that it had submitted to the governor its panel of three nominees to fill the Supreme Court vacancy. The announcement of the panel – which consisted of three members of the Missouri Court of Appeals – ignited a firestorm of controversy.

In the wake of the announcement, critics immediately assailed the three nominees as not meeting “the governor’s criteria of conservative judges who would not be judicial activists.”

On July 26 – the day after the Appellate Judicial Commission announced its nominees for the Supreme Court vacancy – the governor’s office requested that the commission provide: any transcripts and/or audio recordings and notes from every interview with every applicant for the vacancy; information on meeting and interview times, locations and length; details of notice provided regarding all commission meetings and interviews; and insight into the questions presented to the applicants, including whether they were standardized and what questions were included or given priority.

The next day, the commission’s secretary wrote a letter refusing the governor’s request for additional information, citing court rules that prohibit it from providing any further information about the interviews. That stance prompted some lawmakers and others to question the openness of the commission’s selection process.

Criticism of the commission’s inner workings became so heated that the Appellate Judicial Commission felt compelled to issue an open letter to the citizens of Missouri. In that letter, the commission stated its case:

Supreme Court Rule 10, enacted in its current form 35 years ago, has the force and effect of law, and is the law that governs the commission. Rules 10.28 and 10.29 prohibit the commission from publishing the names of any persons under consideration and require the commission to keep all matters discussed confidential until it selects three nominees, whose names are then made public. Rule 10 requires that the deliberations of the commissions be made in executive session. Providing the information that certain politicians and others have requested would require the commission to violate the law that specifically governs it. In fact, the Sunshine Law itself states that its general policies do not apply where “otherwise provided by law.”

Senator Charlie Shields (R-St. Joseph) then requested that Attorney General Jay Nixon investigate the commission. However, in a letter from Nixon to Shields, the attorney general wrote:

There does not seem to be any dispute about the facts and thus no need for an investigation by this office or the General Assembly.

“I believe your efforts are an honest attempt to promote openness and accountability in government. But, there are some who are attacking the Appellate Judicial Commission’s long-standing procedures merely as a smokescreen to mask...

“You’ve got all kinds of changes that make it easier for people with an axe to grind.”
their efforts to abolish the Missouri Court Plan altogether.40

Undeterred, Senator Shields sent a letter inviting the members of the Appellate Judicial Commission to attend a Senate committee hearing to explain the selection process and the reasons they believe the commission is not subject to the Sunshine Law.

St. Louis attorney Nancy Mogab, a member of the commission, countered that the commission’s work needed to stay private in order to attract qualified people. “It’s just unfortunate that all of a sudden they decide to make it an issue. It goes to the rights of privacy of the individuals who are applying, which has to be considered in conjunction with the public’s right to know who could serve in the appellate position. . . . I don’t think a judge in becoming a judge gives up every right to privacy they may have.”41

Chief Justice Laura Stith reiterated that viewpoint when she, as chair of the Appellate Judicial Commission, accepted Senator Shields’ invitation and testified before the Senate Rules, Joint Rules, Resolutions and Ethics Committee on September 11:

Think back to when you last selected a new preacher for your church or superintendent for your school, or even to the last time you applied for a job outside of the legislature. The preliminary phases of all such searches for new personnel are conducted in confidence. And it is important that they stay confidential, for in that way, the broadest group of qualified applicants can be considered. If the Commission publicized the list of judicial applicants, some lawyers who are not qualified for the position might be encouraged to apply merely to use the publicity of “being considered for a Supreme Court position” as a way to sound more important and thereby recruit more clients. If the Commission publicized the list, the mere fact that some lawyers or trial judges applied could be used against them by political opponents, clients, law partners or legal competitors.

If you are a finalist, those are the breaks, but if you are just one of 20 or 30 applicants, that is unfair. It is particularly unfair because often those who are not finalists are fine lawyers or trial judges, but for reasons that may relate more to a desire for geographic diversity or trial judge experience or other matters, they simply happened not to be a finalist in that particular search.42

Chief Justice Stith also took the opportunity to warn those who would inject politics into judicial selection under the guise of removing “activist” judges:

That word is often used when people do not like a particular legal decision – it is much easier to brand the decision and its author as “activist” than to actually look at it and see if it correctly applied the law.

It may be helpful, though, for me to make my views on a judge’s role clear: Judges are not intended to be politicians, choosing sides based on political considerations, or what the judge’s neighbors, fundraisers or special interest groups might think was best. Deciding cases based on the judge’s or another’s perception of what is popular or politically expedient is inconsistent with one’s duty as a judge and is just plain wrong

No one wants to worry that the case will be decided against them because the other side, or the other side’s lawyer, gave a large contribution to the judge’s election campaign, or to those politicians who appointed or nominated the judge for office. Missourians learned long ago, before they adopted the nonpartisan plan, that is exactly what can and does happen when politics becomes a key factor in determining who will be a judge.43

**The Media Chooses Sides**

As the controversy swirled, the news media took note of the unusual clash among the executive, legislative and judicial branches of state government. Of particular note was national coverage by the *Wall Street Journal*, which lambasted the existing system in an August 30 editorial.

Reaction to the editorial was immediate. In a letter to the *Wall Street Journal*, Missouri Bar Executive Director Keith A. Birkes cited several inaccuracies within the editorial and accused the
publication of “misstatement of facts and the creation of fictions to support a position. . . . The Journal cannot support its conclusion that special interests are involved in the state’s selection process. It merely states its opinion, built on a rickety argument that reeks of the kind of political influence that the Non-Partisan Court Plan has so successfully kept out of Missouri’s selection of judges.”

In addition to this national coverage, Missouri newspapers also jumped into the fray, furthering the debate over the openness of the non-partisan plan. “A recent article published by the Adam Smith Foundation attempts – but fails – to show a pattern of activist behavior for any of these judges [the members of the panel],” wrote Missouri Lawyers Weekly. “The commission has given the governor three judges with a total of 45 years of experience, and one is a Republican-appointed judge. Until someone can show that these judges are inexperienced or cannot apply the law fairly, it is difficult to see complaints about this panel as anything but politics.”

The Kansas City Star wrote: “A limited but influential group of politicians and special interests is attacking the system for two nefarious reasons: They’re sore losers who don’t like some recent rulings; and they want to use an assault on the judiciary to rile the conservative base for the 2008 statewide elections. Missouri deserves a chief executive whose priority is good government, not political maneuvering. Blunt demeans his office with his transparent political ploy to attack the judiciary.”

Subsequently, the Star also editorialized: “Polls show that Missouri’s judiciary enjoys a high level of public respect. The same might not hold true for governors and lawmakers who attempt to ‘fix’ a process that shows no sign of being broken.”

The Springfield News-Leader also chimed in with an editorial saying: “That third branch of government, the one that protects us from abuse by the other two branches, is under attack by folks who think the answer is harassing the lawyers and judges who give of their time to make the system work. Missouri voters are smart enough to call that bluff.”

The attacks on the judiciary also had an unintended effect in the General Assembly when Senator Chris Koster announced in late July that he was resigning from the Republican Party and becoming a Democrat. He said that one of the reasons for the switch was because his “extraordinary disappointment in the vituperative that gets spit out of the administration toward the third branch of government had reached a boiling point.”

Two months later – on September 7 – Governor Blunt chose Judge Patricia Breckenridge of the Missouri Court of Appeals – Western District to fill the Supreme Court vacancy.

**WHAT WILL THE NEW YEAR BRING?**

What can Missourians expect in 2008 in terms of criticism of the courts and the Non-Partisan Court Plan? To provide a definitive answer would be a mere exercise in conjecture, but there can be little doubt that the general election that will take place in November 2008 – and the various political interests involved – will play a role in the rhetoric surrounding what is already seen as a divisive issue.

“What can Missourians expect in 2008 in terms of criticism of the courts and the Non-Partisan Court Plan? To provide a definitive answer would be a mere exercise in conjecture, but there can be little doubt that the general election that will take place in November 2008 – and the various political interests involved – will play a role in the rhetoric surrounding what is already seen as a divisive issue.”

“Long a noncombatant in the Missouri nonpartisan plan fight, the state Senate may investigate the matter in the coming term,” Missouri Lawyers Weekly reported.

Meanwhile, the Associated Press reported in late August that legislative leaders planned to forge ahead with a proposal limiting the courts’ ability to rule on tax and expenditure issues – the same proposal seen in HJR 1 during this year’s session – again in 2008.

“I think [efforts to modify the non-partisan plan are] absolutely a threat to the judiciary, and particularly to the impartiality of the judiciary,” said Missouri Bar President Charlie J. Harris, Jr. “I note that most of the ‘tweaks’ appear to be efforts to do nothing but further politicize the process, which is exactly what the citizens of Missouri have been saying they don’t want since the 1940s.”

“I am certain the next year or so will bring more attacks against judges and more proposals in the General Assembly to give politicians – and the special interest groups to which they may answer – control over the selection and retention of judges,” Judge Wolff said. “The General Assembly will be wise to reject them.”

One of the judiciary’s staunchest advocates within the Missouri General Assembly is Senator Jolie Justus of Kansas City. “When I look on an attack on the Missouri Non-Partisan Court Plan, I see a power grab,” she said. “I see an attempt to inject politics and money into the only independent branch of government that we have. What I see if we allow an alteration of the [non-partisan] plan is a stranglehold by special interests on our judiciary.

“Politicians will act in self-interest, and one of the things that we have to do...
is make sure that we don’t give more power to the legislature when it comes to our only independent branch,” Senator Justus added.52

Missouri is one of five states on the watch list of the non-partisan Justice at Stake. That organization says Missouri “may sit on the frontier of the next battle over the courts—the targeting of lower court judges. . . .” Justice at Stake also cites Missouri as a battleground state in ongoing efforts by partisans and interest groups to undo merit selection with retention elections.53

“The attacks on the merit selection system are common across the country, because judicial selection is a flashpoint in every state,” said Jesse Rutledge of Justice at Stake. “Missouri is unique in that no state has had to battle on so many fronts to protect its courts. The variety of fronts on which defenders of fair and impartial courts in Missouri have to work right now is unprecedented, and it certainly stretches the resources of those who are working to keep the courts fair and impartial. . . . 2008 is going to be a very rough year for those working on this issue in Missouri. In many ways, I think, what we’re seeing now is a skirmish in what will be a larger battle.”

ENDNOTES

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Gary Toohey is The Missouri Bar’s Director of Communications.
**St. Louis County Bar Association and Husch & Eppenberger Host Loyola Academy Students**

The St. Louis County Bar Association and the law firm of Husch & Eppenberger, L.L.C. sponsored a recent event for 15 eighth grade students from the Loyola Academy of St. Louis.

Loyola Academy is a Jesuit middle school for boys in grades 6-8, with a maximum of 20 students per grade. The school’s mission is to serve boys who have the potential for college preparatory work, but who are in danger of failing to achieve that potential because of poverty, residence in distressed neighborhoods, or other social or economic factors.

The students toured the St. Louis County Courthouse and then visited Husch & Eppenberger’s offices in Clayton. The tour of the courthouse provided the students with an opportunity to meet with judges, prosecuting attorneys, and police officers. The law firm provided informal discussions and personal conversations with attorneys as to how and why the attorneys pursued their legal careers.

The purpose of the program is to provide the students exposure to some of the opportunities that will be available to them as they continue their education and work to achieve the school’s goal, which is to end the cycle of poverty through education.

**15 High School Students Complete KCMBF/KCMBA Summer Law Intern Program**

Fifteen Kansas City high school students have completed their participation in the 15th annual Kansas City Metropolitan Bar Foundation (KCMBF) and Kansas City Metropolitan Bar Association (KCMBA) Summer Law Intern Program (SLIP). This five-week program provides high school students with an opportunity to explore careers in the legal profession and gain valuable work experience in a law firm setting.

**Kansas City Metropolitan Bar Foundation Creates Scholarship Essay Contest**

The Kansas City Metropolitan Bar Foundation, in partnership with the KCMBA Public Service Committee, announces the creation of a Constitution Day Essay Contest for high school students who will graduate in 2008. A $5,000 college scholarship was awarded by the law firm of Bartimus, Frickleton, Robertson & Gorny, P.C. during the KCMBF’s recent Liberty & Justice Gala.

**Jackson County Bar Honors Judge Jon R. Gray**

The Jackson County Bar Association honored Shook, Hardy & Bacon partner Jon R. Gray with the Judge Lewis W. Clymer Award at its 10th annual Kit Carson Roque, Jr. Scholarship Banquet.

The award is given each year to a minority attorney to recognize service to the community and promotion of the integrity of the legal profession.

**Attorneys Honored as Ageless-Remarkable St. Louisans**

Vern H. Schneider, managing partner of Rassieur, Long, Yawitz & Schneider, and John R. Barsanti, Jr., senior counsel with Armstrong Teasdale, L.L.P., were recognized by St. Andrew’s Resources for Seniors at its fifth annual Ageless-Remarkable St. Louisans gala.

**Kansas City Metropolitan Bar Foundation Honors Attorney**

James R. Wyrsch, president and shareholder of Wyrsch, Hobbs & Mirakian, P.C., received the Kansas City Metropolitan Bar Foundation’s 2007 Liberty & Justice Legacy Award at the organization’s annual gala. The award is given in recognition of the recipient’s dedication to the principles of liberty and justice through exemplary professional, civic and community service.
Survival in Turbulent Times
Using a Business Plan to Focus the Small Law Firm

By John W. Olmstead, MBA, Ph.D, CMC

In spite of today’s tough economy, many small law firms are thriving and doing quite well organizationally and financially. A revolutionary new trend is happening in the legal profession that goes beyond the traditional partnership model of law firm governance involving sole practitioners at the forefront. It’s not uncommon these days to find a solo owner of a small law firm seeking to build his or her firm without a partner. More and more lawyers are finding that solo ownership has its benefits, and by using the right management tools, can result in a highly successful and profitable firm. We are seeing solo owners going far beyond being simply solo practitioners and building law firms with 15+ attorneys and 30+ total office personnel.

The foundation of most traditional law firms was built on the premise that “two heads are better than one,” or in most cases, “several heads are better than one,” leading most attorneys to partner with another attorney of equal stature to build a firm. Some of this may be built out of fear, as most attorneys are schooled solely on how to practice law and seldom receive any training towards managing a business. Instincts in most cases would dictate that it’s better to find someone to share the burden and the responsibilities. But with the right business mindset, a focused firm, a solid business plan, the right team, a deployed staff and the ability to delegate the management of day-to-day operations, being a solo owner can be a wise choice.

Small firm partnerships are also finding that being small in today’s world can be an asset. With smaller and simpler governance structures and focused practices, they can innovate and implement faster than larger firms. Many larger firms are often characterized by:
• Poor, slow, an ineffective decision making
• Ineffective firm leadership and governance
• Internal politics and infighting
• Micromanaging
• Management by committee
• Lack of influence and ability to effect change

CHALLENGES
The 21st century is presenting law firms with new challenges. The general business economy is in turmoil and law firms are facing new risks and uncertainties. Clients are no longer tolerating arrogance and mediocre services. Clients are holding law firms to higher service standards. In order to prosper in the 21st century, law firms are going to have to drastically change their models for conducting business. Organizational performance, effectiveness, and leadership must rise to higher standards. General management, problem solving, and action taking skills must be enhanced. Firms will have to improve their overall marketing initiatives. This will require many firms to improve their overall management effectiveness and use every management tool available. Law firms will need to identify “best management practices” that can be employed to enhance management effectiveness.

