the Messenger

Volume 1 // Summer 2018

Milwaukee Bar Association CLE:
Family Court Judges Live and In Concert

ALSO IN THIS ISSUE:
Technology, Walking, & the Law

Regular Features

Make Your Voice Heard
Send your articles, editorials, or stories to jsawinskicouch@milwbar.org. We also have seats available on the *Messenger* Committee.

We look forward to hearing from you!

The MBA *Messenger* is published quarterly by the Milwaukee Bar Association, Inc., 424 East Wells Street, Milwaukee, WI 53202.
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message from the president


Shannon A. Allen

The old saying "time flies when you are having fun" certainly applies to me as I write my final MBA "Message from the President." It has been an extremely fulfilling, enlightening, and yes, busy, year.

In May, I had the honor and privilege of speaking at the annual **MBA Memorial Service.** It was undoubtedly the most important act I performed as MBA President. Being able to interact with loved ones of our friends and colleagues who left us in this past year was heartwarming. Those conversations are the very reason why the MBA needs to continue to host the annual MBA Memorial Service. If you have not attended the MBA Memorial Service, please strongly consider doing so next year.

Switching gears to a much lighter note, the MBA is certainly having an exciting and busy summer as we prepare to move into our **new home at 747 North Broadway Avenue** in early September. For those of you of a certain law school graduation age, the MBA is moving into the former Grenadier's restaurant space and/or the former Mocean's space.

When the decision was made that the MBA was moving, we had a meeting to discuss capital campaign strategies. As a practicing lawyer and not a professional fundraiser, the concept of running a capital campaign was all new to me and, I admit, a bit daunting. In working on the MBA's Capital Campaign, I have the opportunity to meet with numerous key stakeholders in the Milwaukee legal community. Those conversations have been extremely eye-opening. As I reflect upon those meetings, the common theme in every meeting was how supportive the legal community is of the MBA.

During the past several months, it has also been extremely interesting to hear lawyer's individual experiences with the MBA involvement throughout their respective careers. One MBA member told me when he arrived in Milwaukee after law school, he joined the MBA to develop a social network. A second MBA member indicated that being co-chair of a practice section allowed him to become more confident in his particular practice area and more comfortable with public speaking. A third MBA member from a large firm talked about how the Fairchild Inns of Court have allowed him to get to know local lawyers and judges in State Courts as his practice was a national Federal Court practice.

As both MBA members and members of the Milwaukee legal community, we each have a sense of responsibility to the future of the Milwaukee legal profession in that we have made a decision to create a new space to serve the next generation of legal professionals in Milwaukee.

To that end, the **MBA Capital Campaign Committee** is requesting your help in transitioning to our new home and invite a contribution of each MBA member of equal to one billable hour if you are in the private sector, or a reasonable equivalent if you are in the public sector or in a non-billable and/or non-legal position. We need your help to make our vision a reality. Please spread the word to your friends and colleagues about the importance of financially supporting the MBA's Capital Campaign. Make checks payable to "Milwaukee Bar Association" and note that it is for the Capital Campaign.

The MBA's new space will help with meeting our mission and will provide:

- Increased accessibility and visibility for the community (legal and public alike) via a ground level location with floor to ceiling windows
- Increased ability to act as a resource to the legal community with:
  - A board room equipped with video conferencing technology
  - Two large flexible meeting room spaces for continuing legal education, meetings, depositions, arbitrations, mediations, etc.
  - Two small meeting rooms for client meetings, mediations or flexible attorney workspace
  - A co-working area that can accommodate up to four attorneys complete with laptop plugins and a copier/printer/scanner
  - A comfortable lobby lounge with refreshments

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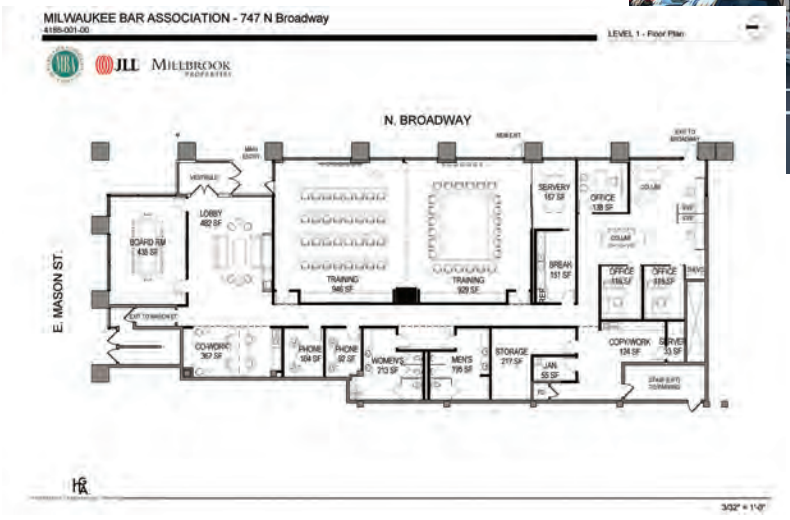
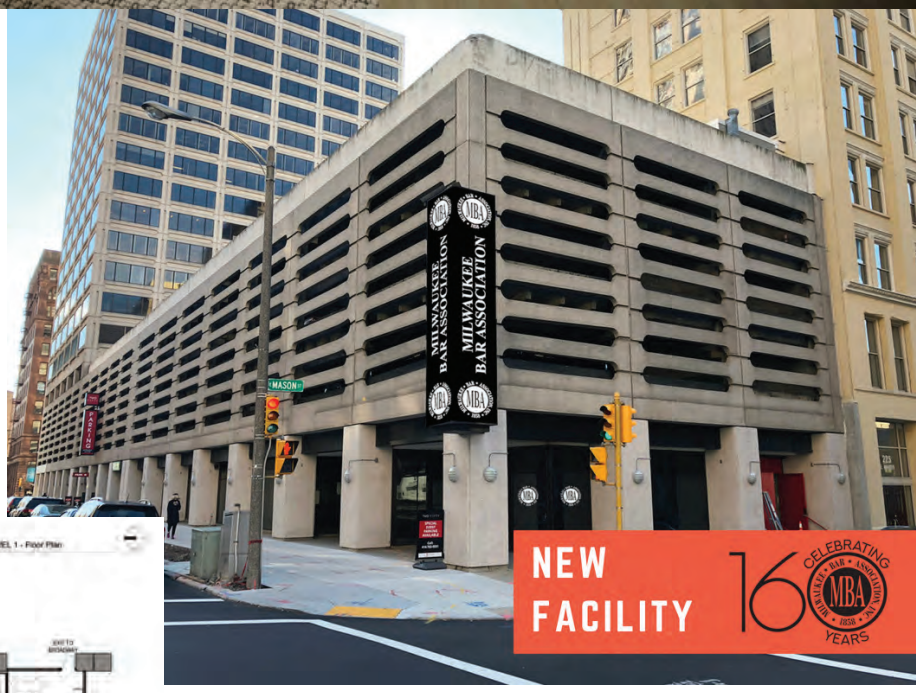
In closing, I want to thank you for your support and input during the past year. I look forward to continuing to work with the MBA Capital Campaign Committee, staff, and membership in transitioning to the MBA's new home in September.

Happy Summer and Go Brewers,
Shannon





Godfrey & Kahn Elects Three New Shareholders

Godfrey & Kahn announces the election of Andrea Cataldo, Krisstina Ebner and Annie Eiden to shareholder status, effective immediately. **Cataldo** is a shareholder in the firm's Corporate Law and Emerging Companies Practice Groups. **Ebner** is a shareholder in the firm's Corporate Law Practice Group. **Eiden** is a shareholder in the firm's Labor & Employment and Litigation Practice Groups.


Andrea Cataldo


Krisstina Ebner


Annie Eiden


Isaac Roang

Isaac Roang Receives Next Generation UPAF Leadership Award

Milwaukee partner of Quarles & Brady, Isaac Roang, received the 2017 Next Generation UPAF Leadership Award, sponsored by the We Energies Foundation. The Next Generation UPAF Leadership Award spotlights one community leader within Next Generation UPAF who cultivates, encourages and promotes the performing arts in Southeastern Wisconsin.


Jason Scoby

O'Neil, Cannon, Hollman, DeJong & Laing Announce Attorney Jason Scoby as Shareholder

Scoby has been with the firm since 2009 and is a member of the firm's Business Practice Group and Banking & Creditors' Rights Practice Group. He advises and represents individuals, businesses, and banks on a variety of corporate, banking and business-related issues.

von Briesen & Roper Expand to Add Peterson, Johnson & Murray and Levine & Bazelon

Twenty-two lawyers and all of the staff formerly of the law firm Peterson, Johnson & Murray, and three lawyers and the staff formerly of the law firm Levine & Bazelon, S.C. have joined von Briesen & Roper.


Christopher R. Liro

Andrus Intellectual Property Law Announce Christopher R. Liro as Partner

Liro focuses his practice on intellectual property litigation in federal district and appellate courts, administrative proceedings before the PTAB, TTAB and ITC, and counseling clients in transactional matters, including licenses, joint development agreements, and dispute resolution. Chris is the Chairman of the Board of Directors of the State Bar of Wisconsin Intellectual Property and Technology Law Section.

Gimbel, Reilly, Guerin & Brown LLP Celebrates 50 Year Anniversary

Founding partner Franklyn Gimbel states, "It gives me a sense of great pride that the law office I started 50 years ago, following a 5 year stint as an Assistant US Attorney, has grown and matured into the vibrant office of today's Gimbel, Reilly, Guerin & Brown, LLP." Attorney Gimbel added, "Our goal has and always will be to give our clients better outcomes than they otherwise would have had."

Featuring Atty. Kathy Charlton, Hawks Quindel

Kathy Charlton is a shareholder at Hawks Quindel, and her practice areas are family law, employment and fair housing. She grew up in a town of about 1,000 in rural Iowa where her parents were very active in the community. "My father was the mayor. I think I grew up just knowing if you want good things to happen in the community, you need to be active," Charlton said. She obtained her undergraduate degree from Bryn Mawr College in Philadelphia and her law degree from Vermont Law School in South Royalton, Vermont.

