The Ave Maria School of Law Moot Court Board Presents:

The Gavel

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Inside this issue:

Blindly Confronting Technology

By Hon. Kirk W. Tabbey with Philip A. DeLoach

The nationwide use of ever-advancing evidence presentation and videoconference technology in our courtrooms raises pressing new issues with what were previously well-settled legal doctrines. Even Lady Justice, forced to preserve the delicate balance of fairness for the State and the accused, is raising an eyebrow and peeking out from behind her blindfold as technology pushes the envelope on what used to be a more simple answer for the right to confront an accuser at trial.

As we advance through this increasingly fast paced information age, it is important to incorporate principles that will guide the judiciary's use of technology. This will save the otherwise stable system from confronting technology in unexpected and unpredictable ways. Blindly moving into the future without a sense for where technology will take the Courts can only ensure that Lady Justice will continually find the need to peek out from behind her blindfold in order to preserve fairness.

The State Bar of Michigan Judicial Crossroads Task Force recognized this dilemma when it created a technology committee to report on the status of technology in Michigan's courts, to reaffirm our guiding principles, and to establish clearly the use of technology in the Michigan judiciary's "One Court of Justice." As stated in the technology committee report, the public has a right to expect that our justice system will incorporate both current and cutting-edge technology where appropriate. Courtroom use of interactive video technology is one of the many new technologies expected by the public to be available and used in court proceedings. Juror surveys indicate that a majority expects to see the use of these new evidence presentation technologies. Similarly, jurors are likely to find a better "quality" in the evidence presented when incorporating interactive video technology. In other words, jurors expect the courts to be up-to-date. According to the Executive Summary, jurors reported

(Continued on Page 5)

The First Amendment & For-Profit Corporations

By Frank Roberts

On Tuesday, March 25th, the Supreme Court of the United States will once again bring the Affordable Care Act (ACA) before its panel of nine justices for oral arguments. Previously, Chief Justice John Roberts wrote an historic opinion which declared the law constitutional in accord with congressional powers. It did not qualify as a "commerce power," nor was it "necessary and proper" to the powers of Congress, but instead was found to be within Congress's taxation power. Now the Court tackles a different question concerning the ACA: Whether a regulation requiring insurance coverage for all FDA-approved contraceptive methods and sterilizations violates Religious Freedom Restoration Act (RFRA) by requiring Hobby Lobby to provide this coverage in violation of their religious beliefs, or else pay severe fines.

(Continued on Page 7)

Featured Professor Article: Ponder Before You Post

Social Media and Standards of Professional Responsibility

By Professor Kevin Govern

While the vast majority of law students and lawyers are familiar – and comply – with the myriad of obligatory rules, canons, and admonitions regarding every aspect of professional responsibility, the area of social media ethics is rapidly evolving beyond the traditional principles. Aside from time-tested rules on the Client-Lawyer Relationship, the lawyer's role as Counselor and Advocate, or Transactions with Persons Other Than Clients, there are new and challenging standards emerging regarding Information About Legal Services and Maintaining the Integrity of the Profession as technologies evolve and lawyers employ those tools to inform and to serve their clients and the community at large.

According to a Fall 2012 ABA survey, 96% of lawyers use LinkedIn, the social networking site, in lieu of or in conjunction with other "private" social media/ social networking sites such as Facebook, Myspace, and Twitter, amongst other sites and services.

Per the Florida Bar's September 11, 2013 advisory advertising opinion, Florida lawyers cannot list areas of practice

(Continued on Page 13)

Sixth Circuit on Split

Is Reversal the Proper Remedy?

By Kelsey Schindler

In *United States v. Ross*, the United States Court of Appeals for the Sixth Circuit addressed the following issue: What is the appropriate remedy for deprivation of counsel during a criminal defendant's competency hearing?

On October 16, 2007, Bryan Ross was among five defendants indicted on "one count of engaging in a conspiracy to utter counterfeit securities and seven substantive counts related to the conspiracy." Before the trial began, Ross exhibited "bizarre" and "paranoid behavior" which gave rise to questions about his competency and subsequently led three court-appointed attorneys to withdraw. While being represented by the third attorney, Ross filed a motion to waive counsel and represent himself. In response, the Government filed a motion for a competency examination and hearing, both of which were denied. The Court found that Ross's signs of delusion and paranoia along with his inability to get along with lawyers did not give reasonable cause to order a psychiatric exam at that time. However, the court indicated a willingness to entertain another motion to waive counsel at a time closer to the start of the trial.

(Continued on Page 10)

Companion or Property?

When Emotional Damages for Pet-Death Cases are Allowed

By Lisa Difilippo

It is not at all unusual to find a companion animal being treated as and often times considered a family member. In fact, a recent study conducted by the American Pet Products Manufacturers (APPM) found that 73 percent of dog owners and 65 percent of cat owners consider their companion animals to be akin to a child or other immediate family member. The boundless connection between people and their pets has even been shown to improve health and emotional disorders.

Many laws recognize this immense bond, including F.S. §737.116 (2004), which provides for the creation of an enforceable trust with a pet as a primary beneficiary. While statutory laws recognize the animal-human relationship, common law classifies domesticated pets as personal property and not as extensions of their owners or any other legal entity whose loss would ordinarily give rise to personal injury damages. It was best stated in *Bennett v. Bennett*, "While a dog may be considered by many to be a member of the family, under Florida law animals are considered to be personal property." 655 So.2d 109 (Fla. 1st DCA 1995).

Since domestic pets are recognized as personal property at common law, the valuation of damages for the loss of a companion animal are often times the fair market value. This is the majority approach employed by the courts.

While recovery for veterinary treatment expenses is possible, even when the treatment is unsuccessful, the courts nevertheless struggle with pet-death cases. In these cases, courts often expressly recognize that pet owners do suffer genuine emotional damages, but declare that such damages cannot be awarded because such "allowance of recovery would enter a field that has no sensible or

(Continued on Page 6)

Common Core: The New Standard

By Brittany Harris

Education reform is nothing new in the United States; in fact, it is so common that you can essentially mark your calendar by the inauguration of a new President. So why are so many citizens up in arms about the Obama Administration's thrust for The Common Core State Standard? Why are those who are promoting Common Core reduced to rephrasing and rebranding the act? The Common Core official website, www.corestandards.org, appears to embrace everything that would be essential to a successful school system. Whether for or against the new reform, it is crucial to not only know what common core is, but how it came to be and where it currently stands in order to form an educated opinion.

What is Common Core?

Common Core, in summary, is a set of academic standards that mandate what students are expected to learn in English language arts and Mathematics each year from kindergarten through high school. The ideal result is making all high-school graduates college and career ready. The National Governors Association (NGA) and the Council of Chief State School Officials (CCSO), both of which are private trade associations, wrote the Common Core State Standards. In addition to standardized testing, the NGA found it extremely important to include the collection of student data starting from the time a child begins their education in preschool through college and into the workforce. Although the authors of the Common Core State Standards (CCSS) have not defined what college and career readiness means, they have determined that national standardized testing and a collection of student data including but not limited to health records and living demographics will produce students that are college and career ready.

How did it come to be?

In early 2007, The Bill Gates Foundation began funding the NGA, CCSO, and Achieve (founded by governors and corporate leaders) to assist in the development of common state standards and construction of larger student databases. As a result of the funding, *Benchmarking for Success* was created. This study became the skeleton of the Common Core Standard. The study addresses five steps to creating a new education system as well as an outline for the federal government's role in promoting the new standard to the states and how it should function with the new policy. According to the study, "the federal government should change existing federal laws to align national education polices with the lessons learned from state benchmarking efforts and from federally funded research." After the election in 2008, President Obama

(Continued on Page 8)

Employers Beware: Intern vs. Employee

By Christopher Antonino

The basis for distinguishing between an intern and an employee, as these terms are defined by the Fair Labor Standards Act ("FLSA") 29 U.S.C.A. § 201 (West), provides important concerns for employers across the nation. Whether an individual qualifies as an intern or an employee will determine whether or not they are entitled to hourly wages and overtime pay according to the FLSA. A uniform and efficient approach to making this distinction would be extremely useful to employers who risk becoming party to a lawsuit for not providing an employee wages which he or she is entitled to under the Act. Unfortunately, we are not so privileged to have such an approach.