The biggest challenge facing solo owners and partners in small firms is the constant need to develop innovative ways to streamline productivity and improve the firm’s bottom line, while at the same time maintaining a proactive leadership role in the firm. This can sometimes be a daunting task for even the most organized and focused leaders. To help keep things in check, many sole business owners and small firm partners are using business plans to focus and
WHY HAVE A BUSINESS PLAN?

One of the major problems facing law firms is focus. Research indicates that three of the biggest challenges facing professionals today are time pressures, financial pressures, and the struggle to maintain a healthy balance between work and home. Billable time, non-billable time or the firm’s investment time, and personal time must be well managed targeted and focused. Your time must be managed as well.

Today well-focused specialists are winning the marketplace wars. Trying to be all things to all people is not a good strategy. Such full-service strategies only lead to lack of identity and reputation. For most small firms it is not feasible to specialize in more than two or three core practice areas.

Based upon our experience from client engagement, we have concluded that lack of focus and accountability is one of the major problems facing law firms. Often the problem is too many deals, alternatives and options. The result often is no action at all or actions that fail to distinguish firms from their competitors and provide them with a sustained competitive advantage. Ideas, recommendations, suggestions, etc. are of no value unless implemented.

Well designed business plans are essential for focusing your firm. However, don’t hide behind strategy and planning. Attorneys love to postpone implementation.

- Find ways to focus the firm and foster accountability from all.
- Keep strategy and planning simple.
- Undertake a few projects at a time that can be realistically accomplished.
- Delegate tasks across the firm.
- Build upon initial successes and move to more complex strategies, which will require more difficult degrees of change.

- Adopt management structures that enable the firm to act decisively and quickly. Replace structures that do not support such a culture.

WHAT IS A BUSINESS PLAN?

A business plan is no more than a roadmap for your business. Developing a business plan is like planning a trip when you know there will be detours along the way — you just don’t know where. You would plan the trip by mapping the route, fully aware you’ll have to make changes frequently. Operating a law firm without a business plan is like taking a trip without a trip plan. You will end up somewhere — but possibly not where you want to be. So just like planning a trip, you prepare a trip plan for your business and then work the plan and deal with detours when they occur.

Elements of an effective business plan should include:
- Decision as to directions of the firm
- Data collection and review
- Identification of problems/opportunities/key issues
- Implementation and follow-up mechanisms

According to a recent survey conducted by the Legal Marketing Association (LMA), 59% of the responding law firms (ranging in size from the largest to 45 attorney firms) have formal written strategic plans and 55% have marketing plans. Smaller firms have a much lower experience. In our experiences with smaller law firms, we are finding that fewer than 15% have formal written strategic or business plans.

I consider success to be achievement of measurable results as evidenced by achievement of the goals and objectives outlined in the plan and actual implementation of action items. Lawyers and law firms seem to do better at planning than they do at implementation. Larger firms usually are more successful in implementation due to availability of management resources, leadership and functional governance. Smaller firms tend to have problems with implementation. In fact, we frequently recommend that a firm address other management issues prior to engaging in strategic planning. If a firm is having problems implementing day-to-day operational decisions, the firm will not be effective in implementing strategic planning initiatives.

Larger firms have the resources to develop strategic plans, marketing plans, and the like. Smaller firms do not have the time or the resources to devote to elaborate planning. For smaller firms we suggest that the process be kept simple and that a simple business plan be developed and used for marketing as well as all other areas of interest.
WHERE TO BEGIN

Begin with commitment. Solo owners should make a self commitment to fully engage in the process and develop habits to faithfully work the plan. In small, multi-attorney firms the partners should make a like commitment. In these firms business plans should be developed at the firm, practice group, and individual attorney levels. Once a commitment has been made, it is time to start the following process of developing your business plan:

Step 1 – Direction of the Firm

Begin by completing (all owners and partners) the Business Planning Questionnaire located at http://members.mobar.org/pdfs/lpm/olmstead.pdf. With more and more attorneys struggling with personal and work-life balance issues, planning must examine both personal and professional aspects. After defining personal goals, vision statement, and personal action plans, use the questionnaire located at the link above to focus on the firm and define the following:

Firm Mission Statement

Write a mission statement. The firm mission statement should answer questions such as what is our purpose, what services do we provide and whom do we serve? What are our values and beliefs? In other words, what are we selling and to whom?

Firm Vision Statement

Write a vision statement. The firm vision statement is a picture of where and what the firm wants to be in the future. What do we want to be? How do we want to be seen? As a roadmap for the future, it represents the major areas of the firm, including: marketing, client service, practice areas, human and operating resources, compensation, governance, etc.

Firm Goals

Write out and list your goals for the next five years. Your long range goals should tie directly and be consistent with your mission and vision statements. Each goal should focus on one area of concentration and describe what is to be achieved. Goals follow the following SMART system:

S – They should be specific
M – They should be measurable
A – They should be attainable
R – They should be realistic
T – They should be timely. In other words, associated with a completion timeframe.

Step 2 – Data Collection and Review

Review documents and collect data to show evidence of problems and opportunities as well as firm strengths and weaknesses. For example:

External
1. Information on competitors
2. Views and attitudes obtained from client satisfaction surveys
3. Views and attitudes obtained from non-clients
4. Demographic changes – legal service market growth rates, market trends, changes in client needs and desires.
5. Key trends in legislation and regulations, in business and technology, and in the local economy that could affect legal services.

Internal
1. Financial statement for past three years.
2. Other financial reports illustrating:
   a. Trends in firm revenue growth
   b. Trends in lawyer and staff headcount
   c. Trends in law firm profitability
   d. Changes in key practice areas
   e. Changes in distribution of revenue by firm’s top ten clients
3. Feedback meetings with attorneys and office staff.

Step 3 – Problems/Opportunities/ Key Issues

Using the information obtained in Step 2, identify problems, opportunities, threats and issues that will have an impact upon the firm reaching its goals.

Problems
Opportunities
Threats
Key Issues

Step 4 – Action Plans

Create special action plans designed to deal with problems, opportunities, threats, and issues outlined in Step 3. Provide detailed action steps, sub-steps, responsible party, deadline, and resources needed. Suggest the following format:

Action Step Resp
Deadline Resources

Prepare supporting documents such as pro forma cash flow statements and financial statements.

Step 5 – Implementation and Follow-up

Incorporate into the plan a monitoring and follow-up system to ensure that the firm does not fall prey to planning paralysis.

(Continued on page 43)
Dealing with Clients with Diminished Capacity Under Rule 4-1.14

By Shannon L. Briesacher

The rule regarding clients with diminished capacity seems straightforward and simple: attempt to maintain a normal client-attorney relationship where possible and seek guidance and protective action when it is necessary and in the client’s best interest. There are a number of other ethical implications, however, and the prudent practitioner would be well-advised to adequately contemplate all of the special considerations in dealing with a client with diminished capacity.

For instance, when a client incapable of communicating has a legal representative, how does an attorney determine who is the client? In discussing the client’s special needs with other interested parties, does an attorney violate his or her duty regarding confidentiality or waive the attorney-client privilege? If an attorney represents a guardian who is acting adversely to the guardian’s incapacitated charge, does an attorney have a duty to intervene? The new Rule 4-1.14 provides guidance in dealing with all of these ethical issues by expanding its directives in the comments to the rule. The rule further seeks to help attorneys determine when protective action is needed and provides direction as to how to go about obtaining such protective action on behalf of an incapacitated client.

Rule 4-1.14 states:

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity; is at risk of substantial physical, financial or other harm unless action is taken; and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with the individuals or entities that have the ability to take action to protect the client and in appropriate cases, seeking the appointment of a next friend, guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 4-1.6. When taking protective action pursuant to Rule 4-1.14(b), the lawyer is impliedly authorized under Rule 4-1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.

THE GENERAL STANDARD

Subsection (a) of Rule 4-1.14 sets the general standard for how clients with diminished capacity are to be treated. The rule recognizes that even when a client’s ability to make decisions is impaired, be it through minority or disability, an attorney should take reasonable steps to maintain a normal attorney-client relationship. The rule also recognizes that a normal attorney-client relationship is not always possible, yet attorneys are required to be attentive and respectful to the client, communicating directly with the client where feasible.1

The attorney should take reasonable steps to elicit the client’s views on the representation and may use family members or others to facilitate communication when necessary.2 At the same time, an attorney should not assume that the client is unable to participate in his or her own representation or needs protective action simply because the client advocates a judgment that the attorney believes to be erroneous.3 A minor or mentally impaired client can often participate meaningfully in a legal proceeding even if he or she is not found to be legally competent and attorneys are expected to facilitate such participation when possible.4

When communication is impaired and other individuals are involved, it may be difficult to determine from whom directives should come. Where the client is capable of communication, but family members are necessary to facilitate communication, the attorney must look to the client for direction and
not to the family members. Where a legal representative has already been appointed it is appropriate for the attorney to look to the representative for decisions on behalf of the client. Where the matter involves a minor, the attorney may be able to rely on the parents as natural guardians, depending on the nature of the legal action. Less clear is the situation where the client has no family members and no representative. In the American Bar Association’s Model Rule 1.14, the ABA declined to explicitly provide that an attorney may make decisions on behalf of a client with diminished capacity. At the same time, the Restatement (Third) of the Law Governing Lawyers § 24 cmt. d (2000) indicates that a lawyer may make decisions arising within the scope of representation, normally made by the client, if the attorney reasonably believes that the client is incapable of making the decision. Such a situation demonstrates the delicate balance required in ascertaining the client’s ability to participate and the client’s need to have a representative act in the client’s best interest.

**Seeking protective action**

Subsection (b) of Rule 4-1.14 creates a “test” for determining when a lawyer may take protective action on behalf of a client with diminished capacity and requires that the lawyer believes that the client has diminished capacity, believe that the client is at risk of substantial physical, financial or other harm and believe that the client cannot act in his or her own best interest. So if an attorney is not medically trained, how does an attorney go about meeting the first prong of the test in determining that a client has diminished capacity?

An attorney should consider the client’s ability to articulate reasoning, the variability of the client’s state of mind and the client’s ability to appreciate the consequences of the decisions that are made. An attorney should also consider the substantive fairness of the decisions and the consistency of the decision with the long-term commitments and values of the client. An attorney may seek counsel from a diagnostician in this regard and the ABA suggests that an attorney additionally consult with the client’s family or other individuals who can provide insight into the client’s capacity.

Once an attorney has determined that the client suffers diminished capacity there are a number of avenues available in seeking protective action. An attorney may seek guidance from others empowered to act on behalf of the client, like family members, professional services and support groups, and adult-protective agencies. If a legal representative has not been appointed, the attorney should also consider seeking appointment of next of friend, guardian ad litem, conservator or guardian, if necessary to protect the client’s interests. In considering whether to take any protective action, the attorney should consider the wishes and values of the client, and the client’s best interest, with the goal of maximizing the client’s capacities and maintaining as much autonomy as possible. Comment (7) of the rule warns that while appointment of a representative may appear necessary, it also may be expensive or traumatic for the client so an attorney should use caution and be aware of other, less restrictive alternatives.

Rule 4-1.14 recognizes that emergency situations may occur and provides the following in Comment (9): In an emergency where the health, safety, or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such person even though the person is unable to establish a client-lawyer relationship or to make express considered judgments about the matter when the person or another acting in good faith on that person’s behalf has consulted with the lawyer. Even in such an emergency, comment (9) warns that a lawyer should not act unless the lawyer believes that there is no other lawyer, agent or legal representative available and should only act to maintain the status quo and avoid imminent and irreparable harm. A lawyer would not usually seek compensation for services rendered in this capacity.

**Revealing of confidential information**

Subsection (c) of Rule 4-1.14 clearly establishes that information relating to the representation of a client with diminished capacity is confidential. The Rule carves out an exception, however, for an attorney who seeks to take protective action pursuant to Rule 4-1.14(b) and allows an attorney to reveal confidential information when limited and in the client’s best interest. This is true even if the client has expressly told the attorney not to disclose such information. Recognizing that disclosure of such information could be harmful to the client’s interests, an attorney is not permitted to disclose confidential infor-
mation pursuant to Rule 4-1.14(c), including the client’s status as one of diminished capacity, unless the attorney is seeking protective action, the disclosure is limited and it is in the client’s best interest. So when might disclosure be permissible in practice? As discussed above, an attorney may appropriately consult the family members of a client with diminished capacity and may usually do so without fear of waiving the attorney-client privilege.\(^{20}\) Also discussed above, an attorney might find it necessary to consult a doctor regarding a diagnosis of diminished capacity. Finally, as expressly provided for in the rule, an attorney may reveal the status of the client’s condition when seeking a guardian or legal representative pursuant to Rule 4-1.14(b).

### PUTTING IT ALL TOGETHER

Consider the following scenario: You are contacted by Grandson Greg, who informs you that his Grandmother Gertrude needs a will and power of attorney. You have never represented either person. Grandson Greg informs you that Grandmother Gertrude is easily disoriented and confused, but that he is aware of what Grandmother Gertrude wants. You arrange to meet with Grandson Greg and Grandmother Gertrude that afternoon.

1. **Knowing that Grandmother Gertrude is easily confused, is it permissible to discuss the legal matters directly with Grandson Greg?** If you are drafting the will and power of attorney on behalf of Grandmother Gertrude, then you must try to establish a normal attorney-client relationship with Grandmother Gertrude, which means communicating directly with her regarding her wishes. If after talking with Grandmother Gertrude you determine that she suffers diminished capacity, you may rely on Grandson Greg to facilitate communication, but must still keep in mind that Gertrude is your client. Therefore, it will be your job to assure that Grandmother Gertrude’s wishes are carried out.

2. **After speaking with Grandmother Gertrude, you determine that she does not have the capacity to make a will. Grandson Greg suggests that you petition for him to be appointed guardian over Grandmother Gertrude, which appears to be necessary for Grandmother Gertrude’s protection. Can you represent Grandson Greg in his guardianship petition? Can you also represent Grandmother Gertrude?** Pursuant to Rule 4-1.14(b), an attorney may represent Grandson Greg in a guardianship proceeding. However, you will not be able to continue representing Grandmother Gertrude.\(^{1}\)

3. **Grandson Greg is appointed guardian over Grandmother Gertrude. When you first spoke with Grandmother Gertrude, you remember her stating that she wished to leave all of her worldly possessions to the church. You become aware that Grandson Greg has committed Grandmother Gertrude to a questionable nursing facility and is using her assets to refurnish his home. As Grandson Greg’s attorney, are you obligated to intervene?** Comment (4) to Rule 4-1.14 states that “[i]f a lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward’s interest, the lawyer may have an obligation to prevent or rectify the guardian’s misconduct. See Rule 4-1.2(d).”

Whether representing a five-year old child in a custody action or an eighty-five year old woman in a guardianship proceeding, the clear intent of Rule 4-1.14 is that all clients be afforded, to the extent possible, the benefit of direct communication with an attorney and respect for the client’s wishes and directives. When it is not possible to achieve a typical attorney-client relationship, however, Rule 4-1.14 and the comments thereto provide guidance in ensuring that attorneys have avenues for appropriately guarding the best interests of clients with diminished capacity, while at the same time achieving ethical compliance.

### ENDNOTES

1. Comment (2) to Rule 4-1.14.
4. Comment (1) to Rule 4-1.14.
5. Comment (3) to Rule 4-1.14.
6. Comment (4) to Rule 4-1.14.
7. Id.
9. Id.
11. Id.
15. Comment (5).
17. Comment (9) to Rule 4-1.14.
18. Comment (10) to Rule 4-1.14.
20. Comment (3) to Rule 4-1.14.