She has spent an extensive amount of time providing *pro bono* services to those in need in the Milwaukee area. "It is important to me to do a significant amount of *pro bono* work representing individuals in family law matters," Charlton said. In addition, she has been a regular volunteer for more than thirty years at the various versions of what is now the Milwaukee Justice Center (MJC). The clinic started more than twenty-five years ago with a group of lawyers, family court commissioners and judges. She was in the group that drafted the initial forms that were sold at the Legal Resource Center. Through the leadership of the Family Court Commissioner's office in Milwaukee County, the Milwaukee Bar Association (MBA) and Marquette Law School, the MJC has evolved into a very important community resource for those who cannot afford an attorney.

In addition to volunteering at the MJC, she also volunteers for Legal Action of Wisconsin's Volunteer Lawyers Project which she has done for more than thirty years. One can make the sound assumption that when she commits to doing something, she goes all the way. "I recognize the importance of a good screening process in terms of being able to connect people who need services—with lawyers who are willing to provide services and organizations monitoring the quality of those services. They do a very good job of providing a structure for delivering *pro bono* services in family law."

When she is not working or volunteering she actively reads, golfs, kayaks, cross country skis and snow shoes. Charlton especially enjoys going to Chicago to attend plays and hiking with her two energetic Dalmatians. While she isn't quite sure what she will be doing when she eventually stops practicing law, one thing is certain—she would like to continue to contribute to her community and use her talents from the legal profession to help others.

Through her career and extensive volunteer work, Charlton remarks that her time has been well spent, "Practicing law in a small law firm is a very rewarding way to practice law because you get the chance to mentor young lawyers and to run a small business with colleagues whom you value and respect."

new members

Christopher Ahrens, *The Previant Law Firm*
Shannon A. Allen, *DeWitt Ross & Stevens*
Sofia Nicole Ascorbe, *Legal Action of Wisconsin*
Jill Aufmuth, *JKA Law*
Samantha Bailey
Nicole Beitzinger
Brett S. Bellmore, *Foley & Lardner*
Josh Bernstein
John Black
Lyndsey K. Bley
Griffin Bliler
Jaime Bouvette, *Cummisford, Acevedo & Associates*
David P. Britton, *Foley & Lardner*
Kelsey Brown
Michael J. Cerniglia, *Esserlaw*
Daniel Chanen, *Goldstein Law Group*
Lillian Cheesman, *Summit Law Office*
Milton L. Childs, *Wisconsin State Public Defender*
Hana Cho, *Reinhart Boerner Van Deuren*
Patrick M. Cooper, *Cooper Law Group*
Casey J. Cross
Jenelle M. Dame, *Legal Action of Wisconsin*
Mercedes de la Rosa
Be'Jon Edmonds
Chelsea Fischer, *Centro Legal*
Alexander Foundos, *Centro Legal*
Joanna Fraczek, *Attorney's Office, City of Milwaukee*
Douglas H. Frazer, *DeWitt Ross & Stevens*
Daniel J. Gabler
Yolanda M. Gauna
Sean M. Gaynor, *Leib Knott Gaynor*
Benjamin B. Genzer, *Reinhart Boerner Van Deuren*
Jana Gerken, *Kinetic Compliance Solutions*
Shelly Grasso
Saveon Grenell
Sarah Hanneman, *von Briesen & Roper*
Mark J. Haberberger, *GE Healthcare*
Kristofor Hanson, *Lindner & Marsack*
Katherine Headley
Dana Rae Holle, *Yost & Baill*
Bailey Holt
Christopher M. Hruska, *Reinhart Boerner Van Deuren*
Anne Jaspers, *The Law Office of Anne Jaspers*
Steve Jesser, *Steven H. Jesser Attorney at Law*
Andre Johnson
Nathan Johnson, *von Briesen & Roper*
Randy Jones
Nathan M. Jurowski, *AGC of Greater Milwaukee*
Tony U. Kim
Danilo Knezic
Alexander J. Kostal, *State of Wisconsin Public Defender*
Bonnie Helfgott Krisztal, *Krisztal Law*
Grace M. Kulkoski
Douglas S. Knott, *Leib Knott Gaynor*
Rudolph Joseph Kuss, *Stevens & Kuss*
Julie Leary
Jenna Leeson
Brenden M. Leib, *Leib Knott Gaynor*
Samuel Liverseed, *Domer Law*
Jessica Lothman
Jonathan Luljak, *Michael Best & Friedrich*
Thomas J. McClure, *McClure Law Offices*
Bethany C. McCurdy, *Michael Best & Friedrich*
Andrew Meerkins, *Foley & Lardner*
Robert Menard, *Menard & Menard*
Robert M. Mihelich, *Law Offices of Robert M. Mihelich*
Samuel M. Mitchell, *Crivello Carlson*
Patricia Morrow, *Patricia Morrow Attorney at Law*
Kilian Pac Murphy, *Reinhart Boerner Van Deuren*
Judith O'Connell, *von Briesen & Roper*
Maureen Lynn O'Leary, *Willms Law*
Madeleine Olmstead, *Nelson, Krueger & Millenbach*
Richard Thomas Orton, *Crivello Carlson*
Lauren L. Otte
Katelyn A. Pellitteri, *von Briesen & Roper*
Jason P. Perkiser
John P. Pinzl
Reince R. Priebus, *Michael Best & Friedrich*
Amber L. Raffeet August, *Legal Aid Society of Milwaukee*
Jeffrey Roeske, *Reinhart Boerner Van Deuren*
J.J. Rolling, *von Briesen & Roper*
Hon. Richard Sankovitz, *Milwaukee County Circuit Court*
Maria DelPizzo Sanders, *von Briesen & Roper*
Sherin Schapiro, *S. A. Schapiro Attorney and Counselor at Law*
Paul Schinner
Madeline Schmid, *von Briesen & Roper*
Pamela Schmidt, *Scopelitis, Garvin, Light, Hanson & Feary*
Danielle L. Shelton
Molly C. Stacy
Craig Stoehr, *Michael Best & Friedrich*
Kimberly Streff, *Michael Best & Friedrich*
Heidi R. Thole, *Reinhart Boerner Van Deuren*
Alissa Thompson
Ryan J. Truesdale, *Hupy and Abraham*
Deanne M. Wecker
Lindsey White, *Probst Law Offices*
Elizabeth Rosemurgy Wood
James B. Vitrano
Marina Waclawski, *von Briesen & Roper*
John H. Wink, *Reinhart Boerner Van Deuren*
Li Zhu, *Michael Best & Friedrich*
Claire Zyber, *Kershek Law Offices*

Milwaukee Bar Association Foundation

30th Annual Golf Outing

August 1, 2018 11:30 a.m. - 7:30 p.m.

Fire Ridge Golf Course, Grafton

Scramble format, but regulation play is also allowed. Reservations will be taken on a first-come, first-served basis. Register as a foursome or individually to be placed in a foursome. Rain or shine.

To register, go to www.milwbar.org and click on event name under Upcoming Events.

RSVP by July 23, 2018.

All proceeds benefit the MBA Foundation and its signature project, the Milwaukee Justice Center

MILWAUKEE BAR ASSOCIATION, INC. MBA 1858 FOUNDATION

Raffle Tickets On Sale Now!

at the MBA
$25 each or 5 for $100

WIN PACKERS TICKETS

Win four 50-yard line tickets to the **Green Bay Packers v. Arizona Cardinals** game on Sunday, December 2nd at Noon

Package also includes:
- Transportation to and from Lambeau Field
- $100 gift card for tailgating supplies

Contact Lesley to get your tickets!
lluehrs@milwbar.org
414-276-5932

MILWAUKEE BAR ASSOCIATION, INC. MBA 1858 FOUNDATION

MJC Mobile Legal Clinic:

A project of Marquette University Law School and the Milwaukee Bar Association Expands

The MJC Mobile Legal Clinic has expanded its services, host sites, and volunteer ranks. In 2017, the Mobile Legal Clinic assisted 2,017 clients at 40 clinics across 17 different host sites, including 12 new sites. As of May 19, 2018, the Mobile Legal Clinic has assisted over 115 clients at 19 clinics across 9 different host sites.

We are happy to welcome three new firms who have committed to staffing attorney volunteers on a monthly basis at different host sites.

Borgelt Powell Peterson & Frauen volunteers are assisting clients at the Milwaukee Rescue Mission one Friday afternoon per month. Thank you to Josh Cronin and Stephen Miracle for recruiting and coordinating volunteers for this project.

DeWitt Ross & Stevens volunteers are assisting clients at Meta House, one Tuesday per month. Special thanks to MBA President, Shannon Allen, for her efforts to recruit and coordinate volunteers from her firm.

von Briesen & Roper volunteers are assisting clients one Saturday per month, alternating between Hope House and Despenza de la Paz. MBA Foundation Board member, Stacy Gerber Ward, has been instrumental in recruiting and coordinating volunteers from this firm and we thank her for this support.

These three firms join **Michael Best & Friedrich** and **Godfrey & Kahn** as the firms committing monthly volunteers to Mobile Legal Clinic services. Welcome all! We hope you enjoy the Mobile Legal Clinic as much as we do.

The Mobile Legal Clinic has also received grant funding from the Evinrude Foundation and Marquette University Law School to continue hosting an AmeriCorps Public Ally each year. The Public Ally works 32 hours per week to help the Mobile Legal Clinic expand its capacity to serve people in Milwaukee by working with host site and volunteer recruitment. The Public Ally spends one day per week in ongoing training and professional development with other Allies at other locations.

The MJC Announces the Jon Allen Pace Setter Volunteer Awards

In February 2018, the MJC lost a valuable and beloved member when Jon Allen suddenly passed away at age 37. Jon volunteered for two years before joining the full-time staff in June 2017. He loved the MJC, treated everyone with respect and kindness, and was an outstanding mentor and teacher for student volunteers.