The Supreme court decided a case called *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947) in which a railroad company trained certain individuals for a period of time so that they were qualified to do certain jobs along the railways. 330 U.S. at. 149 (1947). Although this case distinguished trainees from employees, the reasoning has consistently been applied by a majority of the courts to the intern-employee dichotomy. The trainees in *Portland Terminal* understood they would not be paid for their time during training. However, when the trainees were eventually placed into positions for which they were trained, they demanded retroactive payment for their time spent in training. *Id.* at. 150, (1947). The court held that the trainees were not employees of the railroad during their training and therefore were not entitled to wages pursuant to the FLSA. *Id.* at. 153 (1947).

(Continued on Page 9)

Alex Rodriguez Strikes Out in Appeal to Federal Court

By David Langley

It is always fascinating for sports fan lawyers or law students when sports and the law intersect. This occurred recently in a story that attracted widespread media attention. The case involved the controversial superstar Alex Rodriguez and his ongoing battle with Major League Baseball (MLB). For those unfamiliar with baseball, Rodriguez was once regarded as one of the best players to ever play the game. He was within striking distance of both Babe Ruth and Hank Aaron's career home run numbers. That was until he admitted to using performance-enhancing drugs from 2001 through 2004 while with the Texas Rangers. That admission placed a permanent asterisk next to all his career numbers. Unfortunately for Rodriquez, his troubles didn't end there. In August 2013, Rodriguez received a 211-game suspension from MLB for his alleged ties to Biogenesis, an anti-aging clinic in Miami that supplied players with performance-enhancing drugs. A number of others were suspended along with Rodriguez, including notable players Ryan Braun, Nelson Cruz, and Johnny Peralta. However, Rodriguez received the longest suspension for allegedly interfering with MLB's investigation.

This set into motion a number of proceedings that had been agreed upon between the players' union and MLB from the most recent

(Continued on Page 9)

The Right to Privacy and the Smartphone

By Jessica M. French

Recently, a new string of cases have emerged questioning the authority of police who do not have a search warrant to search the data in a suspect's phone. Nowadays, cellular phones have the capability of containing the same amount of data as a personal computer. Much of this data is private to the owner, such as medical information, calendars, bank records, pictures, video, correspondence, contacts, and more. The issue presented before the Supreme Court is whether the search incident to arrest exception to the requirement of a warrant and probable cause allows police to search a mobile device solely because it is on a suspect's person during arrest. The lower courts have reached conflicting results regarding the issue as to whether a search of cellular phones is reasonable under the Fourth Amendment.

In *Riley v. California,* Riley was arrested for a shooting, attempted murder and assault with an armed weapon. Riley was not arrested at the time of the shooting, but was stopped for an expired license plate. Subsequent to the stop, Riley's cellular phone was examined twice without a warrant. The contents of Riley's phone connected him to the shooting. The trial court admitted the evidence, which resulted in Riley's conviction, and the Fourth Circuit affirmed. The Supreme Court has granted review of Riley's case, but only as it pertains to his conviction and denying a general review of the Fourth Amendment.

In *United States v. Wurie,* the defendant was arrested on drug charges. At Wurie's arrest, police retrieved two flip phones, not a smartphone, off Wurie's person. Police examined the contents of the phone and linked the phone calls to Wurie's home. The evidence retrieved from the phone was used in the investigation and as evidence during the trial. Wurie was convicted of distributing cocaine, possession with the intent to distribute, and being a felon in possession of firearms. The First District reversed two counts of Wurie's conviction, which the government now appeals.

The Supreme Court in *Chimel v. California*, 395 U.S. 752 (1969) held that police may search incident to arrest the area within the arrestee's immediate control to prevent destruction of evidence and to prevent a suspect from gaining possession of a weapon. While the seizure of a cellular phone during a search incident to arrest is allowable, the review of the materials located within the phone without a warrant breaches the expectation of privacy and the scope of Supreme Court cases. There are millions of pages and sources located within today's cellular phones and to examine that content without a warrant seems to be unreasonable. The Fourth Amendment was enacted to prevent general warrants, to limit arbitrary searches, and to give deference to a notion of privacy. The government is seeking a broad application of the search incident to arrest exception, but this is contrary to the purpose of adopting the Fourth Amendment. By opening the door to searches of cellular phones, the door will be opened to generalized searches, expanding the exigent circumstances doctrine, and will result in an intrusion of privacy into information that has historically been regarded as private.

Who Will Rule Recess?

NLRB v. Noel Canning is No Child's Game!

By Kristin Philips

The large constitutional conflict present in *National Labor Relations Board v. Noel Canning* started out as a mundane labor dispute but now has broad ramifications for the President's powers under the United States Constitution. The Supreme Court's decision on the case will affect the balance of power between the President and the Senate. At issue is the Recess Appointments Clause which authorizes the President "to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." (Art. II, §2, Cl.3) One of the questions posed to the court is whether the President's recess-appointment power may be exercised during a recess that occurs within a session (intra session) of the Senate. A second question is whether the President can only use his recess appointments power to fill vacancies that are created during the recess or whether he can also fill vacancies that existed at the time of the recess.

The Labor Dispute

The dispute arose between Noel Canning, a family-owned soft-drink company based in Yakima, Washington, and the International Brotherhood of Teamsters Local 760, the union representing the company's workers regarding a forty-cents-per hour raise. The raise had been negotiated between the two parties, but when the company ultimately refused to execute a written agreement, the union brought a complaint to the National Labor Relations Board (NLRB). The NLRB is a government agency charged with conducting elections for labor union representation and investigating and remedying unfair labor practices.

The NLRB issued a holding that Noel Canning had acted unlawfully, violating the National Labor Relations Act (NLRA) (29 U.S.C. § 158) when it refused to execute the agreement in writing. Noel Canning challenged the Board's order, claiming the NLRB lacked the minimum number of members required to enforce the NLRA.

The NLRB consists of five members who each serve five year terms. Without a quorum of at least three members, the Board cannot operate. Typically, the five members are nominated by the President and confirmed by the Senate. On January 4, 2012, President Obama directly appointed three members to the NLRB without Senate confirmation. He used the Recess Appointments Clause to fill the vacancies. Congress technically began the second session of the 112th Congress on January 3, 2012. However, the Senate had adjourned and many senators had already left D.C. Pursuant to a unanimous consent agreement, the Senate would meet in *pro forma* sessions every three days from December 20, 2011 through January 23, 2013. The agreement stated that no business would be conducted during those

(Continued on Page 11)

(Blindly Confronting Technology … Continued from Page 1)

an enhanced sense of fairness in the court system when technology is present in the court system management and litigation in the courtroom.

"How does the use of interactive video technology for remote, live testimony impact the constitutional right of the accused to confront their accuser?"

CONFRONTATION CLAUSE

The United States Constitution, Amend. VI, Const. 1963, art 1, §20, contains the following language: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Supreme Court in *Coy v. Iowa* wrote, "The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it." Whereas, "A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts."

The meaning of 'confrontation' has been left to the courts to decide. The Supreme Court doubts that the Confrontation Clause was intended to ". . . [O]rdain common law rules of evidence with constitutional sanction . . . (notwithstanding English decisions that equate confrontation and hearsay)." *California v. Green.* Rather, the Supreme Court says, "[H]aving established a broad principle, it is far more likely that the Framers anticipated it would be supplemented, as a matter of judge-made common law, by prevailing rules of evidence." The common law has been rather simplistic with the word; the courts have generally decided on a straightforward definition (i.e. face-to-face encounter).