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The Advisory Committee of the Supreme Court of Missouri: Who, About What, and How Does It Advise?

By John C. Dods

The Advisory Committee of the Supreme Court of Missouri is known to some lawyers as a committee that has something to do with the disciplinary system and the Rules of Professional Conduct.

Beyond that rudimentary understanding, many lawyers do not know who we are, what we do, or how we do it.

This article tries to answer those questions.1

The Advisory Committee is charged by the Supreme Court of Missouri with the general oversight of the lawyer disciplinary system. Supreme Court Rule 5 authorizes the committee and details its authority and responsibility, as well as those of other components of the system. The rule requires the committee to be comprised of no fewer than six lawyers and two lay persons.2 Currently there are nine lawyers and three lay members selected by the Court, representing various regions of the state.3

The chair is designated by the Court and is the chief administrative officer. The committee selects one of its members as the secretary. Each member is appointed for a four-year term, but no member shall be requested to serve more than two successive terms, exclusive of any unexpired term.4

The advisory committee has several components:

1. The Supreme Court promulgates the Rules of Professional Conduct;5 establishes the system for their enforcement; and has the ultimate authority to impose discipline on lawyers who violate the rules.

2. The Office of Chief Disciplinary Counsel, whose Chief Counsel is appointed by the Court (Rule 5.06), is the investigative and prosecutorial agency for enforcement of the rules. Special Representatives are members of the OCDC staff who work with the various Regional Disciplinary Committees.

3. The Regional Disciplinary Committees are composed of volunteer lawyers and lay persons, appointed by the Court, who also investigate alleged violations of the Rules.6 RDCs are an adjunct to the OCDC.

4. Disciplinary hearing panels conduct hearings – trials – of lawyers charged with violation of the Rules. The Supreme Court names lawyers and non-lawyers to a list of hearing officers from which the Chair of the Advisory Committee appoints disciplinary hearing panels for specific cases. The panels make findings of fact, conclusions of law and, when warranted, recommend appropriate discipline, which then are submitted to the Court for its final decision. See Rules 5.04 and 5.16. The role of these panels is discussed in more detail in the section of this article dealing with the Advisory Committee’s activities.

5. The Advisory Committee has oversight of the whole system, subject to the ultimate authority of the Court, and several specific roles.

The Advisory Committee helps to keep all these parts working in “sync.” Its diverse responsibilities include:

**ETHICAL ADVICE AND OPINIONS**

The committee can give advice to lawyers and issue opinions on ethical issues.7 The committee may advise the Court regarding proposed changes in the rules.

The rule authorizes the committee to issue formal opinions as to the interpretations of Rule 4 (The Rules of Professional Conduct); Rule 5 (the disciplinary system); and Rule 6 (fees to practice law).
A formal opinion is, in effect, binding on all lawyers but the rules provide for a review by the Court upon the petition of the Chief Disciplinary Counsel or a lawyer who is “substantially and individually aggrieved” by such opinion.8

The committee also can give informal advisory opinions on ethical issues. These may be written or oral, such as a telephone response to a question. The committee may authorize some written informal advisory opinions to be published for the information and guidance of lawyers generally. Informal advisory opinions are not binding.9

The committee has authority to adopt regulations for the administration of Rules 4, 5, and 6.10

**LEGAL ETHICS COUNSEL**

The Legal Ethics Counsel is selected by the Chief Disciplinary Counsel, subject to the approval of the Advisory Committee. The Legal Ethics Counsel is attached to the OCDC for administrative purposes but serves as staff to the Advisory Committee.11

The Legal Ethics Counsel is responsible for responding to all requests for informal advisory opinions. During 2006, more than 1,220 oral opinions were provided and 96 informal written opinions were issued.12 The LEC sometimes consults with the Advisory Committee regarding her written informal opinions, depending on the nature of the issue. She presents to the committee, for its approval, summaries of those opinions she believes warrant publication.

The Legal Ethics Counsel also prepares drafts of proposed formal opinions. Few formal opinions are issued by the committee, whose recent policy has been to issue formal opinions only when the issue presented is deemed to be of sufficient import to the bar as a whole to warrant a formal opinion. In those instances where the committee has issued a formal opinion, it has sometimes sought additional help from recognized experts in the area of law in question, e.g., a law school professor of ethics.

**Oversight of the Office of Chief Disciplinary Counsel**

In the last several years the Court has expanded the role of the Advisory Committee to include general oversight of the Office of Chief Disciplinary Counsel. The Court is the ultimate authority for the supervision of the work of the OCDC but the committee works directly with the CDC in preparing and submitting to the Court the consolidated budget for operation of the OCDC and the separate AC and LEC budgets, collectively described as the budget for the Advisory Committee Fund.13

The oversight role is not limited to budgetary matters. The committee and its various subcommittees meet with the CDC on a regular basis regarding matters as diverse as office space needs, staffing, case handling and office procedures, training of volunteers in the system, and the work of the RDCs, as well as the substantive rules.

**Supervision of Disciplinary Hearings**

The AC – in fact, its chair – is charged with appointing Disciplinary Hearing Panels to hear formal charges brought against lawyers for violation of the Rules.14

A complaint that a lawyer has violated the Rules is initially reviewed by an OCDC staff lawyer. If it is determined that the complaint may have merit, the complaint may be investigated by OCDC or one of the RDCs. The decision of who makes the investigation is normally made on the basis of the location of the lawyer, complainant and witnesses. If, following such investigation, it is decided that there is “probable cause” to believe the lawyer is guilty of professional misconduct, a formal Information can be filed either by the CDC or one of the RDCs. Informations are the formal pleading, similar to a civil petition, setting forth the predicate facts that constitute the alleged violation.15

The lawyer against whom an Information is filed must be served in the same manner as in a civil proceeding and has 30 days from the date of service to file an answer or otherwise respond. Failure to respond is deemed consent by the lawyer for the Court to enter an order disbarring the lawyer without further proceedings.16

The lawyer may exercise two peremptory challenges to disciplinary hearing panel members.17

Upon receipt of a response, the chair of the AC appoints a three-member panel, one of whom must be a lay person,18 who must participate in the hearing except in extraordinary circumstances.19 Normally, the choice of the panel members is dictated by geographical considerations.

Disciplinary hearings are conducted pursuant to the Rules of Civil Procedure.20

When the DHP has concluded the hearing, the rules require that it make written findings of fact regarding each alleged violation; determine the applicable law; and, if a violation is
found, recommend to the Court the discipline that should be imposed. The DHP has five options:

1. Conclude that there is no violation. If this is the finding, the case is dismissed. The OCDC may seek the Court’s review.

2. Decide that there is a violation but that formal discipline is not warranted and that the lawyer should be admonished.

3. Recommend a public reprimand, the lowest formal discipline. The lawyer’s right to practice is not affected but the reprimand is a serious blemish on the lawyer’s record.

4. Recommend that the lawyer be suspended from the practice of law for a specific period of not less than six months. The recommendation can also include conditions precedent to the lawyer’s application for reinstatement.

5. Recommend disbarment. The AC, by its chair, is responsible for having the hearing record, including the exhibits, and all documents, packaged for the OCDC, which is then responsible for filing with the Court. When filed with the Court, the OCDC is responsible for briefing and argument, if requested by the Court.

**Review of “no probable cause” determinations by the OCDC or Regional Committees**

Complainants who are dissatisfied by decisions by either the OCDC or an RDC that there is no probable cause to pursue disciplinary action against a lawyer are entitled to have that decision reviewed by the AC.

The AC receives approximately 65 requests for review every year. The complete file of each case initially is reviewed by the Legal Ethics Counsel. The investigation file and a brief summary are circulated to each committee member, who then vote either to affirm or discuss the case at the next AC meeting. The present practice is that if any one member of the committee wants to discuss a case, it will be fully discussed at the committee’s next meeting.

There is no rule about how reviews are to be decided. Normally, the AC does a “de novo” review, considering anew the complaint, the lawyer’s response and all relevant documents, although appropriate deference is given to the conclusions of the OCDC or the RDC which first considered the complaint in relation to such things as credibility.

If the committee agrees with the original decision, the parties are notified and that is the end of the matter. There is no further review.

It is not unusual that, upon a review of a matter, the AC will agree that no discipline is warranted but that the lawyer should be counseled in writing about a practice or the specific handling of a matter. In such cases the AC will send the lawyer a cautionary letter.

If, after review, the AC decides that there is probable cause to believe that the respondent lawyer may have violated a rule, the AC will refer the case either to the OCDC or another RDC. Such referral is to a disciplinary body other than the original one.

That investigative body can dismiss the complaint or file an Information and the case would proceed accordingly. A decision not to proceed by a reviewing RDC or the OCDC is final.

**Other Activities of the Advisory Committee**

The committee normally meets as a whole four times a year. For the last several years most of the meetings have been held in Jefferson City, because it is centrally located for the convenience of committee members and so the committee can meet with the CDC and OCDC staff, as necessary. At other times meetings have been held in Kansas City, St. Louis, Columbia, and Springfield.

At least once a year the AC meets with members of the Court at the Supreme Court building, usually for a lunch meeting with members of the Court, Court staff, the CDC and OCDC staff.

Subcommittees of the AC also meet as necessary with the CDC and LEC. The Chair and others on occasion may meet with the Board of Governors of the Missouri Bar to discuss proposed budgets or other issues of mutual concern, such as lawyer advertising, the unauthorized practice of law, multi-jurisdictional practice issues and the like. Various members of the committee are often participants in continuing legal education seminars regarding ethical issues.

**Conclusion**

A hallmark of the legal profession is that we lawyers, ourselves, are primarily responsible for assuring that our members adhere to express rules of professional conduct in our dealings with the public, the courts, our clients and each other. The oversight of the disciplinary system by the volunteer members of the Advisory Committee of
the Supreme Court of Missouri exemplifies the shared responsibilities that all lawyers have for achieving the goal of service to our citizens.

ENDNOTES

1 As with many organizations, acronyms and abbreviations are used as a kind of shorthand. Some of those used in the disciplinary system are:

OCDC – The Office of Chief Disciplinary Counsel;

CDC – Chief Disciplinary Counsel;

AC – the Advisory Committee;

LEC – Legal Ethics Counsel;

DHP – Disciplinary Hearing Panel;

RDC – Regional Disciplinary Committee.

2 Rule 5.01. Missouri has a long and proud history of lay participation in the disciplinary system. The purpose of the system is to protect the public, and lay involvement assures that the interests of the public are considered at all levels.

3 The current lawyer members are Jennifer Gille Bacon (Kansas City) and Doreen Dodson (St. Louis), both past presidents of The Missouri Bar; John C. Holstein (Springfield), a former Chief Justice of the Missouri Supreme Court; David Macoubrie (Chillicothe); Christina R. Neff (Jefferson City); Luther Rollins, Jr. (St. Louis); Sherry A. Rozell (Springfield); Richard G. Steele (Cape Girardeau); and John C. Dods, chair (Kansas City). Lay members are Alvin Brooks (Kansas City); Sidney A. Dulle, CPA (Jefferson City); and Richard Priest (St. Louis).

4 The rule has a “catch”; members shall serve until a successor has been appointed and qualified. Rule 5.01.

5 The Rules of Professional Conduct are the standards established by the Court for the ethical conduct of lawyers. The whole of Supreme Court Rule 4 sets forth these rules and comments on their meaning and application. They are the ethical “commandments” for the profession.

6 Currently there are five active Regional Disciplinary Committees: Region XI, the City of St. Louis; Region X, St. Louis County; Region IV, Jackson County; and Region XV, Greene County. The jurisdiction of the Regional Committees is not limited to a specific geographical area and all RDCs handle matters arising out of other areas. See Rules 5.02 and 5.03. The committees may establish divisions and divide their work among such divisions. Matters are referred to the RDCs by the OCDC based on workload considerations and the location of the lawyers and witnesses involved.

7 Rule 5.30.

8 Rule 5.30. The Court in its discretion may direct the petition be briefed and argued as though a petition for an original remedial writ. The Advisory Committee has issued few formal opinions and to the knowledge of the author no petition for review of a formal opinion has ever been filed.

9 Rule 5.30(c).

10 Rule 5.30(a).

11 Rule 5.07(b). The current Legal Ethics Counsel is Sara Rittman, a lawyer experienced in ethical matters. Prior to her appointment to the position she was Deputy Chief Disciplinary Counsel and had served also as Acting Chief Disciplinary Counsel. Upon the creation of the position of Legal Ethics Counsel, her physical office was separated from the OCDC and is currently located at the headquarters of The Missouri Bar, although she is not a part of the Bar’s staff.

12 See Legal Ethics Counsel Annual Report, April 1, 2007. In addition, Ms. Rittman made 26 CLE presentations on legal ethics to various organizations and groups in 2006.

13 The costs of the disciplinary system are paid from a portion of lawyer enrollment fees. The amount of these fees is set by the Court. The Court has approved setting the fee allocated to the Advisory Committee Funds at $103 beginning January 1, 2008. The amount paid by Missouri lawyers for support of the disciplinary system will still be below the national average for bars of comparable size.

14 The Court appoints and maintains a roster of not less than 24 lawyers and 12 lay persons qualified to act as voluntary Disciplinary Hearing Officers. Rule 5.04. Following a hearing, the panel must render a written decision, including findings of fact concerning each alleged act of misconduct, appropriate conclusions of law, and recommend to the Court the appropriate discipline. Rule 5.16.

15 Informations are captioned as filed in the Supreme Court but are actually filed with the chair of the Advisory Committee. Rule 5.11(c).

16 Rule 5.11(c); Rule 5.13.

17 Rule 5.14.

18 Rule 5.04.

19 Rule 5.05.

20 Rule 5.15(c). Unlike other civil cases, there is no provision for interrogatories. However, the OCDC generally has an “open file” policy and customarily there is little formal discovery utilized in disciplinary cases.

21 Rule 5.19.

22 Rule 5.19(b). The lawyer must either accept or reject an admonition. Failure to affirmatively reject is deemed acceptance. If rejected, the panel must then make findings and recommendations.

23 Rule 5.16.

24 Rule 5.16. Suspension will have a serious economic impact on the lawyer, who cannot practice law while suspended. The panel may recommend the stay of the suspension upon probation conditions the panel deems appropriate. Rule 5.225.

25 Rule 5.16. Lawyers who are either suspended or disbarred are required to notify, in writing, all clients and opposing counsel in pending matters, deliver files to new counsel, refund unearned fees, file notices in the court in which matters are pending, keep a record of the actions in compliance and report their “complete” performance. Rule 5.27.

26 Rule 5.12. A request for review must be made in writing within 30 days of the decision. The complainant is advised of the right of review when notified of the decision. The request normally is sent to the Advisory Committee’s office, which is operated by the Legal Ethics Counsel.

John C. Dods is chair of the Advisory Committee of the Supreme Court of Missouri. The author acknowledges with considerable appreciation the helpful comments and editing made by Sara Rittman, Legal Ethics Counsel.
Informal Advisory Opinions

Informal advisory opinions are issued by the Legal Ethics Counsel under Rule 5.30. The Legal Ethics Counsel only issues opinions to attorneys for their own guidance involving an existing set of facts. Informal advisory opinions cannot be issued on hypotheticals or regarding the conduct of an attorney other than the one asking for the opinion. Although an effort has been made to summarize the important facts of the question, not all details are included in each summary. Therefore, these summaries should be used only for general guidance. Only summaries are available; actual copies of the opinion request and answer are not available. The first four digits of the opinion number indicate the year the opinion was issued.