To honor his memory, the MJC has renamed its annual volunteer awards as the **"Jon Allen Pace Setter"** awards. The 2018 Jon Allen Pace Setter recipients are: Undergraduate Intern Volunteer - Grace Kreuser, UW-Milwaukee; Law Student Volunteer - Matt Sowden, 2L, Marquette Law School; Administrative Assistant Volunteer - Danette Heracovici, Reinhart Boerner Van Deuren; and Attorney Volunteer - Kathy Charlton, Hawks Quindel.

CLE Speaker Thank You

The MBA thanks speakers who presented CLE seminars January through June.

Comm. Patrice A. Baker, *Milwaukee County Circuit Court*
Adam S. Bazelon, *von Briesen & Roper*
Kelsey L. Berns, *Reinhart Boerner Van Deuren*
Comm. Ana Berrios-Schroeder, *Milwaukee County Circuit Court*
Ryan M. Billings, *Kohner, Mann & Kailas*
Hon. David L. Borowski, *Milwaukee County Circuit Court*
Joshua Brown, *Department of Natural Resources*
Stephanie M. Brown, *Department of Workforce Development*
Comm. Susan Callies, *Milwaukee County Family Court*
Nola J. Hitchcock Cross, *Cross Law Firm*
Kelley Schacht Daugherty, *Godfrey & Kahn*
Cesar del Peral, *Equal Employment Opportunity Commission*
Hon. Michael J. Dwyer, *Milwaukee County Circuit Court*
Sara Eberhardy, *Eberhardy & Eberhardy*
Comm. Lorenzo Edwards, *Milwaukee County Circuit Court*
Nadelle Grossman, *Marquette University Law School*
Patricia L. Grove, *Halling & Cayo*
Katherine L. Hanes, *Quarles & Brady*
Katie Hanley, *von Briesen & Roper*
Susan A. Hansen, *Hansen & Hildebrand*
Peter Herman, *Regional Whistleblower Investigator for DOL/OSHA*
Ann M. Hetzel, *Milwaukee County Child Support Services*
William R. Hughes, *Foley & Lardner*
Hon. David E. Jones, *U.S. District Court for the Eastern District of Wisconsin*
David B. Karp, *Karp & Iancu*
Jason Knutson, *Department of Natural Resources*
Amy J. Krier, *Certus Legal Group*
Hon. Mary M. Kuhnmuench, *Milwaukee County Circuit Court*
Maura Cook Lamensky, *Husch Blackwell*
Jeremy P. Levinson, *Halling & Cayo*
Jessica A. Liebau, *Wessels Law Office*
Jeaneen J. Mardak, *Milwaukee County Probate Division*
Hon. Kevin E. Martens, *Milwaukee County Circuit Court*
Avery J. Mayne, *Walny Legal Group*
Joseph t. Miotke, *DeWitt, Ross & Stevens*
Elizabeth S. Murrar, *Murrar Law Office*
Rob Namowicz, *Spindletop Investigations*
Ivy Okoniewski, *AIG*
John C. Osborne, *GZA GeoEnvironmental*
Thomas J. Phillips, *von Briesen & Roper*
Timothy J. Pierce, *State Bar of Wisconsin*
Comm. David Pruhs, *Milwaukee County Circuit Court*
Brian M. Radloff, *Ogletree, Deakins, Nash, Smoak & Steward*
Stacie H. Rosenzweig, *Halling & Cayo*
David P. Ruetz, *GZA GeoEnvironmental, Inc.*
Hon. Richard J. Sankovitz, *Milwaukee County Circuit Court*
Caitlyn B. Sikorski, *Reinhart Boerner Van Deuren*
Steven H. Silverstein, *Thomson Reuters*
Jill Hamill Sopha, *Sopha Mediation*
Charles P. Stevens, *Michael Best & Friedrich*
Roberta Steiner, *Halling & Cayo*
Amanda Dynicki Tollefsen, *Department of Workforce Development*
Anne E. Wal, *von Briesen & Roper*
Peter J. Walsh, *Husch Blackwell*
Aaron R. Wegrzyn, *Foley & Lardner*
Kathryn Westfall, *Reinhart Boerner Van Deuren*
Grant G. Zielinski, *Divorce Financial Solutions*

Marquette University Law School recently launched a new *pro bono* project, the Estate Planning Clinic. Attorney Marisa Cuellar Zane (Marquette Law, 2011), an active volunteer in the Marquette Volunteer Legal Clinics at the Milwaukee Justice Center, was hired in the spring of 2018 to oversee the program.

The **Estate Planning Clinic** pairs attorneys and law students together to assist with providing information as well as the creation of basic estate planning documents, such as a basic will, a living will, and powers of attorney for both health care and finances. The clinic primarily serves people with low incomes and/or few assets, many of whom do not realize the importance these legal arrangements can have for their children or other family members.

The program offers clients an appointment-based service during the Marquette Volunteer Legal Clinic hours at the Veterans' Service Office (6419 W. Greenfield Avenue) on the 1st and 3rd Mondays and the House of Peace (1702 W. Walnut St.) on Tuesdays. For more information and to volunteer, please contact Marisa Zane at 414-288-5378.

New to the practice of law? Want to make a good impression on colleagues and clients? Starting your own firm? If you answered yes to any of these questions, then the MBA's **Grow Your Practice Institute** is for you. Rolled out last fall, the Grow Your Practice Institute is a series of CLE programs designed for newly licensed attorneys and law students and is meant to sharpen and shape one's law practice. In addition to relevant and practical content, programs typically contain a networking component. And, best of all, the programs are free of charge to students and those in practice five years or less.

Programs are planned with the needs of new lawyers in mind and cover substantive areas of law, as well as practical skills necessary to be a successful attorney. Topics presented this past year included time management and maximizing your online presence as well as contract drafting, business basics, building a family law practice, immigration and citizenship basics, and what to know about intellectual property.

In case you missed the programs, here is what people have been saying:

- "Great new program."
- "The information presented is extremely useful for my practice."
- "The advice shared was geared toward being put to immediate use."
- "I enjoyed the speaker expertise and real world examples."
- "I valued the candid practice pointers."
- "Grow Your Practice Institute keeps getting better! Keep it up!"

Another series of programs is in the works for 2018-19. The new schedule will be released in late summer. Be sure to check the MBA's website and read your emails for program details. All Grow Your Practice Institute programs are noted on calendars with the tree or leaf logo.

Top Five Suggestions for Building Your Skill Set as a New Attorney

by Matt Ackmann, Hawks Quindel

As a newly practicing attorney, it is essential that you focus on building your skill set. Not only will it better serve your clients, it will also enhance your professional reputation. Here are my top five suggestions for building your skill set.

1 **Mentoring.** Having a mentor is essential for any new attorney to efficiently build his or her skill set. A mentor will provide the knowledge base from which you can pull as you come across new issues.

2 **CLE seminars.** The State and local bars, including the MBA, host a variety of practice area or issue focused CLE seminars. Often times, the materials provided will be a resource to reference for years to come.

3 **Join and participate in practice area groups.** Practice area groups are a great resource to keep updated on developments in your field and network with potential consult connections. Some groups have dedicated mentor/mentee programs if you are struggling to find a mentor.

4 **Be proactive.** The most essential tool you are intended to exit law school with is the ability to teach yourself. While you should dive into research for issues you are unfamiliar with on your docket, being proactive and learning about other areas within your field will better serve you when those issues inevitably arise.

5 **Don't become complacent.** You've built a solid skill set and are finally getting comfortable. Don't let that sense of comfort overcome your ability to improve. Use what you've acquired and take it to the next level by hosting seminars and authoring pieces. The preparation will improve your knowledge.

Body Heat

Francis Deisinger
113 minutes, 1981
Directed by Lawrence Kasdan

During a recent convalescence, a friend sent me a collection of classic American "film noir" movies from the '40s to help me pass the time. There is a long running question among film critics as to whether "film noir" is a genre of film circumscribed by its dark themes or a style of cinema defined by visual markers.

In my view, film noir is an "open software" that is malleable in the hands of writers and directors. The best lawyer–centric noir film I know is a modern take set not on the shadowy mean streets of LA or New York City, but in a nondescript Florida seaside town during a heatwave.

Body Heat, from 1981, was director Lawrence Kasdan's first film. It also introduced William Hurt, Kathleen Turner, Ted Danson and Mickey Rourke in their first significant film roles. Hurt is Ned Racine, the small town's indolent lawyer/Lothario, cavalierly representing his low-rent clients by day and picking up waitresses at night. On a sultry evening he walks past the town band shell, where an orchestra labors in the heat. As he watches, a stunning woman in the audience wearing a clingy white dress stands up, turns and slowly walks past him. He follows like a fish to a sweetly baited hook, catching up to light her cigarette and to attempt a pick-up. But his prey sizes him up and quickly observes, "You're not very smart, are you? I like that in a man." Racine does not realize how honest she is being until much later.

Thus begins Ned Racine's descent into a double cross scheme in which he plays the sap to Kathleen Turner's *femme fatale* Matty Walker. Matty springs the trap with sex. Ned thinks he has seduced her, but it is really the other way around. And unlike '40s noir films in which sex was implied but never displayed, *Body Heat* explicitly lives up to its name.

Once Ned is sufficiently besotted, he begins to ask about Matty's absent husband Edmund (Richard Crenna)—particularly because Matty lives in a magnificent estate in a tiny village down the coast from his pedestrian town. Matty describes an unhappy May/September marriage to a man who made his fortune with unscrupulous partners and often stays away for weeks on his shady business. Ned is quickly so smitten by Matty that he asks the lawyer's question: why not just divorce him? The two can live together happily ever after—and be rich besides. Matty bitterly explains that under a prenuptial agreement she was forced to sign, she gets almost nothing in a divorce.

The genius of *Body Heat*'s plot (and Matty's plan) is that Ned keeps coming up with ideas that he only thinks are his own. After another bedroom encounter, he suggests the classic noir solution: murder. Matty is "startled"—but allows herself to be convinced. Ned does the planning, which involves throwing off suspicion by disposing of the body in a fire set at a derelict property owned by Edmund and his unsavory partners. Ned consults with his professional arsonist client (Rourke) to create the incendiary device.