The Supreme Court holds that the fundamental purpose of the Confrontation Clause is to "compel [the witness] to stand face to face with the jury in order that they may look at him, and judge by his *demeanor* upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (Emphasis added). This places the actual analysis squarely on what exactly *demeanor* is meant to encompass. Therefore, the focus should be on asking:

"Is the demeanor of the witness readily observable by the finder of fact through the use of interactive video technology?"

DEFINING DEMEANOR

Demeanor can be defined as "*behavior* toward others" or "one's outward manner." Webster's Online Dictionary further defines *behavior* as "anything that an organism does, involving *action* and *response to stimulation*" and "the response of an individual . . . to its environment." Furthermore, "Manner" and "Mannerism" are defined as "a distinctive behaving, air or deportment, and a characteristic and often unconscious mode or peculiarity of action."

Human reaction and response are important factors in the discernment of the truth. The goal is to uncover and perceive the emotions that are obscured either intentionally or subconsciously by a witness who is testifying against the accused. To do this, we need to understand what the courts mean by human interaction. The short version - human interaction innately encompasses an acceptance of familiarity.

If society becomes familiar with technology, instead of merely blindly confronting technology, we may yet reach a level of comfort that would allow for satisfaction of the Confrontation Clause. Until then, we must be on the lookout for the moment when society realizes that we have integrated technology into our lives in such a way that we are used to using it to interact with others on a daily basis. When this finally happens, even if all of the human senses are not fulfilled to their utmost, we might be able to say that *adequate* virtual presence technology has come to fruition. Then, finally, Lady Justice may be able to rest her eyes, secure her blindfold, and stand satisfied with her scales of justice equally balanced.

(Alex Rodriguez Strikes Out … Continued from Page 3)

round of bargaining. The union and MLB agreed to the "Basic Agreement," which sets out the procedures for appealing a drug suspension or any grievance a player may have. The Basic Agreement states that a player's case is to be heard by a neutral and impartial arbitrator. Arbitration is a popular choice in collective bargaining agreements because it prevents costly litigation and keeps information confidential.

Frederic Horowitz is MLB's chief independent arbitrator who heard the case involving Rodriguez over twelve sessions from September 30 through November 20 of last year. Rodriquez hired well-known criminal defense attorney Joseph Tacopina to represent him in the arbitration proceedings. The hearing became a spectacle at times when Rodriguez supporters gathered outside in picket line fashion. Animosity between Rodriguez and MLB Commissioner Bud Selig grew throughout the hearing. At one point in the hearing, the arbitrator refused to call Selig to the stand. Rodriguez then marched out of the hearing shouting obscenities.

In the end, the arbitrator reduced Rodriguez's suspension to an even 162 games (the equivalent to an MLB regular season). This reduction was received as a victory for MLB and a major defeat for Rodriquez, as he will be forced to miss the entire 2015 season and to forfeit his $30 million salary. Almost as soon as the decision was announced, Rodriquez vowed to appeal the case to federal court. His outrage is not totally unjustified. A quick look through the decision shows that Horowitz accepted hearsay testimony, relied on physical evidence allegedly stolen from a source, and drew a negative inference from Rodriguez's refusal to testify in his defense. These are evidentiary and trial issues that would certainly not be allowed in any American courtroom.

However, it is highly unlikely that his case will ever be heard in such a courtroom. Courts do not like to undermine the integrity of arbitration decisions in labor disputes since both parties bargained for and agreed to the arbitration hearing when constructing the collective bargaining agreement. The Federal Arbitration Act provides the grounds for review of an arbitration decision. The Act states that decisions are only overturned for corruption and fraud or where the

(Continued on Page ?)

(Companion or Property? … Continued from Page 2)

just stopping point." *Kondaurov v. Kerdasha*, 619 S.E.2d 457 (Va. 2005).

While the slippery-slope argument may be valid, as in *Kondaurov*, there should nevertheless be a balance to ensure justice and legal protection. Few courts have explored and attempted to cure this issue.

Hawaii is currently the only state that always allows the recovery of emotional damages for the death of a companion animal. In *Campbell*, the Supreme Court of Hawaii awarded emotional distress damages based on the theory of ordinary negligence. *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981).

Currently, only three states sometimes allow emotional damages: Florida, Oregon and Illinois. The term "sometimes" is used because unlike *Campbell*, emotional damages are only awarded in actions where misconduct leading to death or injury of a pet would support punitive damages. In *La Porte*, the Florida Supreme Court affirmed a trial court judgment awarding $2,000 in compensatory damages, primarily emotional in nature, and $1,000 in punitive damages, holding that emotional damages are appropriate in the case of conduct that "was malicious and demonstrated an extreme indifference to the rights of the owner." *La Porte v. Associated Independents, Inc*. 163 So.2d 267, 268 (Fla. 1964).

The court's description of the degree of wrongfulness involved (malicious behavior and exhibiting extreme indifference to the rights of the pet owner) demonstrates that the decision was not based on intentional infliction of emotional distress (IIED) theory. The court allowed for recovery through a new cause of action based on malice, affording greater opportunity for recovery because it avoided the necessary elements of both the intentional infliction of emotional distress ("IIED") and negligent infliction of emotional distress ("NIED") causes of action. Thus, in Florida, it is unlikely the award of emotional distress would be granted without the recovery of punitive damages. This illustrates that despite declining to recognize a cause of action for intentional or negligent infliction of emotional distress based on the death of a companion animal, the Florida courts employ various rationales in their attempts to appropriately value companion animals.

However, Florida's advanced trend was hampered by the decision in *Kennedy v. Byas*, 867 So. 2d 1195 (Fla. Dist. Ct. App. 2004). *Kennedy* appears to be one of the strongest limitations for owners of companion animals in veterinary malpractice suits. In that decision, despite acknowledging *La Porte*, the court agreed with *Bennet* that animals are considered personal property and denied IIED damages for veterinary services stating:

> *"We acknowledge there is a split of authority on whether damages for emotional distress may be collected for the negligent provision of veterinary services. We find ourselves in agreement, however, with the New York courts which recognize that while pet owners may consider pets as part of the family, allowing recovery for these types of cases would place an unnecessary burden on the ever burgeoning caseload of courts in resolving serious tort claims for individuals. We decline to carve out an exception to the impact rule for cases involving veterinary malpractice."*

Florida, along with Oregon and Illinois, may be moving in the right direction in allowing recovery for emotional distress for companion pets, but is allowing recovery only in instances where the pet owner proves malice adequate? Should it extend to negligence cases, including those involving veterinary care? Is Hawaii's law which always allows recovery for emotional distress too broad? Are the remaining states simply outdated? These questions will continue to be addressed by various courts, especially if the pet/owner bond becomes more recognized in the legal realm.

Is This the Final Stop for Municipal Red Light Cameras?

Florida's Supreme Court to Resolve Conflict between the Districts

By Jaime Hewitt

In late 2012, the Florida Supreme Court granted certiorari to resolve a recent conflict between the Third District, *City of Aventura* v. *Masone*, 89 So. 3d 233 (Fla. Dist. Ct. App. 3d Dist. 2011) and the Fifth District, *City of Orlando* v. *Udowychenko*, 98 So. 3d 589 (Fla. Dist. Ct. App. 5th Dist. 2012) regarding the use of red light infraction cameras ('cameras') in local municipalities.

The principal argument put forth by *Masone* and relied upon by *Udowychenko* was that the locally enacted ordinances that authorized the use of the cameras were preempted by state law, specifically The Uniform Traffic Control Laws, Chapter 316 Florida Statutes (2008) ('traffic statute'). Both Aventura and Orlando countered by claiming that the traffic statute expressly permitted municipalities the power to enact traffic control measures within their boundaries, § 316.002 *Fla. Stat.* (2008), and that the ordinances passed did not conflict with existing state traffic laws. The Third District Court in *Masone* held that the local ordinances were permissible, whereas the Fifth District Court in *Udowychenko* held that the ordinances were preempted by state law.