For a searchable database and information on requesting opinions, go to: http://www.mobar.org, click on “Informal Advisory Opinions” in the left menu. Ethics articles can be found at www.molegal-ethics.org, click on “Articles” in the left menu. Law practice management articles are available at: http://www.mobar.org, click on “Law Practice Management Online Center” in the left menu.

INFORMAL OPINION 2006-0077

Question: Plaintiff has been contacted by a finance company that advances loans. The loans are made by a finance company that is licensed by the Missouri Division of Finance. The loan is to be used for reasons other than to support the litigation (i.e. to pay the plaintiff’s living expenses). Plaintiff must repay the loan even if the plaintiff does not prevail in the case. The lender exercised no control over the case, however, the plaintiff grants the lender a contractual lien on the case proceeds under the case of Ford Motor Credit Co. v. Allstate Inc. Co., 2 S.W.3d 810 (Mo. App. W.D. 1999). Is the above situation champertous? If a plaintiff took out a loan as described above and Attorney was aware of it, would it violate the rules?

Answer: If it is a straight loan that must be repaid regardless of the outcome of the litigation, it is unlikely that it is champertous. Therefore, although a Missouri attorney could be aware of the transaction, it will not violate the Rules of Professional Conduct in the absence of any other ethical problem with the transaction. See also, Informal Opinion 2005-0062.

INFORMAL OPINION 2005-0062

Question: Attorney was recently contacted by a finance company that advances funds to plaintiffs. The company only makes loans to people with pending personal injury or workers compensation cases, prior to the appellate stage. The plaintiff is not required to repay the loan if plaintiff is not successful, and the attorney is expected to disburse funds to the company directly from the attorney’s trust account. The company claims that its loans are not champerty because they are not overtly supporting litigation. Can Attorney ethically get involved with this company?

Answer: Under Rule 4-1.8(e), an attorney may not provide financial assistance to a client. It is likely that an attorney’s involvement with loans by this company would be considered champertous. Despite the fact that a client might not use the funds directly for litigation, it appears that the funds are intended to support litigation. If the transaction is champertous, it is not permissible for an attorney to be involved. In Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217,221 (OH 2003), the Ohio Supreme Court stated:

Except as otherwise permitted by legislative enactment or the Code of Professional Responsibility, a contract making the repayment of funds advanced to a party to a pending case contingent upon the outcome of that case is void as champerty and maintenance. Such an advance constitutes champerty and maintenance because it gives a nonparty an impermissible interest in a suit, impedes the settlement of the underlying case, and promotes speculation in lawsuits.

INFORMAL OPINION 2006-0092

Question: Attorney’s firm is currently using a tape method to back up data. Attorney is considering backing up information through a third party contractor. This would be done
automatically, online, and on a nightly basis. Does this create a confidentiality issue that Attorney should be concerned about?

**Answer:** It is permissible for Attorney to use a third party contractor to backup Attorney’s law office data online. Attorney must take reasonable steps to assure the confidentiality of the data. Attorney should receive assurances from the third party contractor that the data, from the time it leaves Attorney’s office computers, will be in a format that is secure at a level that meets industry standards at the time of transmission.

The third party contractor must have an enforceable obligation to preserve the confidentiality and security of the data.

**INFORMAL OPINION 2007-0013**

**Question:** Attorney has noticed that a paralegal in her area has her own separate “paralegal” practice where she advises clients and drafts documents for them. Attorney wants to know if paralegals are able to practice in Missouri, without a supervising attorney.

**Answer:** Paralegals are not regulated in Missouri. Paralegals do not have the authority to provide legal services. A paralegal may perform only the services that any other nonlawyer may provide. If Attorney is aware of a nonlawyer who is engaging in the practice of law, Attorney should report that person to OCDC, the Prosecuting Attorney, the Attorney General, or all three.

Sara Rittman is Legal Ethics Counsel for the Advisory Committee of the Supreme Court of Missouri.

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**Survival in Turbulent Times (From page 34)**

After the above steps have been completed, you should write up and work your plan.

A business plan is useless unless it is used. Don’t create a plan and simply file it. You must actively work your plan. Involve everyone in the firm, delegate action items, and require accountability. Consider it a living document – revise it – update it – change it as needed. Refer to it weekly and incorporate action plan items into your weekly schedule.

Use your plan as your roadmap to your future. Good luck on your journey.

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What is your dream job? Don’t let your qualifications, talents or skills get in the way of your answer. Kathleen Brady explores this topic while alleviating the fear of explaining that you are not “wasting” your legal education.

By Kathleen Brady

The good news is that the options both inside and outside of traditional law practice are unlimited. The bad news is the alternatives both inside and outside of traditional practice are unlimited. With unlimited options, attorneys do not know where to begin. They wonder:

1. Is there some way to combine my legal training with my other, equally important interests?
2. Are there jobs available at my level and salary expectations or will I have to settle for less?
3. How will I explain to peers and loved ones that I have “wasted” my legal education?

These questions can be overwhelming because there are no immediate answers. Many get stymied and opt to stay stuck in an unhappy situation or simply avoid the questions altogether. Yet, career counselors know that people tend to end up happier after a transition; the hard part is living through the unavoidable discomfort and uncertainties.
To help answer the first question, advise your clients that the best strategy to direct the course of their careers is to identify their skills, talents and passions. Attorneys must be able to articulate what they can do and what they know in a way that is relevant to potential employers. Help them to recognize that “non-traditional” careers for lawyers are very “traditional” careers for other types of professionals. The job market, which is conservative and myopic by nature, wants people to keep doing what they have been doing. Candidates are most understandable to potential employers in terms of past career choices and tenure in prior settings. The mere fact of change can raise questions about motives. Self-assessment enables attorneys to articulate the progression of their career choices in a coherent manner. Also, do not underestimate the power of passion. The world is filled with examples of people who achieved their goals – against all odds – because of their passion.

Lawyers automatically assume they will be forced to take a pay cut if they seek an alternative to a legal career. However, there are a substantial number of legally-related and non-legal positions that pay very acceptable salaries. Use the following resources to explore pay scales in different industries.

- Abbott, Langer & Associates’ Compensation of Legal and Related Jobs (Non-Law Firm) provides information on in-house counsel positions sorted by geographic location, type of employer, size of organization and field of specialization. They also publish Compensation in Nonprofit Organizations.
- The Office of Personnel Management provides information on government salaries at http://www.opm.gov/oca/05tables/index.asp

Question 3 often poses the greatest challenge to lawyers. Finding the courage to forge one’s own path and construct a personal definition of success in the face of external obligations and pressures isn’t easy. In fact, it is downright scary.

To help your clients face this challenge, ask them to think about success. What does it look like? Odds are, everyone person will have a different answer. However, there are four common elements in every vision of success. They are:

- being content about your life;
- achieving measurable accomplishments that compare favorably to others with similar goals;
- believing that you have a positive impact on people you care about most;
- leaving a legacy in order to help others experience future success.

Each element contributes to the way success is experienced right now. Success is not a future event or something to aspire towards. It is a current state of being: the ability to pay full and undivided attention to what matters most in life at any given moment. Once people focus on what matters, the rest falls into place.

Of course, the difficult part is helping them figure out what matters most.

Pose the question: What is your dream job? Don’t worry, for the moment, if the job makes sense or if your client is overqualified, underqualified, too young, too old, etc. Don’t worry about pay scales or additional training needed. For the moment, just have clients think about what they would like to do. Once you identify the dream, the practicalities will come into play to shape the direction of the job search. The trick is to not let those practicalities stifle the dream prematurely. There may be ancillary careers that can put clients in the arena of their dream job.

For example, let’s suppose the dream job is to be a pitcher for the New York Yankees. Rather than simply dismiss that as an impractical dream, brainstorm what other positions might be available that incorporate a passion for baseball with current skill sets. Are there legal or management positions at organizations such as Major League Baseball, Topps Baseball Cards, Spalding, Nike, the players’ union, etc? What firms represent the owners, players or specific teams? Have any of the players established youth baseball camps, restaurants or clothing lines? What role could a lawyer play in those ventures? Think creatively. Think big. Once you have a general direction, it will be easier to strategize how to get there.

Seeking an alternative career requires planning and strategizing based on information about the candidate and the world of work, the match between them and the actions they take. There will always be some perfectly logical reason why someone’s qualifications are insufficient for a specific position. Anticipate what those reasons might be and consider if they are, indeed, insurmountable, or merely a hurdle to clear. Investigate what the conventional wisdom tells us about specific positions and then plan a strategy to deal with it.

The greatest benefit of defining your own, personal definition of success is that you realize the only things being sacrificed are things you have identified as lower priority items. Seems like a small price to pay to achieve career/life fulfillment.

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The Lawyer-to-Lawyer Dispute Resolution Program

By Karolin Solorzano Walker

On October 2, 2007, the Chief Justice of the Supreme Court of Missouri, Laura Denver Stith, signed an Order repealing a subdivision of 5.10 and adding a new section entitled “Resolution of Complaints,” containing the new Lawyer to Lawyer Dispute Resolution Program Guidelines. This program, like the Complaint Resolution Program and the Fee Dispute Resolution Program, was created to help lawyers and clients voluntarily solve problems. The specific problems the order addresses include those associated with the breakup of law firms, such as those situations in which a law firm or lawyers are fighting over money, clients, and property.

Approximately one year ago, the Lawyer-to-Lawyer Dispute Resolution Committee set out to address these sorts of problems. The committee, chaired by Judge Gary Lynch, was balanced in that the members consisted of: men and women; African Americans, whites and Hispanics from different geographic regions of practice; judges; attorneys from large, small and solo firms; and attorneys who practice in the public and the private sector.

In recent years there has been an increase of news stories about lawyers fighting with each other. In September 2007 the St. Louis Post Dispatch printed an article about two lawyers involved in a lawsuit concerning a law firm dissolution. The two lawyers got into a physical fight in the courthouse in downtown St. Louis. Similarly, a St. Louis County lawyer filed a restraining order against another in connection with the breakup of their law firm. It seems fair to say that most lawyers have a story they can tell about an ugly law firm breakup where the lawyers were fighting over such issues as who owns the files and whose clients are which lawyer’s property. It should be noted that the Supreme Court has made it clear that “[c]lients are not the ‘possession’ of anyone but, to the contrary, control who represent them.”

The genesis of the program was to provide an alternative for lawyers who cannot resolve their conflicts, but wish to do so. Occasionally I have received telephone calls from lawyers who have made an ethical complaint in a matter better suited for facilitation or mediation. The law firm is breaking up, and now lawyers who have worked together are leveling allegations of unethical conduct against each other amidst the wreckage of their firm.

Unless they hire a private mediator or arbitrator, lawyers with the desire to work out their problems have nowhere to go. The Office of Chief Disciplinary Counsel is not a forum some lawyers would choose, and that office is not empowered or equipped to handle these sorts of disputes. After determining that a problem existed, the question for the committee became: “How can we help these practitioners?”

In discussing a proposed rule, the committee sought to find a voluntary, cost effective forum where two lawyers could meet in a confidential setting and discuss the issues before them with a neutral person who was also a member of the profession. The Lawyer-to-Lawyer Dispute Resolution Program meets that goal. Anyone can voluntarily participate in this program, which will be staffed by volunteer attorneys and a Missouri Bar staff member. Lawyers can meet in a confidential environment, in a neutral setting, with a neutral facilitator who will help guide them to a resolution. In this way the attorneys can sit down across a table and discuss how they are going to divide the files, property, notify clients, and wind up their law firm. Instead of talking to each other about these issues, they can discuss them with someone who has gone through a training program set up by The Missouri Bar. That person, who is referred to as the facilitator or neutral, and the two participants can decide together how and when they will meet and what they will discuss.

The initial text of the Order says the “goal of the program is to provide an efficient, private, cost-effective and voluntary mechanism for resolving economic and professional disputes between and among lawyers.” It goes on to say, “This program is intended to protect the interests of clients and benefit the judicial system, the public, and the profession. . . .” The program will be
administered by a committee appointed by the Missouri Bar Board of Governors, with the chair of that committee designated by the President of the Missouri Bar. The terms of the appointees will be four years, with a two-term limit. Volunteer attorneys who agree to serve as a panel of neutrals will be chosen based on a number of factors, such as years of practice, training, experience, and minority representation, and they shall receive specific training provided by the Missouri Bar.

A program administrator will be responsible for keeping the confidential files for the bar, assigning neutrals, providing notices, record keeping, compiling reports, and other administrative tasks.

The first step in the process is a referral, made by filing a notice of dispute and a request for facilitation with the administrator. Anyone can refer a complaint, including the attorneys involved in the dispute or the Office of Chief Disciplinary Counsel. If the Office of Chief Disciplinary Counsel receives a complaint that is not an ethical violation, but does involve a law firm dissolution, it can refer the attorneys involved in the complaint to the Lawyer-to-Lawyer Dispute Resolution Program.

The process is confidential, with a few exceptions. For example, if the Office of Chief Disciplinary Counsel refers a case to the program, it has access to most of the file. The attorneys involved, as well as their counsel, will also have full access to the file. Of course, if reportable ethical misconduct is discovered during the process, that is not confidential and will result in an ethical referral to the Office of Chief Disciplinary Counsel.

After receipt of the referral, a neutral from the panel is assigned by the administrator and an agreement for facilitation is prepared and signed by the parties. If they want a different neutral, each party is allowed one peremptory challenge. If there is a challenge for good cause, a neutral may be disqualified by the committee. It is then the neutral’s responsibility to gather information and set up the meetings as well as define the issues and provide suggestions in an attempt to resolve the dispute.

The actual meetings for the facilitation are to take place at a mutually agreed upon site. If the parties cannot agree, the neutral will assign a site. The neutral assigned sites include the neutral’s offices, courthouses or the offices of the state and county bar associations. The sessions are also confidential, and the Order defines the limits and extent of that confidentiality. The parties are entitled to have legal representation if they choose, but if they choose that option they are responsible for the cost and arrangements of that representation. The neutral is allowed to exclude counter-productive persons from the sessions and to limit the number of legal representatives who may speak for each side. The Order makes it clear that the neutral may frame legal issues but is not legal counsel for any party and not a judge.

There is a provision in the rule for adjournments and postponements, with the guidelines in the rule noting that they should be granted sparingly. The rule says that the neutral should try and complete the facilitation process within 30 days of its initiation.

The neutral may suspend the facilitation in four circumstances: the parties reach agreement; one party refuses to continue the process; the parties request adjournment; or the neutral thinks that nothing meaningful can be gained by continuing the process. If the parties do reach an agreement, the neutral may assist the parties with a binding written settlement agreement. If the parties cannot agree, the neutral may recommend binding arbitration.

If the parties choose arbitration, a new neutral will be assigned and the committee will determine whether or not to proceed with the arbitration under this program. The arbitration, like the facilitation, is to be conducted by agreement of the parties.

Ten days after the conclusion of the last session or the close of the matter, the neutral is to write a brief report and send that report, along with any settlement agreement, to the administrator. If the parties have trouble enforcing the settlement agreement, they can contact the administrator. When the matter is concluded, the administrator is to prepare a memorandum similar to the neutral’s report, and forward that to the committee chair, who will review and sign it.