Once the plan is fully in motion, Matty complains about another legal document: Walker's will divides his estate between Matty and a favored niece. Matty doesn't think it's fair, and suggests that Ned forge a new one. He is adamantly against it—observing that it would look too suspicious so close to Edmund's death. Matty backs down, assuring him that she was only thinking of how much better the other half of the money would make their coming life together.

When two people agree to murder for money, can they trust each other? In a noir film, the answer is, always, no. But inevitably one does, until it's too late. A few days after the murder and fire, with Ned's two best friends, Assistant District Attorney Peter Lowenstein (Danson) and Detective Oscar Grace (J. A. Preston) on the case and nosing around, Ned gets a call from a big firm Miami lawyer telling him that he had represented Edmund and that "there's a problem with the will." The lawyer sets a meeting for him, Racine, Matty and Walker's sister.

When Ned arrives he is surprised to see Lowenstein there too. And even more surprised, although he keeps a poker face, to learn that the problem is a critical mistake in the recent will that the Miami lawyer says Ned drafted for Walker. Collecting himself, he asks what the problem is. The Miami lawyer explains that the wording Ned used violated the rule against perpetuities, and notes disparagingly that it's the same mistake Ned made in a notorious earlier case in which he had been sued for malpractice. Matty seems befuddled and asks, "But what does all this mean?" Ned explains that the Will is invalid, and that Walker has died intestate. "You mean I get it all!?" asks Matty.

A thematic feature in many noir narratives is the inevitability of doom that often befalls its protagonists. Ned's intent to confront Matty that night about the forged will ends uselessly in another steamy boudoir scene, Matty assuring him that the plan will still work and they will be all the richer. Ned should know much better, but he wants to believe her.

Then, a few nights later, Lowenstein, flouting his own ethical obligations, warns his friend of the mounting evidence that Detective Grace is amassing, and Ned begins to understand the depth of Matty's deception. When Matty calls him from Miami to tell him the money has been released to her, and that she wants to meet him at the boathouse of the estate to plan their future, Ned smells the rat. In the film's climatic scene, he prepares his own double cross for Matty when the boathouse is booby trapped. When Matty arrives, she is wearing the white dress again, her original lure. But Ned is holding a gun, and sends Matty on a forced march to her own fiery end. At the last moment, she turns and tells him that she loves him, and, despite everything, Ned yells "Matty, wait!" just as she disappears behind the boathouse. A moment later, the bomb goes off. In the film's last act we see Ned sweating in a prison bed, staring at the low ceiling. Suddenly his eyes open wide as the realization hits him as to what really happened at the boathouse. Matty was right. He wasn't too smart.

Body Heat is a great modern film noir that skillfully exploits the law and lawyering in its clever plotting.

Justice Arrives Late, But Not Too Late

Honorable William A. Jennaro, Davis & Kuelthau

I am a 1968 alumni of Marquette University Law School, so I'm pushing 50 years in practice and have had a wonderful and varied career—Assistant DA in Milwaukee County; Public Defender for the Legal Aid Society at the Children's Court; then, and defeating an incumbent elected County Judge, then Circuit Court Judge in Milwaukee County for 12 years; and private practice thereafter during which I mediated well over a thousand cases of all kinds. The first one a failure, the second a case with 26 parties arising out of the Bankruptcy Court which took five days, but which settled; and being named Best Mediator in Wisconsin in a poll of attorneys by the *Wisconsin Law Journal.*

BUT my most memorable case did not involve a mediation. It came to me because I was brazen enough to believe I could right a wrong that had occurred in the Milwaukee County Circuit Court almost 20 years previously.

The wrong was that a Circuit Court Judge knew he had an inherent conflict in presiding over and then disposing of a criminal case. Not that the defendant was innocent, he wasn't, having been found guilty by a jury of three counts of sexual misconduct. The defendant was then 28-years-old and a highly educated professional who had become addicted to opiates before his misconduct. The Assistant District Attorney in charge of the sexual assault unit recommended one to two years probation. What did the judge impose?—48 years in prison, plus 10 years supervision post-term and the maximum fine on each count! The defendant was represented by an experienced and very competent criminal defense attorney, who was shocked by the sentence, as was the prosecuting attorney.

Efforts to have the sentence put aside went all the way to the Wisconsin Supreme Court, but to no avail. When I was retained, the defendant had already served more than 18 years and was in a secure prison. The time to appeal the sentence had long since expired. There appeared to be no basis in the law for relief.

The defendant's ex-wife, who divorced him shortly after he was charged, had taken their son (who was two years old at the time of the sentence) to visit his father almost every month, for all those 18-plus years. It was the ex-wife and her long-time second husband who retained me on the defendant's behalf.

The sentencing judge was still on the bench. I asked him to consider a revision; he refused. Post judgment procedure produced no relief. The District Attorney was struck by the disparity between the sentence and the recommendation from his assistant, so he agreed to assign a top deputy to the case. The road to relief still appeared to be blocked.

Then a combination of luck and justice met!

The presiding judge of the Felony Division had been a Sergeant on the Milwaukee Police Department before law school and had been a Deputy District Attorney. Upon review of the request for modification, he too was struck by the length of the sentence and the difference between it and the Assistant District Attorney's recommendation—48 years in prison opposed to one to two year's probation.

What could be a factor for relief? By luck my investigation revealed that the sentencing judge was a member of the same church and the same men's group as the father of the victim. That information was not known by the defense attorney or the defendant's family at the time of the trial. Had it been known, it would have been the basis of asking the judge to recuse himself, which unequivocally he should have done, *sua sponte* in the first place. That information in the record would have certainly opened the door to appellate relief of a shocking miscarriage of justice!

Based upon this newly discovered information, the case prosecuting Assistant DA (who had by then been appointed a Circuit Court Judge) agreed to provide an affidavit supporting revision of the sentence and the District Attorney's Office supported our application. The presiding judge of the Felony Division (the former Sergeant on the Milwaukee Police Department and former prosecuting Deputy District Attorney) granted a hearing on revision. The hearing date was in late September.

The day arrived. Present was the client in an orange jumpsuit, his ex-wife, their child (now 20 years old) and the relative of the victim who was notified of the hearing and who spoke in opposition to a modification.

My client's son told me that he was scheduled to graduate from Northwestern University the following June and the one thing he wanted to tell the presiding judge out of all of this, was that he had a single wish at his graduation and that was for his father to be present to see him graduate, dressed in a suit of clothes, not in his prison garb. I had him testify to that effect and saw a tear fall from the eye of the bailiff.

The judge then cut my client's sentence to time served. He was released from prison the next day.

Gain Clients & Help the Community

Julie Guckenberg started working with the Milwaukee Bar Association in May as the new Lawyer Referral & Information Service (LRIS) Coordinator.

LRIS allows attorneys to select specific practice areas, and locations in Milwaukee and Waukesha counties, for which they'd like to receive referrals.

There are, however, several practice areas that have very few attorneys. We can increase our impact and serve the public more effectively with a broader pool of attorneys. If you have questions about LRIS or would like to sign up, please contact her at 414-274-6768 or jguckenberg@milwbar.org.

LRIS also works for clients whose case you are unable to take. Refer the client to the public LRIS line 414-274-6768.

LAWYER REFERRAL INFORMATION SERVICE

Why do Good People Leave?

Nate Bogdanovich, PS Companies

It's a question most law firms ask around this time of the year. January and February have come and gone. Last year's annual bonuses have paid out and firms are bracing for the departure of great attorneys. Sometimes the departures are welcomed by firm leadership and other times it becomes a huge problem that needs to be addressed.

How do we keep the talent we want?

Culture is more than collegiality, pay structure, respect and kindness—it's about the person. Do your attorneys know their future? Do firm leaders continually remind employees of their career path, its value to the firm and its importance to the individual? Law firms spend a ton of money and time finding and attracting talent. But are you spending enough time and money retaining talented attorneys that are the future leaders of your firm? Are you giving your attorneys resources to be successful? Have you asked what tools, conferences and training attorneys need in order to develop skillsets to be more valuable in the market? And, are you paying for those tools?

As a recruiter who specializes in placing lawyers, I've found that the most challenging candidates to recruit are those that know where their career is going. They know the work they're doing is valuable to the firm, it is appreciated and they have constant reinforcement that they matter. This is also reflected in their compensation.

Given the demand in the market, employees can go anywhere. Invest so much time into people that they know this attention won't exist elsewhere. The reality is people will find whatever they are missing in another platform. Don't lose, win!

In Praise of the MBA Foundation Golf Outing

J. William Boucher III, O'Neil, Cannon, Hollman, DeJong & Laing

The 2017 MBA Foundation Golf Outing was one of the highlights of my year for several reasons. The facilities at Fire Ridge were accommodating and accessible, allowing us duffers to maximize our repetitions at the driving range in pursuit of the elusive title. The MBA staff and Fire Ridge employees did an excellent job coordinating a large group of very difficult people (lawyers) and making sure everything was running smoothly and efficiently.

The event was fun and worry-free, which was more than welcome for a group of people that I imagine have many demands on their time. While we weren't contenders for the grand prize, I was lucky to have an entertaining foursome that made the day a memorable one.

On top of all of that, seeing a diverse set of attorneys and legal professionals donating their time and money to further the mission of the Milwaukee Justice Center made it a truly remarkable experience.

Register today for the 2018 MBA Foundation Golf Outing on Wednesday, August 1! Visit 2018mbafgolfouting.eventbrite.com

MBA Involvement Opportunities!

Get involved in the MBA and help support attorneys like you! The MBA has 17 substantive law sections that provide ample opportunities for section leadership, planning CLEs and networking events, and writing updates for *The Messenger* regarding issues related to the section. Those interested may contact Director of Programs Katy Borowski at 414-276-5933 or kborowski@milwbar.org.

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MISSION STATEMENT

Established in 1858, the mission of the Milwaukee Bar Association is to serve the interests of the lawyers, judges and the people of Milwaukee County by working to: promote the professional interests of the local bench and bar; encourage collegiality, public service and professionalism on the part of the lawyers of Southeastern Wisconsin; improve access to justice for those living and working in Milwaukee County; support the courts of Milwaukee County in the administration of justice; and increase public awareness of the crucial role that the law plays in the lives of the people of Milwaukee County.