The facts in both cases were relatively similar. Both drivers were recorded by cameras for allegedly failing to stop at a red light. Both were issued citations following a review by a code enforcement officer. Thereafter, both drivers requested hearings before special masters, both claims were denied, and the cases referred to above were instigated.

The pre-emption argument successfully made by *Masone* at trial and rejected on appeal, and subsequently adopted by *Udowychenko* in his

(Continued on Page 11)

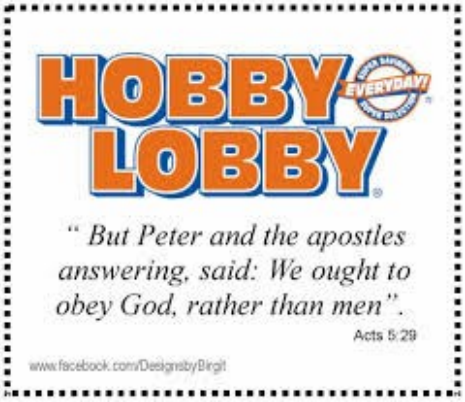
(The First Amendment & For-Profit Corporations … Continued from Page 1)

Hobby Lobby is a national arts-and-craft chain with over 500 stores nationwide and 13,000 full-time employees. It is privately owned exclusively by the Green family, who organized the company with their religious principles in mind. They close all their stores on Sundays, refuse to sell products associated with alcohol, and donate millions of company profits to charities and Christian ministries. In accordance with their Christian beliefs, the Greens believe that human life begins at conception and reflected this belief in the insurance plan they offered to employees. Drugs that are "abortifacients," i.e. that terminate a human embryo after fertilization but before implantation, were excluded from the insurance policy because the drugs are a functional equivalent to an abortion procedure, which violates the Green's religious beliefs. In fact, only 4 of the 20 required contraceptives to be covered by the ACA qualify as abortifacients, and it is only these four abortifacients which Hobby Lobby objects to covering. If Hobby Lobby did not comply with these mandates, they would be subject to fines of over a $1.3 million *every day*.

Thus, the Greens and Hobby Lobby sued, under RFRA, 42 U.S.C. §20000bb, which provides that the government "shall not substantially burden a person's religious exercise" unless the burden satisfies strict scrutiny. A temporary injunction for Hobby Lobby was denied at both the 10th Circuit and Supreme Court level before the case was heard on the merits. The U.S. District Court for the Western District of Oklahoma decided that for-profit corporations do not have free exercise rights, and that Hobby Lobby is not a "person" for the purposes of RFRA, nor is there a substantial burden on the Greens to exercise their religion. The 10th Circuit Court of Appeals reversed on almost all grounds, stating that the RFRA and 1st Amendment claims do have merit and could succeed.

One of the central issues in this case is whether RFRA allows a for-profit company to deny insurance coverage of contraceptives, otherwise required by the ACA, based on the religious objections of the corporation's owners. Kathleen Sebelius, in her capacity as Secretary of Health and Human Services and Petitioner before the Supreme Court, argues that for-profit companies are not within the scope of "persons" as intended by RFRA, and therefore cannot have free exercise rights. For-profit companies are to be distinguished from religious, non-profit corporations when it comes to free exercise rights.

This is not a winning argument. As it was rightly asserted in Hobby Lobby's brief, because RFRA does not define "person," the court must necessarily turn to the Dictionary Act in §1 of the US Code, which states that the word "person" includes corporations, companies, associations, partnerships, societies, and joint stock companies, as well as individuals. In reading this statutory language, I recall the judicial principle



of statutory interpretation "*casus omissus pro omisso habendus est*," that is "a matter not covered is to be treated as not covered." If Congress had meant to distinguish for-profit companies from the common legal definition of what a person is, they would have made a provision specifically outlining the distinction. To do otherwise would be the equivalent of legislating from the bench, which, as prior experiments have shown, can lead to disastrous jurisprudential consequences (*cf. Roe v. Wade*), that can dog our nation for decades.

Furthermore, for-profit companies have been able to exercise First Amendment rights, due mainly to the fact that they are legal persons. A corporation is already allowed to invoke protections of the First Amendment when it comes to freedom of speech (*Pacific Gas v. Public Utilities*), of the press (*NY Times v. Sullivan*), of assembly (*Roberts v. US Jaycees*), and to petition the government for redress of grievances. Thus, the government is asserting in the Hobby Lobby case that the only First Amendment protection that corporate persons cannot invoke is the free exercise of religion. Can only parts of a constitutional amendment protect persons? Surely not. Such a position would abrogate the very purpose of having a written constitution which binds and enumerates the specific powers of government.

This leads some to question why corporations receive the legal protections of personhood at all, and why a corporation should "impose" its religious beliefs on its employees. A corporation is a legal person not for the structures and procedures of the lifeless entity that it is, but for the people who work within it. Those who are professionally employed by corporations have the right to assemble and collaborate towards a goal of profits. They can use protected forms of speech to convey their message, and they can publish information for the masses as a corporation, just as they can as individuals. (*cf. Pacific Gas v. Public Utilities*) The free exercise of religion is no different. The Green family decided to assemble and collaborate to earn a profit around their sincere Christian beliefs. This religiously held belief guided the family as they made several company decisions, both to the financial benefit and detriment of the company. Their company became an extension of their expression as individuals, as many mom and pop shops across America are.

A decision for Hobby Lobby does not force employees to comply with the religion beliefs of their employers. America does not have serfdoms where people are economically tied to lords of the land. Employee's services are marketable, and can be given to any number of employers whose mission and compensation might be best suited to their needs. What Hobby Lobby offers is the chance to work for an art-and-craft company centered on Christian principles. If the "centered on Christian principles" portion of the mission conflicts with an employee's pre-requisites, they do not have to work in that type of environment. I'm sure that Michael's or JoAnn's Fabrics would be an equally viable employer who does not have religious objections to the RU-486 abortifacient.

Therefore, I suspect that Tuesday, March 25th will crack the constitutional armor of the Affordable Care Act, and our political dialogue will retain its focus on the legislation for a few more years.

(Common Core ... Continued from Page 3)

was given a copy of *Benchmarking for Success.* In 2009, NGA and CCSO partnered to write the Common Core Standard. The Gates Foundation continued to contribute millions of dollars to NGA and the education policy well into this term. Gatesfoundation.org and the financial statements at CCSO.org list each time and how much the private company contributed.

In wake of the 2008 Economic Crisis and the disarray of the education system, coupled with the negative effects of the Bush administration's attempted resolution No Child Left Behind (NCLB), Congress gave the U.S Department of Education approximately five billion dollars to reconstruct and reform. Arne Duncan, Secretary of Education appointed in 2009 by President Obama, utilized the funding to begin the promotion of Common Core by organizing a multi-billion dollar nationwide competition, Race to the Top. To compete for a portion of the funding, States were required to promise to adopt the Common Core State Standards and expand their data systems so as to include new types of data such as student health and demographics.

Common Core Today:
What is the controversy?

The majority of the 45 states that promised to reform their state standards by the prompt deadline of Race to the Top are now rejecting Common Core. Almost all are taking actions to withdraw their promise, filing legislation, or at the very least delaying the implementation of the Common Core standards. The following is a non-exhaustive list of some issues raised by concerned parents, teachers, and in States claims in their attempt to withdraw.

Common Issues Raised with Common Core:

After experiencing what standardized testing has done in the past, there is heightened concern teachers will teach only to the test.
With the focus on Mathematics and English literature, the curriculum is narrowed and other subjects may fall by the wayside.
Standardized testing results in creating like minds and thereby suffocates complex thoughts and discourages diversity.
As of now, no evidence shows national standardized testing will have any improvements on education and students are once again the guinea pigs.