That’s most of the program in a nutshell! As always, I encourage you to read the Supreme Court Order and the rule. The rule is to take effect January 1, 2008, and you can find the Order containing the rule on the Missouri Supreme Court website, in the Journal of the Missouri Bar and the South Western Reporter.
Living With Integrity

By Ellen Freedman, CLM

I have a close friend who is my role model where integrity is concerned. That’s because she does the right thing, always, just because it is the right thing to do. She does what is right regardless of who is watching or who will know. She does the right thing regardless of whether or not she can get away with not doing it. She does the right thing regardless of pressure to do otherwise, or the expediency of doing otherwise.

Like many of you, I am of a generation which grew up rebelling against the status quo. Rules which made no sense were to be challenged or, in many instances, disregarded. I have always considered myself to be pragmatic in thought and action, and highly existential from a philosophical standpoint. I have followed rules my entire life, but those rules have been largely those which I have constructed in part from what others establish, and just as often out of whole cloth. And I have felt more comfortable than not with that arrangement, in that I have consistently been true to myself.

But my friend, I acknowledge, is not only true to herself, but to all of those around her. And I find myself sometimes in awe of her depth, personal conviction, and unwavering dedication to doing what is right, instead of what is expedient. Even though I am a moral and honest individual, I humbly admit I am not made of the same stuff as my friend. And having worked with her organization on a consulting basis, I can see that her integrity has had a tremendous impact on the culture of the organization.

I recently attended an educational course entitled, “Living Right Side Up in an Upside Down World,” which opened by introducing the notion that the greatest challenge in the 21st century workplace is living with integrity. The presenter, David W. Thomas, is president of IntegriTalk, a company which stresses the importance of integrity through motivational speeches and interactive seminars. And I admit that although other educational sessions at the Association of Legal Administrators’ Educational Conference offered more tools of the trade, none offered more food for thought.

All around the world, we see examples of lack of integrity in the news: lack of regard for life, people spreading and reacting to false rumors, failure to examine the facts in order to push one’s own agenda, corruption and bribery, and pushing the limits of the law. One need only pick up a newspaper or turn on the TV news to find daily examples of spectacular lapses in integrity: Enron . . . Cobb/NASA . . . tainted pet food . . . Duke University cheating scandal . . . A.G. Edwards & Sons, Inc. trading irregularities . . . World Bank sex scandal. And sadly, more than one top-tier law firm with a proud past of unquestioned integrity has recently found itself facing serious accusations of corruption and criminality in the wake of accelerated growth and financial performance.

Now I challenge you to ponder who at your firm has made a conscious effort to set an example of unwavering integrity, and to create a sphere of influence which weaves the desire to do the right thing into the very fabric of the firm. Who at your firm not only has a point of view about what is right, and actively works to do what is right, but who also demonstrates integrity at the highest level by taking a stand to correct what is not right? It’s easy to lose one’s way in today’s challenging environment. It all starts with a deceptively small compromise. Or an even smaller rationalization.

I’ve heard or seen it all over the years, I think. An attorney who is unable to meet the goal of billable hours strays by rounding up time spent, by charging two separate clients for the same research time because it is applicable to both, or even by adding a few extra hours to that contingent file because, in the grand scheme of things, it has no apparent impact other than making the goal of hours achievable.

We all know of an attorney who has charged two clients for the same time while traveling for one and simultaneously working for another. Sure, there’s an ethical opinion to the contrary, but it’s easy to rationalize that it’s OK because the client gets a discounted rate, or the firm requires too many hours, or maybe just because no one will know.

A partner at a firm would routinely record 3,000 billable hours a year. In his area of law, a trip to court for the day could cover the work for dozens of
matters. All were billed for the same time. All of the partners were aware of the practice, but it made this partner very profitable, and it was apparently his only justification for existence at the firm, because he was an impossible and intolerable person otherwise.

Here’s a simple one that happens all the time in the name of client service: drawing on funds from the trust account to pay the client before the insurer’s settlement check has cleared. Sometimes before the check is event deposited. It’s just a formality, the partner rationalizes, as he demands of someone working for him that the check be cut before it should be. We’re not really using other clients’ money because the check is “good,” we’re told.

Or how about telling job applicants that your law firm is a “lifestyle” firm in order to get them to accept an offer, using the logic that when they arrive and find out you’re going to ask for 2,000+ billable hours, it will be too late for them to change their mind? Is that just fair recruiting technique, and buyer beware, or a lapse in integrity?

I once had a managing partner threaten to fire me because I refused to install a bootleg copy of software on his computer. He felt entitled because he had already purchased many legitimate licenses for the office. He was the boss, and he was outraged that I would not comply for that reason alone. I did learn something about integrity back then. First, we have to have a fair amount of courage to stand up for our convictions. And second, we have to be prepared to take responsibility for and accept the consequences of our actions. I stood up to the managing partner, and ultimately did not get fired. But my backbone cost me dearly for several years in “payback” behavior. My response to that reality, which has been carefully crafted from years of experience, is, “Oh, well!”

Probably one of the defining aspects of integrity is the manner in which individuals and organizations deal with adversity. It’s easy to do the right thing in good times. But doing the right thing in the worst of times shows what people and organizations are really made of.

At one firm, the director of administration discovered that a partner had been stealing from a significant client for quite some time. The client was unaware of the problem. The firm reimbursed the client before he became aware of the misdeed. They required the partner get intensive counseling. The [Rules of Professional Conduct] required that the attorney be reported to the Office of Disciplinary Counsel. But the firm management committee rationalized that this would not help the client, the firm, or the attorney in question. What example was set? Not too many years later the partner in question repeated his actions with yet another client.

Integrity is one of those intangibles which can affect us in very tangible ways. It is also one of the only things we can possess which cannot be taken from us without our consent. People can have the power to take our wealth, health, objects of desire, and even our ideas. But they cannot take our integrity without our willing consent. And most things of importance in our lives must be defended. But integrity needs no defense. No one has to make an excuse for being truthful and honest in all regards.

Our firms, and the people within them, are led from the path of integrity in many ways. One of the top ways is a lack of an ability to prioritize. Where do we place integrity in the constant juggle of the key components of our life: work, family, friends, materialism, and so forth? It becomes so easy to set aside our principals in the name of family or friends or success.

How easy is it for us to rationalize that maintaining integrity is not of the highest priority? First, there’s the “everyone does it” argument. If it’s accepted practice, can it really be wrong? I can just hear my mother saying, “If everyone jumped off the Brooklyn Bridge, would that make it the right thing to do?” Her generation is a lot clearer on answering these integrity questions than mine, I must admit. Her world was and is much more black and white, whereas mine is a blizzard of gray.

And, of course, another source for rationalization is the “who’s going to know?” and if no one knows, is anyone really hurt by it? It’s the old “if a tree falls in the forest, does it make any noise?” or “what is the sound of one hand clapping?” conundrum. Oh, if only it were possible to compartmentalize our lives such that WE would not know what we’ve done, or such that we did in one area of our lives didn’t bleed over into all other areas. So aside from the fact that time and circumstances will eventually bring most actions or inactions to light, the simple fact is that WE will always know what our actions have been, even if no one else ever knows. So who is hurt by it? As my mother’s generation would say, “You’re only cheating yourself.”

Thinking about these things will not make you wealthier. They may not even make you happier. But I promise they will not be an exercise in futility.

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The Nuts and Bolts of Electronic Discovery
Technology Issues You Need to Know

By Carmen Oveissi Field

Electronic discovery has quickly evolved from a cool new tool used by a few early technophiles to the compulsory practice that it is today. While the learning curve may be a little steep, taking the time to understand more about how information is created, shared and stored in your client’s networks will not only allow you to provide better client service, but also help you forge deeper relationships with your clients.

The vast majority of one’s day-to-day communications in today’s “connected” world is now handled electronically, with a blizzard of emails, text messages and instant messaging conversations largely replacing formal letters and telephone calls. Although these electronic communications may seem fleeting at the time, they leave a long-lasting electronic trail throughout the corporate network. These trails continue to pile up until they turn into a colossal mountain of information.

The increasing numbers of these distributed electronic piles have resulted in e-discovery projects where millions of documents end up being collected and reviewed. These voluminous projects, which can quickly overwhelm litigators and result in huge unwarranted discovery expenses for their clients, can be mitigated through education, planning and a willingness to cooperate with your adversaries so reasonable compromises can be made.

Finding Information in Corporate Networks

As a result of the complexity of how information is created, shared and stored throughout an organization, e-discovery has evolved into a delicate mix of science and art. The science involves being able to quickly and reliably identify and analyze information systems where potentially relevant information is stored. The art involves finding the most efficient and cost-effective ways of solving the inevitable thorny issues that arise. It can include anything from dealing with the logistics of gathering information that is spread out across the world to cracking into data from systems that are so old the hardware and software used to read the information is long gone.

The following sections address issues related to identifying and analyzing information from some of the most common and most critical information systems. While this is not an exhaustive list of the types of systems and issues you will encounter, it provides a good starting point for discussion.
**Electronic Mail Servers and Clients**

Electronic mail has quickly become one of the chief sources of information in a wide variety of matters. It is often the first place to look, because it can quickly reveal unexpected relationships and interesting topics of conversation between individuals and organizations, and give unique insights into their thoughts and motives at a particular point in time.

The messages you send and receive are controlled by what is referred to as an electronic mail server. The server runs specialized software that controls the flow of electronic mail in and out of the organization. The most common electronic mail server software program in use today was developed by Microsoft and is called Exchange Server.

Much the same way the postal service is responsible for picking up parcels and delivering them to the correct mailbox by air, sea and land, the server software acts like the postal worker by sending and receiving electronic mail items to the correct electronic mailbox through the Internet. If the organization is larger or more geographically diverse, it may require two or more servers to maintain the electronic mailboxes of all employees.

To read and respond to the electronic mail messages that the server controls, a user will have a software program on his or her personal computer that is complementary to the server software system. This software is referred to as an electronic mail client. The most commonly used client program is Microsoft Outlook, which allows a user to access his or her electronic mailbox that resides on a Microsoft Exchange Server.

One important consideration in trying to identify where and in what format electronic mail messages are stored can vary depending on how the server and client software packages have been configured. It is possible that all messages are stored only on the server, and users just view them from their electronic mail client. Alternatively, it also is possible for messages to be moved to each user’s personal computer as soon as they are accessed from the server. To make matters slightly more complicated, it also can be a combination of the two. Additionally, it is possible for users to make personal archives of messages that can be stored anywhere and in a number of different formats, as dictated by the user.

When assessing how electronic mail is used, never assume that just because your last client used the same type of system, the ultimate location of the messages and formats will be the same.

**File Servers**

Compared to the sophistication and complexity of the electronic mail server, the role of file servers is a simple one. Their sole responsibility in life is to hang out on the network and store files in a central location. While they are not technologically interesting, they play a couple of important roles. First, by storing documents on the file server, the user is assured that in the event of the loss of his or her personal computer the data is stored in a place that is backed up regularly. Second, the file server also serves a collaborative function. It gives users a simple way to share documents with their colleagues.

File servers can contain almost anything, and, depending on the organization, may be characterized anywhere from particular to disorderly. Typically they are divided into two areas – home directories and shared directories.

Home directories are a private slice of space to which an individual user has unique access. The nice thing about home directories is that you know whatever is in them was put there by the home directory owner. While the owner may not have authored the documents located there, you know that it is something the owner explicitly put there. This is almost always a useful area to collect from in e-discovery matters.

Shared directories are a bit more complicated, as they are not controlled by a single user. They are larger slices of the server that are used for groups of people. For example, the entire sales team may be given access to the sales directory. In this directory they may store examples of contracts and the most up-to-date pricing lists and marketing materials to share with potential clients.

The downside is that these shared areas often contain a hodgepodge of files, and are a bit like a child’s toy box in that they include bits and pieces of long-forgotten items and are poorly organized. While you may from time to time encounter organizations that keep their shared directories neat and tidy, there are many more out there that bear a striking resemblance to a toy box.

**Laptops and Desktops**

Personal computers present their own unique set of challenges, as users control what information they store and how they organize it. It is exceptionally difficult to force users to organize their information in a consistent way. This lack of consistency often results in the
over-collection of documents in the event of litigation. To avoid over-collection, it is often helpful to create a simple set of questions to present to the user during the initial interviews to better understand how and where they store their documents. Taking the time to talk to them about their storage habits often can result in a much more targeted set of documents.

It also is important to consider the logistical issues surrounding personal computers for home-based employees and frequent travelers. These employees may be widely dispersed and difficult to pin down. Collecting documents from this population may require a more creative approach. For instance, you may coordinate a time for them to remotely connect to the company network. Once they are connected, you can work with the information technology department to utilize remote control software to transfer documents from their computer. Alternatively, you can send them a simple desktop backup device and remotely coach them on its proper use.

Another significant risk associated with personal computers during litigation arises when users rely solely on their personal computer for document storage—never backing up their critical files. While disasters are not everyday occurrences, a hard drive crash or a stolen laptop will clearly result in the loss of critical files. Some organizations mitigate that risk by implementing an organization-wide desktop backup system. However, most companies do not have centralized backup systems for personal computers.

Be sure to inquire early about the backup habits of the key custodians, as it may be worth preserving the data on their personal computers sooner rather than later, to mitigate this avoidable risk.

**Backup Tapes**

While it is true that a set of backup tapes may contain relevant information, they are one of the least desirable information sources to rely upon. Backup tapes were designed to help computer technicians get a crashed system operational again. They were not designed to act as a corporate storage and retrieval system. Unfortunately, most organizations naively rely on backup tapes for both disaster recovery and for the storage of business records. The two key problems associated with leveraging backup tapes for litigation are the extreme difficulty in locating data of interest and the expense associated with restoration, analysis and review.

One reason that data of interest is so hard to find on backup tapes is the nature of how backup tapes are created. The basic idea is that a technician will create a backup set of tapes on a given date for the specific system they wish to back up. When it comes time to assess which tapes you need, often the name of the system and the date it was backed up are the only two pieces of information you will have to go by. Unless you plan on restoring everything (which is not even close to reasonable), you will have the burden of figuring out which users have data on the tape and the content of the data you can expect to find on the system. If they are old tapes, you can expect those pieces of information are long gone.

The expenses associated with backup tapes can be extensive, especially if there is little known about the tapes or if the tapes are older. To natively read backup tapes you need an equivalent piece of hardware and a copy of the software that was used to make them in the first place. Even if you manage to restore the data, sorting out what you have may be very difficult. If the tape is old you can assume that the data was created with old software programs that no longer exist. The moral of the story is that when it comes to backup tapes, there are many, many obstacles to overcome that should be avoided if at all possible.

**Instant Messaging**

Instant messages (IMs) have quickly come to rival email as a valuable source of information about people’s activities and views, particularly since people tend to be relaxed and candid when IMing their friends and coworkers. Some larger organizations monitor and log IM chat sessions using specialized software. Typically, the users never know their conversations are being logged and stored. Chat sessions also can be archived locally on the user's personal computer, although this can be a less attractive option because a savvy employee might be able to alter or delete the archive.

Although instant messaging services can be shut down at the firewall (or by preventing employees from installing software on their PCs), it is difficult to prevent people from using chat sessions or text messaging on their mobile phones.

**Proactively Preparing for E-Discovery**

To combat the increasing costs and risks associated with e-discovery, one of the new trends in organization with a heavy litigation load has been the
development of a litigation preparedness program. The goal of such a program is to have a well-reasoned, repeatable approach to identifying, preserving and collecting information, as opposed to reacting in an ad hoc fashion each time a new case arises.