Technology Advances Affecting Walking, Driving and the Law

Dr. David M. Cades, Dr. Robyn Sun Brinkerhoff and Dr. Emily Skow, Exponent

The proliferation of mobile technology and its use while performing everyday tasks has become increasingly widespread. It is now commonplace to use a mobile device while engaging in often safety-critical activities such as driving and walking. Think about how often you have observed a driver or pedestrian staring at or talking on a cell phone or some other mobile device while driving or walking. Decades of research have demonstrated behavioral detriments associated with distracted driving (e.g., slower reaction times, poorer visual scanning). Approximately a quarter of automobile accidents are associated with cell phone usage.[1]

More recently the effects of distracted walking have garnered increased attention. In 2015 the National Safety Council added distracted walking to its annual report of unintentional deaths and injuries[2] and there have been many reports in the media about people walking into or tripping over objects and falling off train platforms while using mobile devices. These have led to serious injuries and deaths – for example, a man fell off a cliff while taking a photo with his phone.[3]

Distracted Driving and Walking Principles

Human factors analysis can help explain how distraction leads to incidents by looking at cognitive and perceptual underpinnings upon which successful driving and ambulating rely. In order to operate a motor vehicle or walk in the world, human behavior is guided by a number of cognitive processes including visual perception, attention and motor control. Walking and driving require the ongoing processing and integration of visual information while moving. People are only able to attend to a limited amount of information at any given time. For example, sometimes an individual can focus his or her eyes on an object or a hazard, but still not "see" or detect it because mental resources are occupied elsewhere and thus not adequately engaged in the additional perceptual processing required.[4] While successfully deployed attention is necessary for accident and injury avoidance, it alone is not sufficient. There must also be adequate time for the person to detect an object and execute an appropriate response.

Specifically, with walking, additional factors must be considered, such as looking behavior, foot falls, or gait change to see how distraction related changes might contribute to the potential for slips, trips and falls. Pedestrians often change their visual fixation and scanning patterns[5] and based on acquired information, such as detected obstacles, modulations to gait can occur. Such modifications include avoidance maneuvers, adjustments to step length, width, and/or ground clearance and changing direction of gait, rotation of the body, or stopping.[6]

Research has shown that a distracted driver has slower responses and higher non-response rates to critical events and hazards, decreased ability to safely negotiate gaps in traffic and reduced scanning behavior.[7] Likewise, pedestrians have been demonstrated to engage in less safe intersection crossing behaviors while using mobile devices, including crossing more slowly, looking at obstacles and hazards less often, and exhibiting poorer gait consistency.[8]

Reactions to Distracted Driving and Walking

In response to the increasing incidence of accidents involving distraction due to mobile device use, laws have been enacted aimed at discouraging such behavior, particularly for drivers. According to the Insurance Institute for Highway Safety[9], as of July 2016, 14 states and the District of Columbia have banned talking on a hand-held cellphone while driving, 46 states and the District of Columbia have banned text messaging while driving and many localities have enacted their own bans on cellphone use or text messaging while driving. One New Jersey town (Fort Lee) established a law in 2012 allowing tickets for "dangerous walking" to be issued, to include texting and walking.[10] As a playful commentary on the phenomenon of cellphone-distracted pedestrians (sometimes referred to as "pedtextrians"), several locales have introduced separate painted lanes on the ground for pedestrians using phones.[11] Notably, officials for those projects noted that most people did not obey the lanes and many did not even notice them (often, ironically, due to being occupied by their phones).

Exponent's Distracted Driving and Walking Research

Exponent has conducted research specifically aimed at characterizing the changing nature of driving, with the advent of Advanced Driver Assistive Systems (ADAS) in vehicles as well as how mobile technology use while walking can lead to changing behavior on foot.

With respect to driving, the issue of distraction has been long-studied; however, recent advances in autonomous and semi-autonomous vehicle technology are changing the role of the driver in the vehicle. Specifically, safety systems are being introduced into vehicles aimed at combatting the negative effects of driver distraction by having the vehicle take over if and when the driver does not respond quickly enough. For example, if a driver fails to brake in response to hazard in front of his vehicle, whether because he is distracted or for any other reason, a vehicle with autonomous braking can automatically apply the brakes. Our on-road, closed-course experiments, which required participants to drive with ADAS technologies while performing different types of distracting tasks (i.e., talking or texting on a cell phone), showed that these technologies are helpful at mitigating some, but not all of the effects associated with distractions. Our findings indicate that ADAS have the potential to reduce the number and severity of collisions on the roadway, but are not a replacement for attentive driving.[12]

In another study, distracted drivers did not show an improvement in lane-keeping while using the lane departure warning system. This research has confirmed many of the negative effects associated with distraction while showing that recent advances in vehicle technology may help mitigate some of these effects, but it also demonstrates that these technologies are not a replacement for attentive drivers.

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We have also been engaged in studying mobile device use and ambulation, demonstrating that walking while using mobile devices leads to changes in how we walk – both visually and in gait. In one experiment, we tracked pedestrians eye-movements, gaze and motor behavior as they approached various obstacles (e.g., a short staircase, a curb) while either texting or not texting (Figure 1).[13]

Figure 1. Participant texting in our motion capture laboratory with eye-tracker.

While texting, participants scanned a narrower area, and spent less time looking at obstacles as they approached (Figure 2), suggesting that mobile device use can reduce pedestrians' visual attention to important areas along their travel path, which may lead to a reduced awareness of the characteristics of the environment. Another study utilizing motion capture technology to characterize pedestrians' movements and gait while either texting, talking, or not using a cellphone showed that, while texting people walked slower and had shorter strides than while not using a phone.[14] Taken together, studies, such as these, provide valuable insight into how mobile device use affects human behavior.

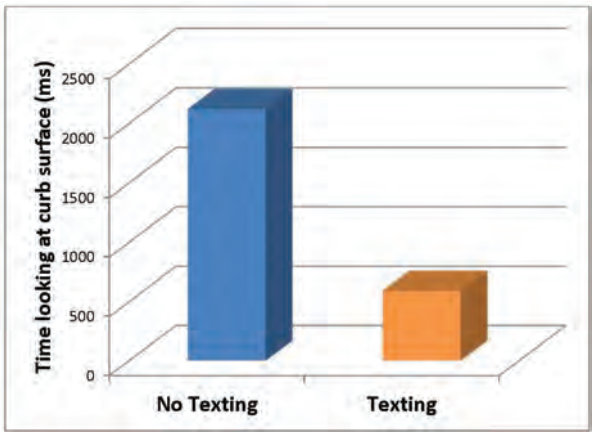

Figure 2. Average time spent looking at a curb surface ahead when walking without texting (blue) and when walking while texting (orange)

What does this mean for accident investigation and litigation?

The proliferation of mobile technology has dramatically increased the prevalence of distraction-related accidents, leading to an increase in public attention and intensifying the need for investigation. Our own research has shown how new technology is changing the nature of driving and walking, in such areas as movement control and visual behavior. As human factors scientists, we can integrate this into our analyses of accident causation and help explain to juries how these human factors may have contributed to an accident. Understanding the effects of mobile device use on attention and perception is essential for understanding the human factors of a case.

Footnotes

[1]National Safety Council, 2016
[2]National Safety Council, 2016
[3]Tatro & Fleming, 2015
[4]Lanagan-Leitzel et al., 2015
[5]Patla, 1997
[6]Patla & Vickers, 1997; Marigold, 2008
[7]Strayer et al., 2011; Recarte & Nunes, 2000
[8]Neider et al., 2010; Hatfield & Murphy, 2007
[9]IIHS, 2016
[10]E.g., Ngak, 2012
[11]E.g., Kaplan, 2015
[12]For more details see: Cades et al., 2016; Crump et al., 2015
[13]Kim et al., 2016; Lester et al., 2016
[14]Perlmutter et al., 2014

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After Outer Space, Should Electric Cars Come to Wisconsin?

Attorney Christopher Keeler, O'Neil Cannon Hollman DeJong & Laing

Elon Musk and his Tesla electric cars have been in the news recently after Musk's other venture, SpaceX, successfully launched the Falcon Heavy rocket into orbit. The Falcon Heavy, the first of its kind to be launched by a private company, carries Musk's personal Tesla roadster and will travel as far from the Earth as Mars.

While Musk's SpaceX team is eying the stars, Musk's more terrestrial venture, Tesla, is setting its sights on the Dairy State. With the support of a variety of Wisconsin representatives, Musk and Tesla have pushed to modify Wisconsin law to allow the electric car manufacturer to directly operate motor vehicle dealerships. While Tesla already has several charging stations around the state, Wisconsin law prohibits the manufacturer from operating physical dealerships and service stations within the state. The proposed changes in the law have brought Wisconsin into the national debate regarding the legality and fairness of direct automobile sales.

Direct Sales in Wisconsin?

For several decades, Wisconsin law has only authorized licensed dealership franchises to sell automobiles directly to consumers. Local and national dealership organizations, like the National Automobile Dealers Association (NADA) and the Wisconsin Automobile and Truck Dealership Association (WATDA), lobbied hard for this licensing system as a means of preventing car manufacturers from directly selling to consumers. The provision of law at issue is short, buried in the Wisconsin code, and extremely important. Specifically, Wisconsin Code Section 218.0121 mandates that motor vehicle manufacturers "shall not, directly or indirectly, hold an ownership interest in or operate or control a motor vehicle dealership in this state." According to WATDA, that short provision is the lifeblood of the dealership franchises and protects consumers from manufacturers, like Tesla, from limiting competition and increasing prices. Tesla, however, disagrees and the company has found support in the Wisconsin legislature.

In late 2017, Representative Rob Brooks (R-Saukville) and Senator Chris Kapenga (R-Delafield) introduced a draft bill to allow electric car manufacturers, namely Tesla, an exception from the rule. Rep. Brooks' and Sen. Kapenga's proposed legislation would create a specific exemption, allowing "[t]he ownership, operation, or control of a dealership by a manufacturer that manufacturers only motor vehicles that are propelled solely by electric power."