Two major legal issues that have been raised turn toward the question of the constitutionality of Common Core and the disregard for the separation of powers shown by the current administration. Although these are not the only legal issues raised, they seem to be the most recognized in arguments.

1. The 10th Amendment of the United States Constitution was created for the very reason of prohibiting expansion of powers by the federal government. It created a catch-all that "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people." According to Secretary Duncan, the current administration plans to expand those powers regardless.

> *"Traditionally, the federal government in the U.S. has had a limited role in education policy. The Obama administration has sought to fundamentally shift the federal role, so that the Department is doing much more to support reform and innovation in states, districts, and local communities."* The Vision of Education Reform in the United States: Secretary Arne Duncan's Remarks to United Nations Educational, Scientific, and Cultural Organization (UNESCO), Paris, France. November 4, 2010.

If CCSS were constitutional, it would be in accordance with the implementation process set out by the Constitution. Instead, it was created behind closed doors by private trade associations and allows no amendable process by the States and people it governs. Instead, the associations included a clause that states verbatim:

> "ANY USE OF THE COMMON CORE STATE STANDARDS OTHER THAN AS AUTHORIZED UNDER THIS LICENSE OR COPYRIGHT LAW IS PROHIBITED. ANY PERSON WHO EXERCISES ANY RIGHTS TO THE COMMON CORE STATE STANDARDS THEREBY ACCEPTS AND AGREES TO BE BOUND BY THE TERMS…"

Additionally, the license continues to lay out the copyright notice stating "NGA Center/CCSSO shall be acknowledged as the sole owners and developers of the Common Core State Standards, and no claims to the contrary shall be made**."**
www.corestandards.org/public-license

2. "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *James Madison*. The Spending Clause of Article I, §8, cl. 1 is the authority Congress relies on for ways in which it disburses federal money and in some cases allows conditions to attach to funding. However, to prevent coercion and limit the federal governments influence of state policy, the Court has established limitations through *South Dakota v. Dole*, expanded through *Pennhurst State Sch. & Hosp. v. Halderman* and *United States v. Butler.*

Dole and *Pennhurst* require conditions be clear and unambiguous. The purpose is to allow states to be mindful of what a condition entails and the consequences of accepting the funds. Many states take issue with the immediacy of acceptance implementation of CCSS Race to the Top requires. Some even claim that in order to comply with the abrupt federal grant application deadline, they were strained to approve Common Core before the standards were concluded and published.

Another issue found was the coercive nature of CCSS implementation. States that conformed to the new standards of Common Core would receive waivers from NCLB, whereas states that refused would be held to the full effect of NCLB and the pressure of more school closings. This type of condition was recently addressed when 26 states brought a challenge to the constitutionality of the Affordable Care Act of 2010 against the current administration in *Nat'l Fed'n of Indep. Bus. v. Sebelius.* The Court referenced *Pennhurst,* "Though Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post acceptance or 'retroactive' conditions."

(Continued on Page 10)

(Alex Rodriguez Strikes Out … Continued from Page 3)

arbitrator has shown a "manifest disregard for the law." Federal courts neither look at the decision *de novo* nor substitute their judgment for that of the arbitrator.

The Supreme Court case *Steelworkers v. Enterprise Car Co*. is one of many cases directly related to this topic. In *Steelworkers*, the Supreme Court stated,

"Federal courts should decline to review the merits of arbitration awards under collective bargaining agreements . . . The question of interpretation of the collective bargaining agreement is a question for the arbitrator, and the courts have no business overruling his construction of the contract merely because their interpretation of it is different from his."

If that's not convincing enough, it is important to note that the Labor Management Relations Act governs collective bargaining agreements. Under the LMRA, a review of an arbitrator's decision is even more limited. The courts again cannot review *de* novo and can only overturn the decision if the arbitrator "clearly abused his authority."

Rodriguez certainly has the right to file an appeal in Federal Court, but a reversal on appeal is highly improbable. It will likely turn out like many labor arbitration appeals of the past—a waste of time and money.

Update: February 8th, 2014

On January 30th of this year United States District Judge Edgardo Ramos directed Rodriguez's counsel to respond to MLB's motion to dismiss. In response, Tacopina filed a voluntary dismissal. Although no explanation or further details were given, it is clear that Tacopina finally convinced his client that to continue legal action would be imprudent. Sources say one reason Rodriguez dropped the suit was the estimated $10 million it would cost in legal fees to continue the legal fight. Another reason was Rodriguez's wish to stay in baseball's "good graces." Rodriguez hopes to pursue a broadcasting career or a partial ownership of a team after his career is over and fears that a prolonged fight with Major League Baseball might cause him to be "blackballed" by MLB. These considerations, along with the highly unlikely possibility that the arbitrator's decision would actually be overturned, finally convinced Rodriguez to drop all suits against MLB. How and when Rodriguez will return to baseball remains to be seen. He has expressed every intention to return to the game after his suspension in 2015.

(Employers Beware … Continued from Page 3)

The court employed what is now understood as the "primary benefit test" and held that the inquiry into whether an individual is an employee entitled to wages under the act will be determined on a totality of the circumstances standard in light of the economic realities of the situation. Here the court looked at the entire factual scenario to determine which party was the primary beneficiary of the training program. The court ultimately reasoned that because the trainees were not guaranteed to be placed into positions for which they were trained, the trainees' work needed to be supervised and checked, the trainees' work did not expedite the employer's business, and the trainees did not displace any regular employees, the trainees were not employees entitled to compensation under the act.

This case has proven problematic for employers because of its application and similarities to the intern-employer relationship. Interns that are trained on the job and that have begun working within a business according to their training may very well begin to impart some benefit to the business, thus blurring the line between their status as an intern or as an employee entitled to remuneration for their work. Like the trainees in *Portland Terminal*, interns who take positions with actual knowledge that they will not be paid can possibly transcend such a limitation by taking on work which may displace that of regular employees or expedite the overall work production of the company such that the intern becomes entitled to wages according to the benefit it bestows upon the company.

Thankfully, *Portland Terminal* does not leave employers without viable arguments in their defense. The primary benefit test has been interpreted to mean that an intern will gain employee status when it provides a *greater* benefit to the employer than that which he or she receives from the internship. See, e.g., *Velez v. Sanchez,* 693 F.3d 308 (2d Cir. 2012). Therefore, under the primary benefit test, employers should argue in the alternative that the experience and insight the intern gained coupled with the burden of scrutinizing the intern's work weigh heavily in favor of holding a person to their status as an intern.

An interesting twist came to the intern-employee analysis when the Department of Labor ("DOL") offered guidance with a six factor test. In April of 2010, the DOL published *Fact Sheet No. 71*, which includes six principles. The DOL states that when all of the principles are met, an employment relationship does not exist. The principles are as follows:

1. *The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;*
2. *The internship experience is for the benefit of the intern;*
3. *The intern does not displace regular employees, but works under close supervision of existing staff;*
4. *The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;*
5. *The intern is not necessarily entitled to a job at the conclusion of the internship; and*
6. *The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.*

The DOL approach is unique in that it claims to provide an exclusive set of principles for courts to use and it ultimately changes the Supreme Court's totality of the circumstances standard to a bright line standard with six exclusive factors to be met. It is unclear just how much deference courts will give to the factors set out by the DOL; however, they stand to obtain some deference under the Supreme Court's reasoning in *United States v. Mead Corp*., 533 U.S. 218, 234 (2001) due to the expertise that an administrative agency such as the DOL has in labor issues such as this.

Going forward, many courts still employ the primary benefit test. However, this test is accounted for in the second and fourth principles of the DOL test. In order to stay abreast of the standard to which they will be held in any claims brought by an intern for wages under the Fair Labor Standards Act, employers and their respective legal departments would do well to stay aware of any pending litigation that is considering the scope and extent of these factors.