By taking a comprehensive approach through a deliberate focus on improving global records management and legal hold practices, and by developing forensically sound document preservation, collection and chain of custody policies and procedures, organizations are able to improve their ability to react more decisively and effectively to new matters. As a result, organizations increase their chances of finding what they need when they need it, reducing their information management and legal costs and most importantly, demonstrating their commitment to good faith efforts from the beginning.

While it is not an expectation that organizations can turn the ship overnight, by jumping in and learning the unique information issues their clients face, outside counsel have a unique opportunity to not only help steer their clients through the murky litigation waters but also to become a trusted advisor, and therefore a more crucial part of the extended corporate legal team.

This article was originally published in the August 2007 issue of New Jersey Lawyer Magazine, a publication of the New Jersey State Bar Association, and is reprinted here with permission.

Carmen Oveissi Field is the managing director of the forensic technology practice, and is based in the New York City office of Daylight Forensic & Advisory LLP, an independent fraud risk management and investigative consulting firm conducting forensic investigation, providing electronic discovery advisory services and advising on regulatory compliance to corporations and the public sector worldwide.
How to place an announcement:
If you are a Missouri Bar member and you’ve moved, been promoted, hired an associate, taken on a partner, or received a promotion or award, we’d like to hear from you. Talks, speeches (unless they are of national stature), CLE presentations and political announcements are not accepted. In addition, Precedent will not print notices of honors determined by other publications (e.g., Super Lawyers, Best Lawyers, etc.). Notices are printed at no cost, must be submitted in writing, and are subject to editing. Items are printed as space is available. News releases regarding lawyers who are not Missouri Bar members in good standing will not be printed. Contact Cynthia Heerboth at (573) 635-4128 if you have questions.

Photographs:
Professional quality photos submitted with your announcement are also printed at no cost. Attach a label with the subject’s name and address on the back of the photo (do not write on either side of the photo). Group photos are not accepted. Photos may be sent as e-mail attachments to cheerboth@mobar.org. Photos should have a resolution of 300 dpi in a .jpg format.

Deadlines:
Precedent is published quarterly, in February, May, August and November. The deadline for announcements is the 15th of the month preceding publication. For example, to place an announcement in the May issue, it must be received by The Missouri Bar by April 15. Send or e-mail your announcement to: Cynthia Heerboth, Publications Assistant, P.O. Box 119, Jefferson City, MO 65102; cheerboth@mobar.org. Please include your Missouri Bar membership number.

KANSAS CITY AREA
Rebecca B. Beal, Michele Pittman Gellis, Douglas W. Dahl and Jason C. Parks have joined the law firm of Lathrop & Gage, L.C. as associates. Prior to joining the firm, Ms. Beal served as bond counsel for Missouri and Kansas governments.

Michael E. Callahan has joined Husch & Eppenberger, L.L.C. as a member in the firm’s business transactions practice group. Aaron M. House, Kent M. Dryer and Jaclyn Smith Maloney have joined the firm as associates. Lisa A. Brunner, an attorney with the firm, received the 2007 Advocate of the Year award from the American Civil Liberties Union of Kansas and Western Missouri at the Liberty Awards dinner held November 3, 2007.

CORRECTION: Brian W. Fields joined Lathrop & Gage, L.C. as a member. It was erroneously reported in the last issue of Precedent that he had joined Husch & Eppenberger, L.L.C. The Missouri Bar regrets the error.

J. Bradley Pace has joined Armstrong Teasdale, L.L.P. as of counsel. Megan J. Ochs has joined the firm as an associate. Dione C. Greene has joined the firm’s public law and finance practice group. Sarah Voss Hanson has joined the firm’s litigation department.

The O’Connor Law Firm, P.C. announces that Christie E. Sherman has joined the firm as of counsel. Most recently, Ms. Sherman was a senior attorney with Cordell & Cordell, P.C.

The law firm of Shank & Hamilton, P.C. announces that Sara B. Anthony has joined the firm as an associate.

Michelle L. Pratt has joined the law firm of Sanders, Conkright & Warren, L.L.P. as an associate.

Martina L. Peterson has joined the Liberty Public Defender’s Office. She was formerly with the Kansas City office.

Lewis, Rice & Fingersh, L.C. has added Thomas R. Larson as a member in its litigation department. Additionally,
the firm has elected Jay D. Seaton and John E. Cruz as members.

Patrick J. Eng of Eng & Woods Attorneys at Law in Columbia was presented the Robert Duncan Award for Appellate Excellence from the Missouri Association of Criminal Defense Lawyers at a recent meeting in Kansas City.

**Springfield Area**

Evans & Dixon, L.L.C. announces the relocation of its office to 1717 East Republic Road, Suite C, Springfield 65804.

**Bryan R. Berry** has joined Lathrop & Gage, L.C. as an associate in the business disputes practice area.

The Greene County Circuit Court has named Sue Chrisman and Jeff B. Marquardt to the 31st Circuit Family Court as family court commissioners.

Kyle L. Kanable has joined the workers’ compensation and litigation practice groups of McAnany, Van Cleave & Phillips, P.A.

The law firm of Husch & Eppenberger, L.L.C. announces the addition of Lacey N. Hacker as an associate in the business transactions department.

Former administrative law judge Martin F. Spiegel is now of counsel with the law firm of Reynolds, Gold & Grosser, P.C. Scott A. Smith has joined the firm as an associate.

Charlton C. Chastain, formerly with the St. Louis Public Defender’s Office, has joined Bryan M. Delleville, Michael A. Stanfield and Justin R. Watkins in the Springfield Public Defender’s Office.

**St. Louis Area**

Donald Calloway, Jr., formerly with Thompson Coburn, L.L.P., has joined the law firm of Lathrop & Gage, L.C. as an associate in the business disputes section of the business litigation practice area.

The law firm of Danna McKittrick announces admission of the firm’s newest principal, Brian S. Weinstock. Principal Joseph R. Soraghan was elected president of Missouri Venture Forum, a business advocacy organization. James M. Heffner, an attorney with the firm, was named one of the MS Corporate Achievers “Class of 2007” by the Gateway Chapter of the National Multiple Sclerosis Society. Laura Gerdes Long, also an attorney with the firm, has been appointed to the board of the Youth & Family Center and to the board of adjustment for the City of Kirkwood. Danna McKittrick has opened a St. Charles office, located on the second floor of 136 South Main.
The Padberg & Corrigan Law Firm, P.C. announces its relocation to 1926 Chouteau Avenue, St. Louis 63103.

McAnany, Van Cleave & Phillips, P.A. announces that Byron A. Bowles, Jr. is the new head of the litigation practice group in the St. Louis office. Shelley A. Wilson has become a shareholder with the firm.

J. D. Luhning has joined Rabbitt, Pitzer & Snodgrass, P.C. Luhning will practice in the firm’s products liability group.

The firm of Greensfelder, Hemker & Gale, P.C. announces that Suzanne B. Strothkamp, Adam J. Hamilton and R. Brian McMaster have joined the firm as associates.

Gina C. Mitten, a councilwoman for the City of Richmond Heights, has joined the Clayton law firm of Siegel Poger, L.L.C.

Jeffrey P. Duke has been named a partner at the law firm of Curtis, Heinz, Garrett & O’Keefe, P.C. in Clayton.

Armstrong Teasdale, L.L.P. announces that the firm has expanded its intellectual property practice with the addition of seven patent attorneys, including four partners: Christopher M. Goff, Richard L. Bridge, Derick E. Allen and Michael G. Munsell; and three associates: Laura J. Hilmert, Jeannie M. Boettler and Patrick E. Brennan.

Keith J. Grady has joined Polsinelli, Shalton, Flanigan, Suelthaus, P.C. as chair of the intellectual property litigation practice group.

The law firm of Lashly & Baer, P.C. announces that Margaret C. Scavotto has joined the firm as an associate.

Devereux Murphy, L.L.C. announces that Gary A. Growe and Janet L. Horgan have joined the firm as members. Michael J. Hart has joined the firm as an associate.

Joyce M. Capshaw, a principal at Carmody MacDonald, P.C. in Clayton, has been recognized as the Honorary Inductee for the Order of Barristers at the University of Missouri School of Law. Ms. Capshaw received this honor at the November 10, 2007 Law Day Awards ceremony. Katherine J. Doherty, Andrew D. Lamb and Matthew D. Melick have joined the firm as associates.

Michael W. Forster has been appointed as managing partner of Sandberg, Phoenix & von Gontard, P.C. Jennifer D. Growe, Natalie J. Kussart, Timothy B. Niedbalski, Tyler C. Thompson and W. Wylie Blair have joined the firm as associates.
Maury B. Poscover, a member of Husch & Eppenberger, L.L.C., has been appointed a member of the American Bar Association’s Standing Committee for the Federal Judiciary, which evaluates all federal judicial appointments. Jordan T. Ault, Mary Kate Griffith, Timothy C. Hodits, Elizabeth A. Mushill and James K. Schleiffarth have joined the firm as associates.

The Missouri State Public Defender System announces that Louis R. Horwitz, formerly with the Columbia office, has joined the St. Charles office. Formerly attorneys with the St. Louis Juvenile Public Defender’s Office, Monique D. Abby, Teresa M. Coyle and Dennis P. Owens have joined the St. Louis County office. Sarah E. Lambright, also formerly with the St. Louis juvenile office, has joined the St. Louis City office. Stephen P. Reynolds is the new assistant district defender of the St. Louis City office. Also joining the St. Louis City office are Susan A. DeGeorge, Courtney M. Harness and Matthew C. Melton. Ms. DeGeorge and Ms. Harness were formerly with the Farmington office.

Former Missouri Supreme Court Justice Ronnie L. White, currently with Holloran, White & Schwartz, L.L.P., was honored with a special award for his distinguished service on the Missouri Supreme Court at the 2007 Missouri Association for Social Welfare annual conference.

Elsewhere in Missouri

The Missouri State Public Defender System announces that the following attorneys have joined public defender offices: Stephen R. Williams (St. Joseph), J. Christian Sowash (Bolivar), Brady A. Musgrave (Monett), Cora M. Clampitt (Moberly), Heather Ingrum Gipson (Sedalia), Jonathan S. Hoover (Hannibal), David L. Brengle (Jackson), Meghan E. Scherer (Kennett), David M. Walters (Poplar Bluff), Robin C. Bourgeous (Rolla), Kathleen E. Goddard (Rolla) and Donna L. Holden (Rolla). Brandon E. Sanchez, formerly with the Jackson office, is the new district defender in the Caruthersville office.

Other States

Samantha N. Benjamin-House and Robert J. Wonnell have been added as shareholders with the law firm of McAnany, Van Cleave & Phillips. Joining them in the Kansas City, Kansas office are new associates Caroline S. Mudd and Alix R. Pereira, Jr. Rachel E. Rolf has joined the firm’s Roeland Park, Kansas office as an associate.

Jehan Kamil has joined the Overland Park, Kansas office of Lathrop & Gage, L.C. as an associate in the business disputes law group.
If the Gloves Don’t Fit, You Didn’t Check the Evidence

Physical evidence can have a huge impact on jurors. Just make sure you know whether it will help or hurt your client.

By Judge Ronald D. Spears

It was a matter of trial strategy that backfired. The defense counsel had offered into evidence an ATM video of the defendant at a bank shortly before the alleged criminal battery. The intent was to show the jury that the defendant looked different than the victim’s description of the perpetrator.

Unfortunately for the defendant, the jury did not agree. Unfortunately for the defense attorney, several jurors stated in a post-verdict interview that they were primarily convinced of the defendant’s guilt based upon their viewing of the ATM video. It seems the jury’s interpretation of the video was that the defendant’s boots matched the description of those the victim claimed to be kicking him during the battery.

Following the dismissal of the jurors, the defense counsel and state’s attorney went into Judge Justice’s chambers for a critique of their trial advocacy. “I hope my trial exhibit didn’t help convict my client,” said Jane, the shocked public defender. “Those weren’t boots, they were high-topped black sneakers.”

The prosecutor, trying to be noble in victory, said, “I didn’t even notice the shoes on the video and didn’t mention them in my closing. The video was low quality and it was hard to tell much from it. There was plenty of other evidence to prove the defendant’s guilt.”

Both young attorneys looked toward Judge Justice for input.

He smiled as he considered some of his experiences with evidence while in practice and on the bench. “Real evidence, or physical evidence as they call it now, is extremely powerful but can cut in unexpected ways,” he said.

LOOK INSIDE AND OUT

“Let me tell you about one of my first cases as a defense attorney. It was a bank robbery case and my client was a veteran of the criminal justice system. At one of our first meetings he asked to personally inspect all the physical evidence in possession of the state, including everything seized from him when he was arrested. I had already reviewed the items but arranged for the inspection, which took place under the watchful eye of government agents.

“My client scrutinized every inch of every item and paid particular attention to a flashlight. He unscrewed the end and looked inside. From my angle, I could only see the remaining residue inside the flashlight from the crime lab’s search for fingerprints.

“As soon as we were back in the conference area, my client demanded an investigation. He claimed that there had been several thousand dollars in the flashlight when he was arrested and it was now missing.

“I was skeptical, and said it might not be a good idea to point this out if the money could be marked. He insisted on a hearing, so the discovery issue was heard in open court.

“The investigator brought in the exhibit. The U.S. Attorney opened all the evidence bags, removed the flashlight, opened the end, and to the amazement of everyone pulled out $3,500 in cash.

“The possible conclusions were that someone from the lab took the money but got nervous and put it back or that the investigation was very incompetent. Either way, this was strike one against the government’s case.

“The lesson here is to look over every piece of evidence critically and carefully, inside and out. Don’t assume anything or take shortcuts, like missing the contents of a flashlight.”

PAY ATTENTION TO WHAT ISN’T THERE

Judge Justice continued. “Next, the crime scene investigator at the site of the abandoned get-away car had recovered some human feces and collected it...
as possible evidence. Based on the CSI report, the government had obtained a pre-trial court order to require my client to provide anal hairs for comparison.

“I examined the lab reports and found no hair-feces comparison. During cross-examination, the officer who took custody of the feces reluctantly admitted that he disposed of it before giving it to the lab, because lab personnel chided him for making them handle such nasty material.

“The officer feared discipline and kept quiet about his spoliation of evidence, hoping that an inexperienced, over-worked defense attorney wouldn’t discover it. Strike two for the prosecution.

“The lesson is to think about what physical evidence should exist and ask questions when those items – including lab reports – are missing. Missing evidence can be just as important as physical exhibits admitted at trial.”

USE DEMONSTRATIVE EVIDENCE WITH CARE

“I very nearly snatched defeat from the jaws of victory, though,” Judge Justice said. “During the arrest, the defendant had a paper sack that held one foot and part of the leg of a woman’s panty hose.

“A close inspection of the exhibit convinced me that it would be impossible to stretch it over an adult’s head. I imagined the dramatic moment in closing argument when the jury watched the host fail to go even a little way over my head. The night before closing, I tossed and turned in bed, going over and over the argument. Each time in the mock closing the hose demonstration won over the jury.

“Suddenly, I sat upright, woke up my wife, and her for a pair of panty hose. I went into the bathroom and cut off the hose leg so it was the same size and shape of the court exhibit. Then I rehearsed the jury demonstration. Taking the hose leg in both hands, I placed it on the top of my head, expecting to only get it an inch or two down my face.