Currently, the bill is still a draft, having been opened to public hearings in the House on January 31, 2018 and the Senate on January 30, 2018. Tesla representatives argued that the dealership franchise model is being used to restrict competition by prohibiting entry of manufacturers, like Tesla, who utilize a direct sales model. Moreover, proponents of the proposed amendment argued that salespeople at dealerships tend to place less emphasis on electric cars, by often omitting important information, like tax breaks that come with the car, and "hiding" electric cars in the corner of dealership lots.

Opponents of the proposed amendment, including the WATDA, argued that direct manufacturer sales would effectively bring the dealership system, which has been protected by law for decades, to an end. The Association warned that allowing manufacturers to set up direct dealerships would pave the way for scores of unfair trade practice lawsuits. According to WATDA, should the bill pass, other car manufacturers will follow Tesla's vertical integration model by creating subsidiary dealers to bypass the franchise dealerships.

The National Debate

Although Tesla has its eyes set squarely on Wisconsin, the company has been involved in similar legislative and legal battles across the country. In 2014, Michigan passed a law, mirroring Wisconsin's dealership franchise law, prohibiting direct sales from automobile manufacturers. Two years later, Michigan denied Tesla's application to open a dealership, citing the 2014 law. Tesla subsequently filed a lawsuit in federal district court arguing that the 2014 law violated the company's due process and equal protection rights and also violated the commerce clause of the U.S. Constitution by unjustly discriminating against out-of-state vehicle manufacturers. Attorneys for Tesla argued that the 2014 law effectively constituted "protectionist legislation…effectively giving franchised dealers a state-sponsored monopoly on car sales." Although Tesla has requested a jury and an expedited trial, the case is Michigan is still in its preliminary stages.

The debate surrounding the direct sales of automobiles by manufacturers is occurring throughout the nation. Ten states, including Wisconsin and Michigan, have completely banned direct sales from manufacturers; seven states have authorized limited direct sales; and at least nine states have generally allowed unrestricted direct sales. In the last few years, Tesla has won court battles in three states (Massachusetts, Missouri, and Arizona) and has successfully advocated for changes in the law in at least three other states.

From Mars to Milwaukee

While Musk is catching the world's attention with his spaceships, his electric cars are making noise here in Wisconsin. Reports indicate that, if the law passes, Tesla is likely to open up dealerships and/or service centers in Milwaukee, Green Bay, and Madison. Such an expansion comes as the company is set to introduce electric pickup trucks and semi-trucks at the end of 2018 or the beginning of 2019; driverless, autonomous Teslas could follow later in 2019. Currently, Tesla owners in the state need to drive to Chicago or Minneapolis to visit a dealership or to have their cars serviced.

If the bill does not pass, the electric car company could follow its path in Michigan, Missouri, and Arizona and file a lawsuit charging the law, as currently constructed, as unconstitutional. Either way, the debate regarding Tesla's ability to open dealerships in Wisconsin is about to become fully charged.

Conflicts of Interest:

How Past Representations Can Become a Current Problem

Attorney Mark Bassingthwaighte, ALPS

Malpractice claims alleging a conflict of interest have been a serious concern for insurers for years. One of the reasons is this. Conflict of interest claims can get expensive fast, if for no other reason than they almost always boil down to a greedy attorney putting his or her financial interests above someone else's. So not good, particularly if a jury has any say in the matter.

As a risk guy working in the malpractice insurance arena, I've taken a number of calls over the years from attorneys who need help working through a potential conflict situation. These are the calls that both challenge and fascinate me the most. Suffice it to say, before becoming a risk manager, I had no idea how complicated and crazy some of the conflict fact patterns could get.

Given the frequency of conflict questions that come my way, I wanted to share a little advice concerning one particular conflict resolution misstep lawyers sometimes make with Rule 1.9 of the *Rules of Professional Conduct,* commonly known as the past client rule. Let's start with a fact pattern. Nine years ago, attorney Smith defended a prosecutor in an ethics probe. Six years ago, Smith made a lateral move and joined the firm of Jones, White and Parker. Attorney Parker, one of Smith's current partners, has been asked by the city, a long-term client of the firm, to defend the city in a gender discrimination suit. The employee suing the city happens to be the prosecutor that Smith represented nine years ago. The question is, can Parker accept the new matter?

At the outset, let's assume that Smith properly closed her file nine years ago by sending a closure letter to the prosecutor once the ethics probe was resolved. If that never happened, there could be an argument that the prosecutor remains an inactive current client and we'd need to review Rule 1.7, the current client rule. With documentation that the prosecutor is a past client, we're clearly dealing with Rule 1.9.

Thinking about Rule 1.9 part (a), which most of us readily recall, it's tempting to look at the above fact pattern and conclude that even though the situation involves the same person, the same employee and the same position, there's no conflict because a gender discrimination suit and an ethics probe are not the same matter nor are they substantially related matters. The conflict resolution misstep that sometimes occurs is in stopping here because this is all the attorney remembers Rule 1.9 saying. Unfortunately, the decision to stop here ignores the fact that it is the same person, same employee and same position. This becomes a potential misstep because Rule 1.9 part (c), which prevents Smith from using information relating to or gained in the course of her prior representation to the disadvantage of her former client, has been overlooked.

Prior to the firm agreeing to represent the city, Smith would need to review her file to see if any information was discovered that could be used to her past client's disadvantage. If the answer is yes, then the firm cannot represent the city. Yes, it's Smith's partner who would be defending the city but the information Smith has will be imputed to her partner under Rule 1.10, the imputation of conflicts rule.

Conflict of interest situations are something every lawyer should take very seriously. Perhaps it comes as no surprise that I chose to discuss this fact pattern because it's real. Learn from the missteps of others. The above referenced firm ended up being disqualified by the judge. One must always remember that there's more to Rule 1.9 than the question of whether the past and current matters are the same or substantially related. Rule 1.9 also requires you to think about what you know and to include any information that is in your files that you may have forgotten about. Forget that—and you could find yourself facing a similar outcome.

About Mark Bassingthwaighte, ALPS Risk Manager

Since 1998, Mark Bassingthwaighte, Esq. has been a Risk Manager with ALPS, an attorney's professional liability insurance carrier. In his tenure with the company, Mr. Bassingthwaighte has conducted over 1200 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Mr. Bassingthwaighte is a member of the ABA and the Montana State Bar Association. He received his J.D. from Drake University Law School.

USDA Issues Proposed Rule Establishing National GMO Labeling Standard

On Thursday, May 3, 2018, the U.S. Department of Agriculture (USDA) released a proposed rule establishing the national bioengineered (BE) food disclosure standard. This represents the first public look at how a uniform federal genetically modified (GM) mandatory labeling standard will be implemented.

In 2016, Congress amended the Agricultural Marketing Act, directing USDA to establish a nationally uniform marketing standard for bioengineered food products. (See 7 U.S.C. §§ 1639—1639j.) Viewed as a compromise effort, the legislation embraced a mandatory GM disclosure standard for food products intended for human consumption that contain bioengineered ingredients. Responding to food industry concerns that compliance with a patchwork of state laws would be expensive and challenging, the federal legislation preempted state-level genetically modified ingredient (GMO) labeling laws and embraced flexible mechanisms for making the required disclosure.

While the proposed rule provides significant insight into USDA's current approach, the rule makes clear that USDA's consideration of many important aspects of the labeling standard is far from over. "This rulemaking presents several possible ways to determine what foods will be covered by the final rule and what the disclosure will include and look like," explained Agriculture Secretary Sonny Perdue in a USDA news release. "We are looking for public input on a number of these key decisions before a final rule is issued later this year."

To that end, USDA made more than a dozen explicit requests for comment in the proposed rule and in some instances, proposed two or more potential alternatives for public consideration.

Food Subject to the Disclosure Standard

In general, the disclosure standard applies only to food, as that term is defined under the Federal Food, Drug and Cosmetic Act (FDCA), intended for human consumption and which is subject to labeling requirements under the FDCA. The labeling standard also applies to products subject to the labeling requirements of the Federal Meat Inspection Act, the Poultry Products Inspection Act, or the Egg Products Inspection Act, if the predominant ingredient (excluding broth, stock, water, or a similar solution) would independently be subject to the FDCA.

Bioengineered Food Lists

The Act and proposed rule define "bioengineered food" as food that "(A) contains genetic material that has been modified through in vitro recombinant deoxyribonucleic acid (DNA) techniques; and (B) for which the modification could not otherwise be obtained through conventional breeding or found in nature."

USDA has applied this definition to generate two lists of bioengineered foods (i.e., crops for which a genetically modified cultivar is available). To facilitate regulatory compliance, only consumer-facing end products which are on one of the two lists, contain ingredients on one of the lists, or are produced using foods on either of the lists would be subject to disclosure requirements. Thus, as USDA explains, "the BE food lists serve as the linchpin in determining whether a regulated entity would need to disclose a BE food" under the standard.

The first list comprises commercially available BE foods which are highly adopted. These crops are those for which a bioengineered cultivar has been adopted at a rate of 85 percent or more in the United States, as determined by USDA. USDA proposes that this list initially include five crops: canola, field corn, cotton, soybeans, and sugar beets. Significantly, foods on this list are presumed to be bioengineered food subject to disclosure requirements, absent documentation to the contrary.

The second list is made up of commercially available BE foods which are not highly adopted. This list includes BE crops for which a bioengineered cultivar is commercially available in the United States, but which have a prevalence of less than 85 percent. This list would initially include apples (non-browning cultivars only), sweet corn, papaya, potato, and squash (summer varieties only). USDA states that the "default presumption" for these foods is that they may be bioengineered. However, because BE cultivars for these crops are less prevalent in the marketplace, regulated entities are permitted to use more flexible disclosure language such as "may contain a bioengineered food ingredient."

These two lists would be updated periodically to reflect new bioengineered varieties and commercial adoption of GM crops.

Disclosure Mechanics

Under the proposed rule, disclosure is closely tied to whether a food appears on the two lists of commercially available BE foods. For products that contain a food on either list, the regulated entity must make a disclosure or "maintain documented verification that the food is not a BE food or that it does not contain a BE food."