(6th Circuit Split … Continued from Page 2)

In a subsequent motion, after inquiring into Ross's knowledge and ability to represent himself, the Court found that Ross "knowingly and voluntarily waived his right to counsel" and allowed him to proceed pro se with the help of standby counsel. A second competency hearing was then held at which standby counsel was present but did not participate on the record.

After an eight-day trial, Ross was convicted of conspiracy and five of the six substantive counts against him. On appeal, Ross argued that the "trial court erred in permitting him to waive representation of counsel and to represent himself because he was not competent to do either" and that the "trial court should have reappointed counsel for his competency hearing."

On the issue of whether Ross was competent to waive representation of counsel and represent himself, the Court found that the trial court substantially followed the proper model inquiry, strongly supporting the finding that Ross's waiver was knowing, voluntary and intelligent.

The critical issue of Ross's appeal was whether the trial court erred in failing to reappoint counsel to represent Ross during the second competency hearing. The Sixth Circuit found that the absence of counsel at the competency hearing constituted a statutory and constitutional error, and as such, required reversal.

A criminal defendant who is the subject of a competency hearing does not merely have a *right* to counsel, but rather Title 18 of the United States Code provides a criminal defendant "who is the subject of the hearing *shall* be represented by counsel." 18 U.S.C. § 4247(d). As the Court explained, "Even if the 'Constitution does not force a lawyer upon a defendant,' enforcing the Supreme Court's determination that the Constitution 'require[s] that any waiver of the right to counsel be knowing, voluntary and intelligent' requires representation until—as well as while—such a determination is made."

Furthermore, the Court relied on the unanimous agreement among Federal Courts of Appeals that a competency hearing is a critical stage of the criminal trial and as such the Sixth Amendment right to counsel applies. Therefore, the Court concluded that failing to provide Ross with counsel during his competency hearing was a statutory and constitutional violation.

The Sixth Circuit was split as to what the appropriate remedy was for deficiency of counsel during a competency hearing. Ultimately, the Sixth Circuit joined the Third Circuit in finding that the deprivation of counsel during a competency hearing is a "structural" error warranting automatic reversal. In comparison, the Tenth and D.C. Circuits held that deprivation of counsel during a hearing is a "trial" error, which does not require reversal, but instead warrants a retrospective competency hearing to determine whether the lack of counsel impacted the outcome of the trial.

The unique circumstances of Ross's case highlight several tensions inherent in the judicial process: efficiency versus comprehensiveness and judicial economy versus the appearance of fairness. As Judge Boggs argued in his dissent, the majority's standard "will raise the legal and practical costs of the diligent pursuit of a trial judge's ongoing duty to ensure the defendant's competence," and "means that a trial judge may well be understandably reluctant—especially in marginal cases—to have any type of proceeding focusing on a defendant's competence to represent himself once that judgment has initially been made."

In the context of the Sixth Amendment right to counsel, courts have frequently drawn a bright line in favor of comprehensiveness and the appearance of fairness. Likewise, I agree that the rule of automatic reversal is the appropriate remedy for deficiency of counsel during a criminal defendant's trial. However, I do not believe that this rule is necessarily appropriate for every deprivation case.

In the present case, the Court first deemed Ross to be competent, and permitted Ross to knowingly waive representation, while Ross was still represented by counsel. The Court then held a second competency hearing and permitted Ross to represent himself, as he had already waived his right to representation. It was not until his conviction that Ross claimed the court was in error in permitting self-representation at the second competency hearing. Therefore, I am of the opinion that the error in this case should have been treated merely as a "trial" error, as opposed to a "structural" error, because the Court had already held a competency hearing at which Ross was deemed competent.

After researching this case, one might question: Was the reason for Mr. Ross's appeal that he felt his lack of counsel violated his Constitutional rights, or did Mr. Ross merely regret his initial decision to represent himself?

While the answer to that question is not clear, I am inclined to disagree with the Sixth Circuit's holding. Based on the uniquely specific facts of this case, I believe this split decision in the Sixth Circuit is not likely to set a precedent on the proper remedy for a deprivation of counsel during a criminal defendant's competency hearing.

(Common Core … Continued from Page 8)

The last issue addresses the third and fourth requirements of *Dole:*

> 3) *the federal grant of funds must be related to the federal interest in particular national projects or programs.*
> 4) *the conditions imposed on the States must not be in violation of other constitutional provisions that may provide an independent bar to the conditional grant of federal funds.*

At least 4 separate federal laws prohibit the DE from its involvement with schools' curriculums. Because federal law explicitly prohibits the federal government from involvement in the curriculum, Common Core is a violation of *Dole's* third requirement as it cannot be a legitimate federal interest.

The new Common Core State Standard is not a policy that should cause animosity between political parties. The implementation of the new standard should not be viewed as embracing one party's views over another. Regardless of whether you affiliate yourself with the Republican Party or the Democratic Party or a little of both, the content of the curriculum is not the main issue. The establishment of a federal curriculum is.

Whether you consider yourself a full-blooded American or an American with a hyphen, the implementation of the Common Core Standard is an unconstitutional intrusion upon your constitutional rights. Irrespective of what state you yield from, when state(s) adopt policies that the federal government created by surpassing its constitutional limits upon powers reserved for the states, all citizens are affected. With all the changes taking place in American society, those made to our education system affecting the next generation should be subject to the highest scrutiny. More importantly, if we do not take it upon ourselves to question unconstitutional changes and allow unlimited authority to one branch, what form of government are we leaving for our children?

(Is This the Final Stop for Municipal Traffic Light Cameras … Continued from Page 6)

appeal, centered around two primary points.

Firstly, the local ordinances passed by Aventura (and Orlando) were unlawful exercises of power as Chapter 316 of the traffic statute was enacted to permit the legislature "to make uniform traffic laws [that] apply throughout the state . . . and uniform traffic ordinances [that] apply in all municipalities." Further Chapter 316 makes it "unlawful for any local authority to pass or to attempt to enforce any ordinance in conflict with the provisions of the chapter." *§ 316.002, Fla. Stat.* (2008).

Secondly, there is no express authorization for the city's ordinances; as such no solace can be sought under a city's home rule power, conferred by *Article VIII, section 2(b) Florida Constitution*, which states that "[m]unicipalities shall have governmental . . . powers [that] enable them to perform municipal functions . . . and may exercise any power for municipal purposes except as otherwise provided by law . . ." or the similar provision included within the traffic statute that "[t]he provisions of this chapter shall be applicable and uniform throughout this State and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any ordinance on a matter covered by this chapter unless expressly authorized . . ." *§ 316.007 Fla. Stat.* (2008).

In response, the cities relied primarily on *§ 316.008* in arguing that the ordinances did not conflict with the traffic statute as municipalities were expressly granted the authority to regulate traffic on their roads so long as the regulation was not inconsistent with state law, and here the ordinances were merely a supplement to Chapter 316. Also, the ordinances were not pre-empted by the traffic statute as there was no express reservation of the ability to use red light cameras to the state. *§ 316.008* (1)(w) allowed local authorities "with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, [to] . . . [r]egulate, restrict, or monitor traffic by security devices . . . on public streets and highways, whether by public or private parties . . ."

Each side of this argument had some success, namely, the City of Aventura in the Third District and Mr. Udowychenko in the Fifth District. This, however, created the current jurisdictional spilt and was the basis for the Florida Supreme Court granting certiorari to resolve the matter. It is easy to understand and appreciate the public policy argument behind the enforcement of red light cameras, as was noted and rejected by the Fifth District. However, looking at the arguments made by the drivers, there was clearly sufficient merit to create a split in authority, but, under the surface there is a lack of substantive depth. Given that the scope and application of the ordinances is narrow, it is likely that the Supreme Court will rule in favor of the municipalities in these specific instances, but going forward, with the recent enactment of the Mark Wandall Traffic Safety Act, the use of red light cameras will be a matter expressly reserved to the state, and the state alone, for enforcement.