“To my amazement, the hose went completely down, with little resistance, and I was looking in the mirror at someone who looked a lot like a bank robber. Needless to say, I eliminated that part from my closing.

“The lesson was to never use a demonstration with physical evidence that you were not absolutely sure would work just as you expect.

“The jury deliberation went on for several hours and the prosecutor asked me if we could go back to the holding cell and see if the defendant would consider a plea agreement. We went back to the cell and my client had his coat off. It was apparent that he had shaved both arms and hands from the elbow to the finger tips.

“It was hard to know who was more shocked, me or the prosecutor. The defendant had testified and been cross-examined, but neither attorney noticed anything about his hands or arms. Several of the bank witnesses had testified that the robber had dark, hairy hands. Just as the prosecutor was preparing to call my client some unkind names, the bailiff informed us the jury had reached a verdict: not guilty.

“The lesson, of course, is that the defendant who takes the stand becomes a type of physical evidence and any relevant change of appearance is fair game for cross-examination. My client claimed that the shaving was because of bed bugs in the jail, but the case would probably have been lost if the prosecutor had noticed and asked him to remove his coat in front of the jury.”

TESTIMONY FADES, PHYSICAL EVIDENCE DOESN’T

“From that case, and hundreds of cases since then, I can tell you that a jury often places great weight on exhibits that they can see and examine. Testimony fades from the juror’s memory and is not literally in the jury room. The physical evidence they have with them is.

“They will closely scrutinize the exhibits and place their own interpretation on them, so you must take care what you give them. Make sure any physical evidence you plan to offer is legally admissible and will help and not hurt you. You must also be sure the bailiffs only gather up the legally admissible evidence to take into the jury room.”

The two young attorneys thanked the judge, excused themselves, and left for the local pub to discuss their next case. As they left the room, Judge Justice smiled and said to himself, “If those boots kicked, you must convict.’ Works for the prosecution or defense if you change a word or two in either case.” He pulled on his jacket, turned out the lights, and shut the door behind him.

Missouri Bar Releases Economic Survey Results

The Missouri Bar has released the results of The Missouri Bar Economic Survey – 2007. The survey is a guide for Missouri lawyers to use as they plan and manage their law practice or work within the legal profession.

The information may be useful for lawyers in the private practice of law to evaluate their firm’s performance relative to comparable law firms and may compare their firm’s performance with those of similar size, by geographic location, and other similarities. Some sections of the survey include data from previous surveys presented in such a manner as to decipher trends over the past decade. A portion of the survey also depicts economic information about Missouri lawyers who practice solo or work in law-related and non-legal professions.

The Missouri Bar has conducted a survey every other year since 1958 to gain insight into the economics of the practice of law in the state of Missouri. This non-scientific survey is a snapshot of the economic performance of the legal profession in Missouri as of December 31, 2006.

The survey began with a sampling of 3,501 Missouri Bar members listing an address in Missouri that was randomly selected from the member database. Approximately 20,000 lawyers listed a Missouri address at the time the survey was taken. In the spring of 2007, those in the sampling were sent the confidential survey questionnaire to complete. The survey questionnaire was sent out electronically to those in the sampling who have an email address on file with the Supreme Court of Missouri. The survey was subsequently mailed to Missouri Bar members who did not have an email address on file or those who did not respond to the online survey. The survey was completed by 1,167 members online and 563 by mail. This represents a total of 1,730 that completed and returned the survey with a 49.4% response rate. For the first time, considerably more responded to the survey online than by mail. The respondents were asked to provide information as of the close of business on December 31, 2006.

EXECUTIVE SUMMARY

The following is a brief summary of the results from The Missouri Bar Economic Survey – 2007. Based on the concise information presented in this summary, the reader should not make any particular assumptions. You are encouraged to review the entire copy of the survey results to form your own analysis.

GENERAL INCOME INFORMATION/ FULL-TIME PRACTITIONERS

The mean (average) annual net income for all full-time practitioners answering the survey was $158,691 in 2006. This represents an increase of $14,891 or slightly more than 10% from the survey conducted two years ago. It may be important to note, however, that more than 37% of the respondents reported mean (average) incomes ranging from $60,000 to $119,999 and 18.5% in the $30,000 to $59,999 range.

Reflecting on mean (average) incomes reported by respondents in full-time private practice by practice area indicates that those who practice alternative dispute resolution; patent, trademark, or copyright; administrative/regulatory law; appellate practice, including personal injury; and environmental law all show mean (average) incomes in excess of $200,000 ranging from $279,305 to $202,952.

Full-time practitioners in the City of St. Louis reported the highest mean (average) income in 2006 at $186,272, followed by Jackson County at a mean (average) income of $177,599. In St. Louis County, the mean (average) income was reported at $150,222. In out-state Missouri, the mean (average) income for Cole County totaled $146,350, while the mean (average) income for full-time practitioners in neighboring Boone County totaled $93,455. Incomes increased in some areas, namely St. Louis City, Jackson County, and Cole County, but decreased from the last survey in St. Louis, Greene, and Boone Counties.
More than 50% of the respondents anticipate their firm will hire additional lawyers in 2007. Only approximately 4% expect to decrease the number of lawyers in their firm during 2007.

SOLE PRACTITIONERS

Information was captured in the survey concerning sole practitioners in private practice. Full-time sole practitioners answering the survey reported their overall mean (average) income in 2006 to be $96,069, which is an increase of $15,069 from 2004. The highest percentage of earners who are sole practitioners is reflected in the $60,000 to $89,999 range, followed closely by the $30,000 to $59,999 range. Comparing all respondents in full-time private practice, the highest percentage of earners is reported to be in the $60,000 to 79,999 range, followed closely by those in the 66 to 75 age group at $223,391. Those admitted to practice 30 to 39 years reported the highest mean (average) income at $249,938, followed by those admitted 20 to 29 years with the mean (average) income of $212,732.

Male lawyers in private practice reported a mean (average) income of $178,270 while female respondents in the same category reported a mean (average) income of $108,833.

ANNUAL MEAN (AVERAGE) INCOME BY AGE, GENDER, AND LENGTH OF TIME SINCE ADMITTED

Comparing mean (average) incomes by age indicates the highest earners in private practice to be in the 56 to 65 age group at $228,206, followed closely by those in the 66 to 75 age group at $223,391. Those admitted to practice 30 to 39 years reported the highest mean (average) income at $249,938, followed by those admitted 20 to 29 years with the mean (average) income of $212,732.

SALARIES OF NEW LAWYERS

The salary range for new lawyers in 2006 shows a marked increase. Nearly 35% of the respondents indicated they hired a newly admitted lawyer in the over $90,000 range, while in 2004 only 5% of the respondents reported hiring in this range. It may be important to note that there were 979 responses to this question, of which 455 reported hiring a newly admitted lawyer in 2006; 390 did not employ a new lawyer and 134 did not know.

Viewed by counties, 38.6% of the respondents from Jackson County hired a newly admitted lawyer in the over $90,000 range as compared to the mean (average) for corporate lawyers at $153,346. Those working in education reported a mean (average) income of $82,906. The respondents who indicated they worked in full-time government employment (including prosecutors and public defenders) reported a mean (average) income of $69,999, while those who reported working in full-time government, education or other corporate (not specified) reported a mean (average) income of $86,839.

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practice as sole proprietors sharing office space, and 1% reported other. This nearly mirrors the results from the previous surveys taken in 2002 and 2004. More than 64% of those practicing with partners indicated that they have a written partnership agreement, while only 52.5% of those agreements include a provision for the death, disability, or retirement of key members of the firm.

**Contingency Fees**

Nearly 70% of the respondents responded that they charge between 30-34% of the settlement proceeds in contingency fee arrangements. If the case goes to trial, nearly 48% of the respondents reported charging between 35-40%. Over half of the respondents (55%) indicated their contingency fee is taken from the gross proceeds rather than from the net, while 45% reported their fee is taken after expenses are paid.

**Hourly Charge for Trial Work**

The hourly charge for trial work was reported by 16.8% of the survey respondents to be in the $126-$150 per hour range, 16.7% in the $151-$175 per hour range, and 15.8% in the $176-$200 per hour range, which is up slightly from the results of the previous survey two years ago. More than 11% of the respondents indicated they charge more than $300 per hour for trial work.

**Charges for Expenses**

Nearly 70% of the respondents reported charging their clients more than $60 per hour for services provided by legal assistants or paralegals. Most respondents charge clients for time on the telephone, reading and responding to email, and for travel expenses. A good percentage also charge clients for computerized legal research. Only a small percentage of the respondents reported charging for secretarial time.

**FEES AND COLLECTIONS**

More than 86% of the respondents reported they routinely provide their clients with a written representation agreement. This reflects a 6% increase since the previous survey two years ago. This percentage has increased significantly over the past decade.

In excess of 46% of the respondents indicated they wrote off less than 5% of their billings as a loss; 28% wrote off between 5%-9%; nearly 19% wrote off between 10%-19%, which is consistent with the prior survey. Somewhat over 21% reported they charge interest on past-due billings. Nearly 30% of the respondents indicated they accept credit cards for payment, which is up slightly from the survey taken two years ago.

Past due billings were reported by 41% of the respondents to be handled by either negotiating with their clients or voluntarily reducing the fee, while 36.5% simply write off unpaid billings. Only 4% suggested they routinely file a law suit to collect past due billings.

**Office Overhead/Professional Liability Insurance Coverage**

Slightly more than 27% of the respondents reported their overhead to be in the 31-40% range, followed by 24.7% in the 41-50% range, and 21.7% in the 21-30% range. Nearly 42% did not know the amount of the office overhead at their firm. The survey reflects the amount of overhead by counties.

More than 88% of the survey respondents indicated they carry professional liability insurance coverage, which is considerably higher than other types of insurance carried by the respondents.

**Advertising and Marketing**

More than 66% of those who responded reported they used some form of advertising during 2006, which is consistent with the prior survey. The largest number of respondents indicated their firm has a website. Websites have pulled far out in front of yellow page advertising as the most frequently used method of advertising; however, yellow page advertising was reported as the second most favored type of advertising by the survey respondents, followed by speaking engagements. A much smaller percentage used radio or television advertising.

**Main Sources of New Clients**

Client referrals and referrals from other lawyers continue to be the main sources of new clients coming into the firms of respondents, which is consistent with past surveys. Social and business affiliations round out the respondents’ most favored methods of attracting new clients, with advertising and results from the firms’ websites trailing significantly behind.

*The Missouri Bar Economic Survey – 2007 is available in its entirety on The Missouri Bar’s web site at www.mobar.org under the Members Section. One free copy, either printed or on CD-ROM, is available upon request to all Missouri Bar members as a member service. Send your request to mstevens@mobar.org or call 573/638-2259.*
The Proper Care and Feeding of Clients

By Stephen Hayne

Practicing law must be the best job in the world. Why else are so many bestselling books, movies, and television shows devoted to our profession? And where else could we get paid so much for essentially, well, standing around talking? No wonder everybody hates us but wants to be us at the same time!

Despite its obvious benefits, it is a tough business. To keep the wolves at bay, you have to get clients in the door. Then you have to get them to pay a lot of money. Then you have to tell them bad news. Then you have to make them feel okay about it. Then you have to make sure they leave pleased with what you did for them. Doing all that ain’t easy.

Every once in a while I hear friends complain, “You know, the practice of law would be great if it weren’t for the clients.” It’s sometimes true: Client relations can be the hardest part of the business. But there are some basic steps you can take to make them feel okay about it. Then you have to make sure they leave pleased with what you did for them. Doing all that ain’t easy.

First: recognize that clients usually come to us in terrible distress – afraid, confused, ashamed, defiant, and angry. Many lawyers are uncomfortable dealing with their distress. After all, it’s really quite irrelevant to the legal problem, isn’t it?

No, it’s not, and it is also critical to what kind of relationship the lawyer and client are going to have, from beginning to end. The failure to appreciate and empathize with the client’s psychological struggle will be a barrier to good client relations, no matter how brilliant the lawyer or fantastic the result. If there is a single prerequisite, a single key to keeping clients happy, it is seeing them as someone who is suffering first, and as someone with a legal problem second. Doing so offers the client the most fundamental component of a good lawyer/client relationship: trust. Trust that the lawyer is on the client’s side no matter what the client did, no matter how worthless the client feels. Trust that no matter how ugly it gets, the lawyer won’t cut and run.

Consider what the client is experiencing when he walks in your door: “There’s a monster trying to break down my door, it wants to destroy me and I’m helpless to stop it. And it’s my fault it’s there. I feel worthless and ashamed. I’ve failed everyone who cares about me. Oh, how I wish I could go back and start over!”

I don’t care how stoic the client appears: When he shows up at a lawyer’s office, something like that is usually going on inside. It must feel pretty awful. So what is the client looking for? What does he need and want from you? He needs someone capable and strong to join him in the fight, someone who knows the monster, someone who has fought it before and is not afraid of it, someone who will protect him. And he needs someone who will resist the temptation to judge him, who won’t align himself with his enemies. In short, someone he can trust.

That is the foundation of a good attorney/client relationship.

This kind of trust can only develop when the lawyer pays attention, really hears the client, tries to understand the client’s pain, and does so without even a hint of judgment. Being on the client’s side doesn’t mean you approve of what he or she did. It means you’re going to help your client deal with it, to begin the process of putting his life back together, and to help him forgive himself. It also means resisting the temptation to join the self-righteous legions surrounding him, whose disapproval haunts him day and night. The client already has more than enough people judging him – what he needs is an unwavering ally. It doesn’t mean you tell him what he wants to hear. It means telling him the truth. Trust allows him to hear it, because he knows you are on his side.

Many lawyers don’t understand or are uncomfortable with our role as counselor to our clients, describing it as time-
wasting “hand-holding.” But it is a vital part of what your clients need, and if you’re not willing to give it to them, who will? If they can’t count on you being on their side, who else in the system can they count on? Recognizing the importance of this role is the key to satisfied clients.

I’ve learned a lot about dealing with clients and keeping them happy, starting with my first job with legendary iconoclast Alva Long. Alva did everything his own way. Calling Alva a lawyer was like calling Ozzy Osbourne a suburban dad. He practiced out of a small storefront office in downtown Auburn. On the huge picture window facing the street, he painted “Alva the Lawyer” in letters six feet high. He was partial to garish suits, wild ties, and fluorescent socks. His battered briefcase was covered with peace symbols and “Free the Chicago Seven” and “Legalize Pot” stickers. He spoke in disjointed parables, arguing points of law so esoteric no one in the courtroom had any idea what he was talking about. During an opponent’s direct examination of a key witness, he’s often take out a deck of X-rated cards and play a noisy game of solitaire. He drove prosecutors nuts, motivating at least one to actually file a “Motion to Make Mr. Long Leave Me Alone.” Despite his flaming eccentricities, every Saturday morning clients lined up on his sidewalk for their turn to implore him to take their case. Alva certainly was never a candidate for Super Lawyer status, yet he had more clients than he could hope to handle.

Why? Well, Alva demonstrated the first lesson in the business of practicing law. Let’s call it Lesson Number One: To be successful in the practice of law, you may not need a good reputation, but you do need a reputation. In other words, while you don’t need to be eccentric, you do need to stand out from the pack, to take some risks, to do some extraordinary things. It means working harder than the lawyer down the street, trying cases you don’t think you can win, taking on a case pro bono because it’s the right thing to do, appealing a case for nothing because you know the judge wrong. Over time, your efforts will impress those around you. In law, your developing reputation is by far the most effective means of attracting clients.