The 2016 legislation authorized several disclosure methods, including disclosure though text, a symbol included on the food label, or an electronic or digital link (such as a QR code). The final option (use of an electronic or digital link) remains controversial, with some groups calling for USDA to disallow this method by finding that it does not provide sufficient access to required information. In addition to these three methods, USDA is also proposing a text message disclosure option as an additional means of compliance. This method would work similar to an electronic or digital link.

The legislation also directed USDA to provide disclosure options for small food manufacturers (which USDA proposes to define as those manufacturers with less than $10 million in sales) and for small and very small packages. USDA's proposed rule addresses each of these requirements.

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USDA is seeking comment on three potential variations of the bioengineered "BE" symbol. The three variations (designated Alternatives 2-A, 2-B, and 2-C) can be viewed at www.ams.usda.gov/sites/default/files/media/ProposedBioengineeredLabels.pdf.

Exemptions from the Disclosure Standard

The proposed rule embraces several exemptions from disclosure.

- **Non-Bioengineered Foods.** Food products that appear on one of the "BE foods" lists which do not, in fact, contain bioengineered substances are exempt from making a mandatory disclosure. However, like the predominant voluntary GMO-free or non-GMO labeling standards, USDA recognizes these foods may still contain small amounts of GM crops.

USDA's proposed rule does not identify a proposed threshold level or method of evaluating compliance with the threshold (e.g., by ingredient or total weight), but instead seeks comment on three alternatives. Alternative 1-A does not require disclosure if the presence of BE substances in a food ingredient is "inadvertent and technically unavoidable" and does not exceed 5 percent of the specific ingredient by weight.

Alternative 1-B would not require disclosure if the presence of BE substances in a food ingredient is "inadvertent and technically unavoidable" and does not exceed 0.9 percent of the specific ingredient by weight. This restriction is consistent with the threshold for inputs to human food used in the Non-GMO Project Standard. USDA specifically noted that while this standard is more restrictive, it "may align with some existing industry standards for the separation of BE and non-BE products, as well as the thresholds established by some U.S. trading partners."

Finally, Alternative 1-C represents a less restrictive approach. Alternative 1-C would not require disclosure if the total amount of all BE ingredients used in the product is not more than 5 percent of the total weight of the product.

- **Very Small Food Producers.** The 2016 legislation exempted "very small food manufacturers" from the disclosure standard. USDA defined "very small food manufacturer" as any food manufacturer with less than $2.5 million in annual receipts, a threshold that would have the effect of exempting 74 percent of food manufacturers from the requirement, but just four percent of food products and one percent of food purchases. USDA seeks comment on whether the "very small food manufacturer" exemption should be reduced to cover firms with receipts of less than $500,000 or expanded to cover firms with less than $5 million in annual receipts.

- **Food Served in Restaurant or Similar Retail Food Establishment.** This proposed rule defines "similar retail food establishment" to mean "a cafeteria, lunch room, food stand, saloon, tavern, bar, lounge, other similar establishment operated as an enterprise engaged in the business of selling prepared food to the public, or salad bars, delicatessens, and other food enterprises located within retail establishments that provide ready-to-eat foods that are consumed either on or outside of the retailer's premises."

- **Food from Animals Fed Bioengineered Feed.** The 2016 legislation prohibits animal-based products such as beef, pork, poultry, eggs and milk from being considered bioengineered foods solely because the animal consumed feeds that contain bioengineered feeds or feed ingredients. Consistent with the legislation, USDA has incorporated this statutory exemption into the rule.

- **Certified Organic Foods.** Food that is certified organic under USDA's National Organic Program is also exempt from any disclosure or similar recordkeeping requirements, recognizing that organic standards already prohibit use of GM crops.

Compliance Dates

In general, USDA proposes to require all entities except small food manufacturers to comply with the disclosure standard by January 1, 2020. Small food manufacturers are those food manufacturers with at least $2.5 million in annual receipts but less than $10 million in annual receipts. Small food manufacturers would have an additional year (until January 1, 2021) to comply.

As noted previously, very small food manufacturers (less than $2.5 million in annual receipts) are exempt from the disclosure standard as currently proposed.

Submitting Comments

The proposed rule was published in the Federal Register on Friday, May 4, 2018. Comments on the proposed rule should be submitted by July 3, 2018.

The Facebook Effect: Today's Changing Data Privacy Regulation Climate

In the words of the Nobel Prize writer Bob Dylan, "The times, they are a-changin.'" Revelations in the press about Facebook's current privacy problems, and a new comprehensive European Union privacy framework that impacts American businesses, may be changing the climate towards more data privacy regulations by United States lawmakers. As technology and uses for data surge ahead at breakneck speed, however, the testimony of Facebook CEO Mark Zuckerberg seemed to highlight both the public's and lawmakers' limited understanding of the impact that dizzying advancement has on individual privacy and on our society at-large. Against these rapidly changing times, the challenge now is for businesses to voluntarily be more transparent and get express consent from data subjects and for lawmakers to create a protective framework against a hazy and unpredictable future.

Facebook and Zuckerberg Testimony

Facebook's most recent publicity nightmare has received scrutiny worldwide because multiple millions of users have accounts on the social media platform. However, the facts underlying the uproar over sloppy privacy practices could happen at any company on a much smaller scale.

What happened? In the summer of 2014, about 300,000 Facebook users agreed to accept a small payment to download a third party application via Facebook, called This Is Your Digital Life, which presented them with a series of surveys. The Terms of Service in the application disclosed, in broad scope, that the users were granting permission to the application developer to collect and use data on the profile of those downloading the application – and, data from the profiles of their Facebook friends – if their privacy settings allowed it. This is why the number of Facebook profiles compromised exponentially increased from a mere 300,000 users to that of 87 million users. At the time, this practice was seemingly consistent with Facebook's practice of allowing outside developers to collect information from the Facebook profiles of users, according to their privacy settings, who downloaded the application.

It was this haphazard business practice that got Facebook (and potentially any company), into its current privacy predicament. Specifically, Facebook did not require its outside developers to provide comprehensive notice and obtain consent for all of the ways for which data from the multiple millions of Facebook profiles would be used. In the case of the profiles downloaded into This is Your Digital Life, the data was sold and licensed to Cambridge Analytica for psychographic targeting and marketing of voters based on their "Likes" and other profile data.

At the heart of questions for Mark Zuckerberg during congressional hearings in Washington, D.C. during the week of April 9, 2018, lawmakers were trying to determine whether these sloppy business habits could be considered a violation of the terms of a Consent Decree, as part of a 2011 settlement with the FTC, to get clear consent from users before sharing their material. During his testimony, Zuckerberg disputes the violation and testified that the Application Developer lied by saying he was gathering the data for research purposes and violated the company's policies by passing the data to Cambridge Analytica.

Although this scenario played out on a grand scale, the lesson all companies can learn is to unambiguously notify data subjects of all uses that will be made of data collected or voluntarily provided – beyond the original purpose it was given – and get their unequivocal consent for such uses.

United States Reaction

Although proposed legislation was swift, it is unlikely to result in immediate federal legislation. The Senate introduced the "Customer Online Notification for Stopping Edge-provider Network Transgressions" or "CONSENT Act," which directs the Federal Trade Commission to promulgate regulations for edge providers requiring them, among other things, to obtain opt-in consent from customers in order to use, share or sell sensitive customer proprietary information. Edge providers broadly include any person that provides a service over the Internet: which requires a customer to subscribe or establish an account; from which customers can purchase without a subscription or account; through which a program searches for and identifies items in a database that corresponds to keywords, or characters; and through which a customer divulges sensitive customer proprietary information. For purposes of the proposed act, "sensitive customer proprietary information" would include financial and health information, information pertaining to children, social security numbers, precise geolocations, content of communications, and web browsing and application usage history. A violation of the CONSENT Act would be considered an unfair or deceptive act or practices under Section 5 of the FTC Act. The introduction of the CONSENT Act is a continuation of legislative dialogue that includes other proposed legislation, including the "Balancing the Rights of Web Surfers Equally and Responsibly (BROWSER) Act," and the Secure and Protect Americans' Data Act.

At the state level, Facebook withdrew its opposition to the proposed California Consumer Privacy Act of 2018. Facebook in a written statement clarified, however, that this action is not a signal that it supports the proposed state law but that it is instead focusing its "efforts on supporting reasonable privacy measures in California." The proposed California law not only provides California consumers with certain rights relating to their personal information, but it gives them a private right of action and minimum statutory damages of $1,000 per violation.

As other states begin enacting privacy and cybersecurity legislation, it is unclear whether the federal government will intervene with a more comprehensive national law. What is common to the laws proposed at both the federal and state level, however, is a call for more transparency in an organization's collection, use, and sharing of personal information.

European Union Reaction

European regulators are also taking keen attention to these issues. For example, German justice minister Katarina Barley

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called for an EU-wide investigation into the use of Facebook's data by Cambridge Analytica and other companies. These concerns are particularly salient and enhanced in the shadow of the EU's General Data Protection Regulation (GDPR), which strictly requires consent from data subjects for many of the practices that are the subject of the activities at issue here and introduces significant fines and penalties for failures to comply. European authorities will in particular have a keen eye on digital technology and social media companies, as the consent requirements within GDPR go above and beyond what many companies in the industry have in place today and in many cases fresh, more specific permissions will be needed in order to continue current uses and sharing of personal data.

Is Bitcoin Headed for Government Regulation?

Attorney Jason Luczak, Gimbel Reilly Guerin & Brown, Kenneth Baker, Law Clerk, Gimbel Reilly Guerin & Brown

If you haven't heard of Bitcoin by now, you haven't been paying attention. Bitcoin and other cryptocurrencies such as Litecoin, Ethereum and Ripple have dominated headlines for the past six months. Cryptocurrencies are digital assets designed to work as a medium of exchange that uses cryptography to secure its transactions, to control the creation of additional units and to verify the transfer of assets. What does that mean? Basically, it is a computer generated asset that is capable of being bought and sold. There is a finite number of Bitcoins, which creates demand and therefore creates value for the crypto-asset. The Blockchain is what secures the cryptocurrency. Blockchain technology is a public ledger that tracks Bitcoin transactions. Every second, millions of people are buying and selling Bitcoin. Every transaction has a specific transaction code and is part of the Bitcoin Blockchain. This procedure creates a record of authenticity that is verifiable by a user community, increasing transparency and reducing fraud. This is where miners come in.