(Who Will Rule Recess … Continued from Page 4)

sessions. The point of these sessions was an attempt to limit the length of time that the Senate is deemed to be in "recess."

In January 2013, the US Court of Appeals for the District of Columbia Circuit held that the Board lacked the necessary quorum when it issued its orders because the appointments were unlawful. The Court ruled that the President can only make recess appointments during inter-session recesses. These are recesses occurring between the first and second sessions of a particular Congress. The President may not make such nominations during intra-sessions, recesses occurring during a session of Congress, like the one that occurred in January 2012. The court also ruled that the President cannot use his recess appointment power to fill a vacancy that already existed before the recess. The only appointments that can be made are to those vacancies that are created during a recess. The NLRB petitioned for a writ of certiorari on April 5, 2013, which was granted by the Supreme Court. On January 13, 2014, the Supreme Court heard oral arguments.

NLRB

On behalf of the NLRB, Donald B. Verrilli, Jr., Solicitor General, argued that invalidating the appointments would make illegitimate thousands of presidential appointments. He also argued that diminishing presidential authority in this matter would be at odds with the constitution as the framers established it. According to the NLRB, the Clause applies to both inter-session recesses and intra-session recesses, allowing the President to fill vacancies that arise before the recess as well as those that arise during the recess. The NLRB further contends that *pro forma* sessions are covered by the Clause.

Noel Canning

Noel J. Fancisco of Jones Day, arguing for the employer, said that the government's position would rid an important check on presidential power, "creating a unilateral appointment power available for every vacancy at virtually any time with advice and consent to be used only when convenient to the President." According to Francisco, the recess appointment power arises only when the Senate chooses to trigger it by beginning a recess. Therefore, the power to prevent recess appointments lies with the Senate. Francisco argues that neither the President nor the Senate has the authority to take away Constitutional protections. The Constitution's purpose is to protect the people, not the President or the Senate.

Noel Canning argues that according to the plain text of the Clause, it only applies to inter-session recesses. The Clause only allows the President to fill vacancies that arise during the recess. Further, *pro forma* sessions are not recesses as specified in the Clause and thus the President is not allowed to make appointments during such sessions.

The Justices

Justice Kagan suggested that the clause was a "historical relic." She stated that the clause is largely used today to deal with "congressional intransigence." Essentially, the clause was created at a time when it was difficult to travel and communicate over large distances. It would aid in ensuring the executive branch could function while Congress was away. In modern times, however, the clause has become politically used as a way to deal with congressional intransigence rather than congressional absences—a way for a President to make appointments that the Congress does not want to approve. Justice Ginsburg observed that now "the Senate is always available" because it can be "called back on very short notice."

Conclusion

It is always difficult to determine how the Supreme Court will rule on any given case. It is even more so in this case as there is no precedent because the Justices have never confronted the issue until now. Based upon what has been argued and the reactions of some of the justices during oral arguments, I predict that the Supreme Court will uphold the U.S. Court of Appeals for the District of Columbia's ruling and find that the recess appointments of President Obama were not constitutional. The Court will likely limit the President's ability to make recess appointments. How strictly that limit will be is yet to be determined. If my prediction is true,
recess will no longer be as fun for the President!

Book Review: *Making Your Case*

By Ruth Doland

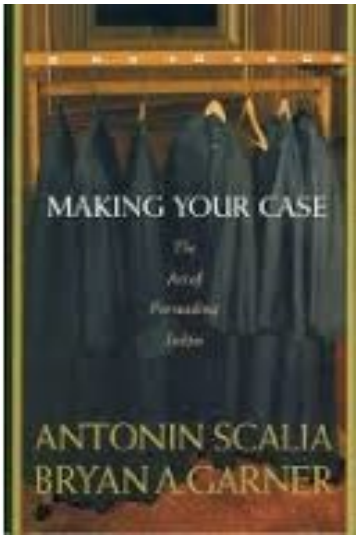
In *Making Your Case*, Justice Scalia and legal writing guru Brian Garner took a simple yet humorous approach to brief writing and oral argument. By using a clear and engaging writing style, the authors made this book a fun read. Scalia and Garner did an excellent and thorough job of simplifying the complexities of persuasive legal writing and oral advocacy. This book was written intentionally in a conversational manner so that it is adaptable by the first year law student and the practicing attorney alike.

The book is divided into several segments, but for purposes of this review, I will be centering my focus on the chapter entitled "General Principles of Argumentation." Laymen and lawyers should agree that arguments are a lawyer's craft. Indeed, without the right arguments, it would be a difficult task for an attorney to zealously defend and advocate on behalf of his or her client.

In the first section of *Making Your Case*, the authors focus on key points that I think lawyers should adopt in their practice. At first glance, I mumbled to myself about these points because they seemed so elementary. However, considering the rise in legal malpractice, these points should not be ignored or shrugged off. Instead, one should be eternally grateful for Scalia and Garner's advice because Scalia adjudicates major landmark cases that impact the entire nation. Consequently, he is routinely subjected to seeing great lawyers as well as mediocre lawyers at the high court. Similarly, Garner educates lawyers and students, thus making a significant impact on the quality of writing from legal professionals.

Scalia and Garner addressed 21 points in the general principles of argumentation. I do not propose one point over another because they all are equally important. Nonetheless, I will discuss principle number three: knowing your audience.

Succinctly stated, "[A] good lawyer tries to learn as much as possible about the judge that will decide her case." This point is important for not so very obvious reasons. The first thing to remember is that judges are humans like you and I. Hence, judges will all have their likes and dislikes. Scalia proposes that, prior to entering into a judge's courtroom, a lawyer should have already studied that judge's judicial philosophy. For Garner, the judicial philosophy is the driving force that leads a particular judge to draw conclusions. A wise lawyer would familiarize herself with articles, speeches and opinions of a particular judge.



Another important tactic to incorporate into one's legal practice is to observe the judge in action. Although it is not explicitly mentioned in *Making Your Case*, a lawyer should take the time to see how the judge interacts with other lawyers in that judge's courtroom. To observe a judge in the courtroom, a lawyer must think, plan and project. For instance, if a lawyer has court on a given day, the lawyer should plan to arrive at court earlier so as to allow himself a few minutes to not only confer with his client, but to also step into the judge's courtroom to see how the judge conducts his hearings. This is not always practical given a lawyer's busy schedule, but the benefits are enormous.

Scalia states one of the major benefits of observing a judge prior to a hearing in his courtroom when he offers the hypothetical of dealing with an impatient judge. If a lawyer dedicates as little as five minutes for observation, she can learn a lot about the judge who she will stand before in court. In five minutes, the lawyer would be able to observe whether the judge is impatient, rude, funny, or fair. In the case of the impatient judge, the lawyer will have advantage over the opposing party because she knows to be brief and to the point with the judge (a point that the opposing counsel missed because he did not observe the judge before appearing in his courtroom).

So what happens to the opposing counsel who does not take the time to observe the judge prior to appearing before the impatient judge for the very first time? First of all, that lawyer might feel it is necessary to bombard the judge with too many details. While the lawyer is rambling on, the judge is ready to show the lawyer the door. That is the least of the lawyer's worries! The lawyer will not only be humiliated in front of his client, the judge (a human like you and I) might force the lawyer to rush to his point. This can be detrimental to a client's case because the lawyer might miss out or skip important claims and defenses, possibly losing a client in the process. Finally, this lawyer will be marked as the lawyer who gives too much detail and fails to address the major points of his client's case.