My second job was with another renowned character of the bar, Irving Paul. Irv was a Harvard-educated lawyer from old Boston money who could have made millions working for his uncle’s Wall Street firm. Instead, he packed his bags and headed west. Irv had a heart as big as the Kingdom and, in the days preceding public defenders, founded what was essentially a poverty law center in Pioneer Square. Our firm “specialized” in representing clients no one else wanted, those folks Irv proudly called “the Great Unwashed.” They were the legions of poor and down-and-out, with nowhere else to turn. They called him “Lawyer Paul” and would appear at our doorstep unannounced – summons in hand, wallet empty, eyes filled with hope. As far as I recall, no one was every turned away.

Irv asked only one question of prospective associates: “Will you work for peanuts and do so until you drop?” Those of us desperate or idealistic enough to say “yes” were rewarded with massive caseloads, little support, missed paychecks, and lost causes. We represented many wonderful, decent folks with terrible facts and predictable results. What surprised me was how appreciative my clients were despite losing, simply because I cared enough to try my hardest for them.

My experience working for Irv taught me Lesson Number Two: When it comes to making clients happy, it isn’t about winning or losing. It’s about how you treat the clients in the process. I can’t count the number of times folks were effusively grateful after I lost their case. They appreciated the fact that I was on their side, that I cared, and that I treated them with dignity and respect when no one else would.

When I left to begin private practice, I shared space with an established lawyer known for his take-no-prisoners attitude. Through the brick wall separating our offices, I winced as he loudly berated clients, demanding they follow his advice and not ask stupid questions. He ended up fighting a series of bar complaints and eventually gave up on the practice of law. I was not surprised. We lawyers operate in a world that is mysterious and frightening to our clients. We speak to judges and each other in a language they don’t understand. We assume that if we know something is in the client’s best interests, they will, too.

We could be wrong. Explaining complicated legal principles and tactical decisions is a pain, requiring patience, empathy, good listening skills, and a lot of time. But it must be done. It presents Lesson Number Three: It doesn’t matter that the lawyer knows what’s best
for the client – what matters is that the client knows and agrees. Otherwise, clients can’t move on; they are tortured with uncertainty, wondering whether they made the right decision. And they will blame the lawyer for the anxiety they feel. We owe it to our clients to remove the confusion as well as we can at every stage of the proceedings, by making sure they understand and approve of the decision before we ask them to make it.

As I learned how to practice law, every once in a while a client would get mad at me. The complaints usually seemed trivial; I didn’t return calls promptly, or failed to follow up, or was late to court, or sent another lawyer in my place, or contradicted myself on some minor point. I’d often respond defensively, without much genuine concern. That just made ‘em madder. Eventually I came to realize what I was doing: creating molehills, then challenging clients to make them into mountains.

I learned there is no such thing as a “trivial” client complaint. This led me to Lesson Number Four: Always return calls promptly, encourage questions from clients, respond immediately to complaints with sincere concern, keep them informed, explain your advice, be on time to court, and never promise something you’re not positive you can deliver. Attention to these details goes a long way toward calming nervous clients.

I occasionally receive calls from other lawyers’ clients who want to fire them and hire me. The complaints are rarely about the lawyer’s competence or the results attained. It’s almost always over frustration with the lawyer’s inability or unwillingness to explain the lawyer’s actions or advice. I hear them out, then almost always suggest that they go back to their lawyer, discuss the problem, and give him or her a chance to resolve it. I rarely hear from them again.

Which brings me to Lesson Number Five: If you have an unhappy client and are lucky enough to hear from her before some other lawyer or the bar association does, for gosh sakes take it seriously. Sit down, shut up, listen attentively, explain without a bunch of excuses, and apologize when appropriate. Figure out what the client needs to feel okay about it and move on. In such cases, the warning “act in haste, repent at leisure” is dead on. The worst thing a lawyer can do in response to a client’s complaint is to blow it off, even if the client is wrong. Yes, client complaints often seem frivolous, unfair, or misguided. They are sometimes exaggerated or distort the facts. In reality, they are often manifestations of the client’s unresolved fear, guilt, or shame. But they are real to the client and must be treated as such by the lawyer. In doing so, you are providing the client with what all clients need — the means to let go of all that emotion and move on.

Occasionally, we all run into clients who want their money back. This sometimes seems patently unreasonable. You feel you earned it twice over. The client was very demanding, even irrational. You achieved a terrific result. Maybe you had a bad month and need the money. It feels like a complicated question. Should you return all of the client’s money? Should you return any of it? Isn’t it unfair to you? Didn’t the client sign the fee agreement freely and voluntarily? However you answer these questions, there is only one appropriate response. Let’s call it Lesson Number Six: Give it back. And if necessary to make the client happy, give it all back.

I don’t care why the client wants it back. I don’t care how much it is, or how hard you worked on the case, or what a great job you did. I don’t care if the client is crazy, a complete jerk, or a con artist. I know it hurts, but give it back anyway. Suffice to say, I’ve known a lot of lawyers who didn’t, and every one eventually really wished they had. It is simply not worth the hassle. By the time the complaint reaches the bar association, the client will likely be complaining about everything you did and lot you didn’t. It will expand into a general indictment of your competence and ethics. It will require massive amounts of time, money, and effort to defend. It will not be worth it. So, just give it back and move on, sadder but wiser.

Over the many years of your career, you will likely repeat many of the same mistakes I’ve made. None of us is perfect. All we can ask of ourselves is to do our best and learn from our experiences. I hope you can benefit from mine. Yes, this can be a tough job, but even after 30 years, I still think it’s the best job in the world. Not despite the clients, but because of them.

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Stephen Hayne practices in Bellevue, Washington. He is a past member of the Washington State Bar Association Editorial Advisory Board.
By Patricia A. Yevics

By the time most of you will be reading this, the end of the year will be quickly approaching. This is a good time to look at the fiscal outlook for your firm or practice so that you can enter the new year fiscally healthy.

Here are some tips in no particular order to help with your financial well-being.

1. Have a good financial advisor or accountant. This should be someone who works with solo and small firm lawyers. This person should be an advisor and *not* a bookkeeper.

2. All firms should have someone who does the bookkeeping on a monthly basis. While most accounting packages make it much easier to do the bookkeeping, this is *not* where practitioners should be spending their time.

3. In addition, *all* firms/practitioners must monitor all staff members who work with billing, collections or financial records. All accounts must be reconciled monthly and reviewed by a partner. If there is more than one partner, this responsibility should be alternated to avoid fraud.

4. Have a partner be the first to open all bank statements. According to CPA J. Richard Borck with the firm Weil Akman Baylin & Coleman: “Even if you write and sign all the checks, people
can embezzle from you. I know several lawyers who have had checks stolen from the back of the checkbook and forged. If you don’t open the bank statements you won’t find out until it’s too late.”

5. All firms, no matter how small or how new, should have a written annual and monthly budget. This budget should be reviewed regularly. Ideally, you should work with an accountant familiar with law firms of your size. Your budget should include all fixed expenses for the coming year on a month-to-month basis.

6. You should know when all of your accounts payable are due. This will help with cash flow. You should have a spreadsheet listing of all your fixed expenses, the amounts due and dates due. No accounts payable should be paid without partner approval.

7. You should have a projected budget for non-fixed expenses such as education, publications, marketing/client development, supplies. If you have been in practice for a few years, you should be able to know what you spent each year on these expenses to make an estimate for the coming year. You should be able to compare months and years to determine differences or when there may be a greater need for cash.

8. You should have a technology budget for at least the next year. If you have others in the office, get their input on what problems they may be currently having and what types of purchases may be needed within the next year. Be sure to put the cost of training into the budget.

9. You should review the rules on fees and on attorney trust accounts. Make certain that everyone in your office knows the rules.

10. Do you know how much you will need to generate in fees in order to pay your expenses and your salary? You should have a budget for projected income. Your budget for your expenses lets you know how much you need to just cover expenses, but you will have to add in your own salary. According to Ward Bower of Altman Weil Inc., knowing your costs is fundamental to financial management. It is important to know your per-lawyer overhead. To know the cost of your lawyers, add compensation and benefits and divide by 90 percent of expected billable hours to get the actual number of billable hours needed to cover costs.\(^1\)

11. Do you know your projected cash flow for the next six months? You should know what will be coming in and what needs to be paid.

12. Manage expenses as though money were tight. I knew a managing partner of a firm who once said, “If we had managed the practice as well when times were good as when times were bad, we would not have noticed that times were bad.” Unless there is a good reason to spend more with a particular vendor, such as for outstanding service, business referral, relative, etc., if you can get it for less, do so.

13. Another tip from Richard Block is to use a payroll service. Yes, they cost money but they also eliminate tax penalties and having to prepare quarterly reports, paying taxes weekly at the bank, etc. You can sleep better at night.

14. All clients should have signed written fee agreements. At a minimum, all new clients should receive a fee agreement. They should understand that little or no work will begin on a matter until the fee agreement is signed. There should be a mechanism for knowing whether or not a fee agreement has been signed before putting too much time into a matter.

15. You should have a written billing and collection policy. These policies should be given to the client at the initial interview and explained.\(^2\)

16. There should be written policies for billing and collection, even for contingency work. The policies should state the procedures for out-of-pocket expenses, replenishing the account for expenses, and payment from fees for outstanding expenses. According to CPA Steven Manekin with Ellin & Tucker Chtt. “[Practitioners] who do not bill by the hour [need] to monitor their files carefully and make sure they keep them on the fast track for settlement. They need to monitor their settlements by type of file, i.e., workers’ comp, personal injury, etc., to allow them to forecast their revenues and budget on a monthly basis.”

17. Keep a record of referral sources and who sends the most profitable cases. Devote more time to sources that send you good cases. “Every two years, make a list of all the cases for which you received fees in the past three years, along with the type of case, amount billed, amount received and referral source. Cultivate the referral sources who have made you the most money. Stop taking the types of cases that have made you the least.”\(^3\)

18. Monitor the types of cases that are most and least profitable. Stop doing work that is not profitable.

19. Establish an attitude of “Full Day Accounting.” You and everyone in your office who does billable work should be able to account for a full day. This includes time that is not billable or client-related. It could include time

\(^{Continued on page 69}\)
Stress Seeking v. Stress Management

By Jim Brady

Lawyer stress certainly gets a lot of attention. Whole books are written about it, and good books, too. Workshop and CLE sessions offer tips about dealing with the incessant pressures, made worse by cell phones and the avalanche of email. What’s an exhausted lawyer or frazzled judge to do?

At the risk of being iconoclastic, I suggest reveling in it. I think it silly to believe that lawyer stress is going to ease any time soon.

So what then to do? It seems there are three options. First, soldier on under great stress to the point of physical illness and mental exhaustion, then pick up the pieces after the grand collapse. Second, drastically cut back on lawyer-ing, cutting stress in the bargain, with financial and career trajectory consequences. The third is to ratchet up one’s coping strategies, to inoculate oneself, so that more stress can be managed without disaster. Let’s see what you’d like.

Suppose I were leading one of these frequent stress management seminars. I might ask the group of lawyers to brainstorm good stress management techniques, while I jotted them down on a flipchart. I imagine the group would say good ideas faster than I could write them, until the page was full. In my imaginary workshop, I would then scan the group, look them all in the eye, and say, “So why aren’t you doing these great ideas?”

I think most of us already know what works best for us to mitigate stress. The key issue seems to be the resistance that keeps us from doing those useful things. So what would keep very intelligent problem solvers from doing what’s really good for them? It could be that lawyers would like to appear as wonderwomen or supermen to their clients and the rest of their firm. Maybe they strive so very hard to gain advantage, or to keep from being disadvantaged on cases. Maybe it’s a service heart, which is passionately committed to helping others, at the risk of using one’s self up. It might just be the competitive nature of people who go into law, constantly seeking to one-up the next person. Or it might be a method to prove oneself in the giant shark tank: “Can I really cut it in this business?” Handling monster stress is proving oneself monster tough.

Lawyers also have to contend with several other issues endemic to the practice of law that make things even worse. The first is the problem of interruptions; connected to the second, false crises (the client, the judge, or opposing counsel believes something to be a crisis, when you don’t). Next is the problem of emotional suppression. Lawyers are often forced to appear impassive and thoughtful, when they are inwardly seething. What a strain! Finally, there is the issue of unreasonable demands. Many members of the public, including clients, blame lawyers for the complications of our system. They conveniently ignore the public’s part in the mess by demanding what they want, when they want it, expecting it to happen quickly and at a very cheap price!

There is a strong drive that brings academic success in college, law school admission, law school completion, and then professional development and success. That same drive now leads to packed schedules, pressured production, ruthless deadlines, and the incessant bombardment of communications of all sorts, from the ridiculous to the essential. In the face of such duress, there are at least six standard stress management domains: fitness, nutrition, sleep hygiene, nurturing relationships, time away, and time shifting (controlling or manipulating schedules to reduce multiple competing demands). Some lawyers might say that carving out time to use these techniques would make the stress worse rather than providing relief!

So would you be willing to take a new approach to your stress issues? If so, let me suggest four questions for your consideration: Is your family happy that you are a lawyer? Are you about as rich as you need to be? Are you having a good time? Where is all this going to end up in 10 years? As you reflect on these ideas, and maybe even discuss them with the important people around you, you might have opportunity to re-evaluate how helpful or hurtful all this stress is to you.
Let’s acknowledge that if you continue to practice law at all, you are deliberately stress-seeking. But you have already demonstrated a substantial ability to deal with significant stress, or you wouldn’t be where you are now. Perhaps a better concept to consider is “sustainability.” This is a great ecological term, useful here. If you change some of your ways, cut back some things and increase healthy coping behavior, can you increase the amount of stress you can sustain over an extended time? Probably. This assumes that you are in charge of your practice, as opposed to having the practice in charge of you. If you choose to change the amount of stress you wish to sustain, that will entail changing, doing new or different things, which is always tough. But imagine how comfortable and satisfying it would be if some things were limited or controlled. How would that feel? Would the difficulties of the change process be worth it?

If we’re going to be in the deep end of the pool, we might as well get life jackets. Choose a nice one.

**ENDNOTES**

1. Excellent reference sources include:

**Fiscal Aerobics**

(From page 67)

spent marketing, reading, attending CLE, etc. This is important in small firms to make certain that time is being used wisely.4

20. Consider taking credit cards to speed cash flow.

21. According to CPA John G. Iezzi: “A firm should perform an annual analysis and ascertain the extent to which each client is generating revenue.” He points out the difficulties of having a firm depend too much on one client or even one partner to generate revenue. Some of the other issues this analysis may point out are whether the firm is client or case-oriented and whether major clients are more aligned with a particular attorney than with the firm.

22. There is a philosophy that each year a firm should “fire” one or two of its least profitable clients. Obviously, it may not be possible if there is litigation or other factors that prevent this, but getting rid of clients that are not profitable frees you up to find better clients.

23. Have a retirement plan. Explore options such as SIMPLE Plans and Roth 401-Ks.

24. Monitor your expenses. Enough said.

25. “Make more money? There is no simple secret. The rules are simple: 1) pick clients who can and will pay for your services; 2) receive a retainer from them before you begin work; 3) use a fee agreement to confirm the fee and payment arrangement; 4) bill promptly and regularly using each entry on the statement to clearly describe efforts on behalf of the client with more than a reminder statement; 6) cut off the work when the client has not paid for 90 days or has not made arrangements to pay.”

Work hard and get paid. You deserve it!

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**ENDNOTES**


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