At the other end of the spectrum, the lawyer who observes the judge beforehand will likely get favoritism because she took the time to prepare the major points of her case and kept it brief. Afterwards, she might even have time to take her client out to lunch for the victory in court. This small point makes a big difference not only in one's professional development, but also in one's relationship with the court and potential clients. No lawyer wants to be known as the lawyer whose client's case was thrown out because he talked too much and did not do his homework. The effects of this stigma will be hard to recover from. In conclusion, the principle of knowing your audience extends to familiarizing yourself with the judges who will adjudicate your client's matter. Overall, *Making Your Case* is one of the best legal practice treatises I have read because it is practical, funny, and can make a difference in an attorney's practice.

(Featured Professor Article … Continued from Page 2)

under "Skills & Expertise" on LinkedIn without being board-certified in those areas. Unfortunately, such endorsements often come from family members, colleagues, friends, and even mere acquaintances, and may be casually (not with any contemplated egotism) attributed with a simple click. For a carefully crafted analysis of this dilemma, consider Attorney Adam C. Losey's July, 2013 Orange County, Florida Bar Journal ("The Briefs) on "Think Before You Click – Social Media Ethics"[1] as well as more general commentary.[2] As Losey points out, "While Florida attorneys cannot list various fields of practice under Skills & Expertise on LinkedIn unless they are Board Certified, it is not entirely clear if that would include areas where the Florida Bar does not currently offer Board Certification (e.g., eDiscovery, underwater basket weaving, making hot chocolate)."

For non-Florida lawyers, state bars in New York, New Hampshire, Indiana, and Ohio— just to name a few—have issued ethics opinions regarding "skill endorsements" so that every lawyer (and law student lawyer-to-be) on social media can more carefully cultivate their online professional persona. The National Center for State Courts (NCSC) also has a helpful but non-exclusive compendium of ethics opinions on social media and the judiciary.

From New York, I share this piece entitled "Why New York's Recent Ethics Opinion on LinkedIn Shows the Folly of Regulating the Minutia of Social Media,"[3] and an article from New Hampshire.[5] From Indiana comes a piece on "Legal ethics involved in online social media and networking: an overview"[5] and from Ohio an item on whether a judge may be a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge.[6]

In the spirit of the Japanese Proverb "fix the problem not the blame," as this is an issue for law students and lawyers, the ABA's Law Practice bimonthly has published very useful guidance in their "Social Media for Lawyers Guide,"[7] and "The Professional's Social Network: LinkedIn"[8] for effectively using LinkedIn. Also worth perusing is AVVO's Lawyernomics piece on "LinkedIn Skills Endorsements for Lawyers: What You Need To Know."[9] As legal professionals exercise "message management," the following is a tip on how to "undo" an endorsement, notwithstanding that someone, somewhere on the Internet may have an image of that endorsement or a cached copy of what you are hoping to delete. LinkedIn's FAQ section provides an easy-to-follow process on how to undo an endorsement, but the abiding requirement is attorney monitoring of endorsements and periodic "culling of the endorsement herd" through the undo feature.

Finally, Attorney Greg Froom has also offered contemporary, helpful tips on "5 Legal Ethics Pitfalls to Avoid in Your Law Firm's Social Media Campaign."[10] He sagely advises:

1. Avoid unintentionally turning a "friend" into a client;
2. Social Media sites don't respect state lines;
3. Privacy on Social Media is an illusion;
4. If you can't tweet something nice, don't tweet anything at all; and
5. If you can't do it yourself, don't get someone else to do it for you.

So, if the reader has no other take-aways from this short article, they should ponder before they post – not only may your online entries follow you far longer than your "followers" do, but those entries may help or harm your ability to practice law.

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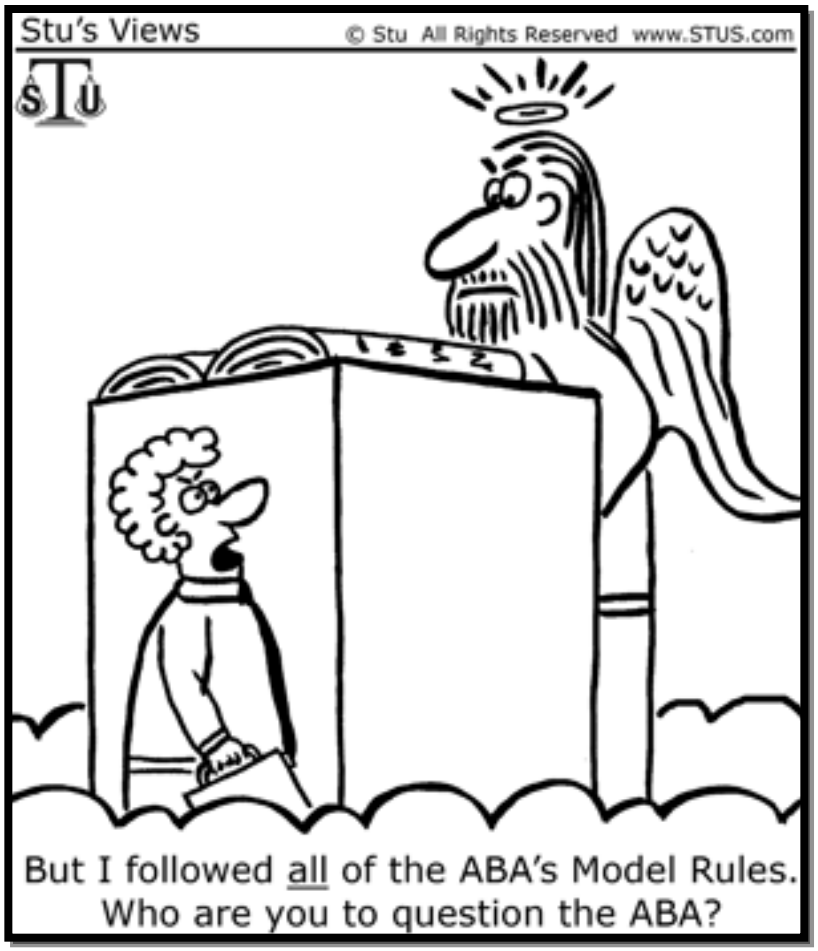
Misdirected Documents: An Ethical Dilemma

By Josh Schueneman

You are sitting in your law office, going over some of your cases set for trial in the next couple of weeks, and you receive an email from the opposing lawyer about the high dollar personal injury case that you landed a few weeks ago. You see that the subject line states "Client Letter," and as soon as you open the email, you know that the opposing lawyer has made a huge mistake: He has accidentally attached to you an email in which he is informing his client of the proposed course of action to resolve the case. You know this information would benefit your own strategy tremendously, but you aren't sure if you should read on. What are you supposed to do? Is it unethical to read the letter? Is it immoral or unprofessional to use the letter to your advantage? Should you delete the email and act like it never happened?

When dealing with misdirected documents, the Florida Rules of Professional Conduct require very little of the receiving lawyer. Rule 4-4.4(b) states, "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." In determining whether the lawyer has any further duties after notifying the sender, the comment section of Rule 4-4.4 makes it clear that any further requirement, such as returning the document, is a matter of law beyond the scope of the rules of ethics. While some lawyers may choose to return a misdirected document without reading it, the comment section states that applicable law does not require the lawyer to do so and that it is a matter left to the lawyer's professional judgment. However, a lawyer should consult with his client prior to his decision in accordance with Rules 4-1.2 and 4-1.4.

Now that you have promptly notified the opposing lawyer of his mistake, what do you do with the confidential email in which he discusses litigation strategy with his client? Some lawyers would choose to delete the email immediately. Others would read the document thoroughly to gain an advantage in upcoming settlement negotiations and possibly at trial. Another thing to consider is that when a lawyer represents a client, it is the lawyer's responsibility to do so with zeal while conforming to applicable laws and ethical rules. Although there may be differences in opinion as to which approach to take when deciding what to do with a misdirected document, as a lawyer, you should always keep this in mind: While each case is of great importance to you, there is nothing in the world that is more important to your clients than their own case.



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