Bitcoin miners utilize highly-advanced supercomputers, much greater than your common PC, to "mine" for Bitcoins; however, this characterization is a tad deceiving. Miners do not find Bitcoins on the internet, rather, the miners are tracing the Blockchain transactions. Once the transactions reach a certain threshold and the miners complete a "block" they are rewarded in, you guessed it—Bitcoins. Put simply, Bitcoins are a form of currency that is capable of being used to purchase goods and services on the internet. It is helpful to understand that this entire process is completely free from governmental intervention; therefore, there is currently no recourse for any person that is cheated out of a transaction using Bitcoin.

Opponents of regulation argue that the Blockchain is more secure than normal transactions and does not require governmental interference. Moreover, they argue that Bitcoin is premised on being a global currency, capable of being bought and sold from anywhere with an internet connection. This flexibility has a great impact on individuals who move from impoverished countries to countries with thriving economies, many of which send money (or remittances) back home. Cryptocurrencies also have a lower transfer rate than money transfer institutions like Western Union. Proponents of regulation argue that there are no procedures in place to prevent owners of Bitcoin from purchasing illegal items over the internet such as firearms, drugs and other contraband. The pro-regulation camp is also concerned about the lack of oversight for businesses that use Bitcoins for laundering money, evading taxes and sponsoring terrorism.

Currently, there are no regulations in place as to how one can use their Bitcoins to buy and sell goods. There are also no regulations regarding how the cryptocurrency is traded. House Republicans have discussed a bill that would limit the scope of what Bitcoin owners could purchase with their cryptocurrency. The driving motivation behind the bill is to close loopholes that could allow for sponsorship of terrorism, money laundering and tax evasion. In addition, the IRS takes the position that Bitcoin must be treated as property (for tax purposes). That means a capital gain or loss should be recorded as if it were an exchange of property. If it is used as payment, it should be treated like currency—converted and its fair market value checked on an exchange.

Rep. Jared Polis (D-Colorado) and Rep. David Schweikert (R-Arizona), co-chairs of the Congressional Blockchain Caucus, introduced the *Cryptocurrency Tax Fairness Act* on September 7, 2017. According to Representative Polis' website, the bipartisan legislation creates a structure for taxing purchases made with cryptocurrency. Similar to foreign currency transactions, it allows consumers to make small purchases with cryptocurrency up to $600 without burdensome reporting requirements. "To keep up with modern technology, we need to remove outdated restrictions on cryptocurrencies, like Bitcoin and other methods of digital payment," said Polis. "By cutting red tape and eliminating onerous reporting requirements, it will allow cryptocurrencies to further benefit consumers and help create good jobs."

Moreover, the act "would treat cryptocurrencies similarly to how foreign currency is now treated and relieve users from having to keep track of small personal transactions. Not only will this create a level playing field for digital currencies, it will also help unleash innovation on applications like micropayments, which can consist of dozens of transactions per minute and thus are difficult to square with the current law," according to Jerry Brito, Executive Director of cryptocurrency think tank Coin Center.

The extent of which the federal government can regulate cryptocurrencies remains to be seen. The decentralized nature of the Bitcoin Blockchain increases this uncertainty to the extent that it has no one central authority. Regulations of cryptocurrency and how they relate to taxes may come in the near future. Full blown SEC guidelines and regulations of cryptocurrencies seem a more distant possibility.

Working with Experts

Russell A. Ogle, PhD, PE, CSP, CFEI, Exponent

A fresh lawsuit lands on your desk. After a quick perusal of the complaint, you decide that you will require the services of an expert. Immediately, several questions come to mind:

- What type of expert do I need?
- How can you keep your expert focused on your scope, schedule, and budget requirements?
- What can you do to ensure that your expert delivers an objective, scientifically defensible work product?
- How will your expert translate their technical analysis into a compelling presentation to the jury?

In this article I will offer some suggestions for you to consider as you ponder these questions.

Scope of the Engagement

What type of expert do you need? Sometimes this is an easy question to answer. If your loss is a structural collapse, one of your experts will need to be a structural engineer. But many times the nature of the expertise that you need may not be so transparent. Instead of thinking in terms of occupations or disciplines, try asking yourself what core issues need to be investigated and then formulate these as objectives. Your objectives should support the development of your legal strategy, but should not be formulated in terms of advocacy. Instead formulate each objective in terms of the fundamental technical question or issue that needs investigation.

For example, consider a toxic tort case in which it is alleged that a contaminant in a food ingredient found its way into a yogurt product. Your client is the food ingredient manufacturer that has allegedly contaminated the finished yogurt product. At first glance you might think you need a yogurt expert. But instead of thinking in terms of expertise per se, think in terms of what objectives support your legal strategy. Potential objectives might include:

1) Determine whether the contaminant is truly present in the food ingredient and in the yogurt;
2) Investigate the manufacturing process and supply chain for the finished yogurt product to determine the source of the contaminant;
3) Evaluate the quality control measures intended to prevent contamination of the food ingredient and the finished yogurt product; and
4) Assess the potentially harmful effects of the contaminated yogurt.

Each objective suggests a different type of expertise and perhaps a different type of expert. On the other hand, you may find the perfect candidate who can cover it all: a toxicologist with a strong chemistry background and extensive quality control experience in the food products industry. The goal is to identify an expert with the ability and expertise to help you objectively investigate the core technical issues of your case.

Once you have hired your expert and have communicated your objectives, it is important to discuss the scope of work for the investigation, the schedule, and the budget. There is an aphorism in the world of project management that says, "Scope, schedule, and budget: pick any two." The scope of work translates directly into the level of effort, and therefore the labor charge for the investigation. Fast-paced projects tend to require more effort than slow-paced projects with the same scope. Large damage claims may warrant an extensive level of investigative effort; small damage claims will likely not warrant as much effort. It will probably take more than one conversation, but definitely have the conversation about your scope, schedule and budget expectations. Both you and your expert will appreciate it later.

Investigation

While being mindful of the schedule and budget expectations, your expert should define the scope of their investigation in a way that identifies and evaluates reasonable alternative hypotheses or scenarios. This is especially important when evaluating causation claims. Testing alternative hypotheses is the hallmark of the scientific method. Whether in federal court or not, you will stand to benefit if your expert conducts their investigation in a manner that meets the Daubert criteria for a sound, scientifically defensible methodology.

The expert may be helpful in refining production requests to ensure that useful technical information is obtained during discovery. In addition to the usual production requests involving documents, correspondence, emails, drawings, and memoranda, your expert may request digital media like photographs, video or audio files. It is important to seek high resolution digital media, if available. Photographs and videos often unintentionally capture useful information in the distance or at the margins of the field of view, but can be missed in low resolution images.

Further developing that theme, we live in a world awash in digital data. Your expert should work with you to identify potential sources of digital records that may inadvertently have captured useful information about the time and place of events. Most industrial machines have some type of automatic control system (read "computer") which includes measurement data and data history. The successful recovery of electronic data may require additional forensic expertise, the cost of which must be balanced against the potential benefits.

As the discovery process gets underway, the time line is an excellent tool to help you and your expert correlate and evaluate preliminary observations about the case. This is also a good way to develop new lines of inquiry or to determine where more information may be useful. A time line can take many forms: it can be a narrative, a table, a spreadsheet, or a graphic. Placing events in a time sequence does not necessarily prove causation, but it does help reveal the story (sequence of events) and can clarify the relationship between events.

There are many other facets of expert analysis that may yield useful insights in an investigation. These include conducting witness interviews, analysis of witness observations, inspection of an accident scene, examination and testing of artifacts, laboratory testing of exemplars, mathematical calculations, or scientific reasoning (inductive and deductive logic). Experts can also assist in preparing you for taking depositions, by

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highlighting potential questions, or topic areas that are relevant to the ongoing investigation. It can be helpful to discuss these options with your expert and to assess the costs and benefits of techniques. Each investigation has its unique aspects which may favor one technique over another.

Finally, a most important aspect of the investigation process is frequent communication between you and your expert. Status reports in the form of telephone conversations or face-to-face meetings may best suit your needs. As discovery unfolds and your expert's investigation proceeds, new facts are learned which may influence the direction of both the litigation and the investigation. Frequent communication about intermediate findings will keep you both on track and increase the likelihood of receiving an expert work product that answers the pertinent technical questions.

Disclosure of Expert Opinions

Because you and your expert are communicating frequently, you should have a good sense of how your expert will develop their preliminary observations into expert opinions. You and your expert should schedule a specific conversation to discuss potential opinions before a written document is created. Your expert's analysis is constrained by the facts of the case and the fundamental principles of their discipline. If this analysis does not assist your legal strategy, there is, of course, no need for a formalized report.

Depending on your needs, you may request a written report. If so, be sure to explain your preferences on whether you wish to see a draft report and, if so, how the expert should handle the draft document. The expert often finds it helpful to have the attorney review a draft of the report because there are legal nuances in factual statements (e.g., the use of the proper legal name of a corporate entity) that may fall outside the scope of the technical issues investigated by your expert. Fact-checking is always appreciated.

Your expert can also be of assistance in evaluating the opposing expert's report. This can be a useful way to learn of any unexpected strengths or weaknesses in their analysis. And, without a doubt, this is a great exercise for preparing your expert for cross-examination.

Testimony

The legal world is different from the technical world and it may be helpful to remind your expert of that fact. Whether it is in deposition, trial or arbitration, there are certain professional expectations your expert must meet, which need to be communicated. For example, if opposing counsel has a tendency to ask long, complex questions, the expert should wait and listen to the entire question before responding. The expert must resist the temptation to anticipate the question or to interrupt it; otherwise the result is a muddled and confusing transcript.

Another aspect of helping your expert to prepare for testimony is to ask them some sample questions, especially questions regarding what you perceive to be the vulnerable areas of your legal strategy. Be sure to also identify and explain any key legal phrases that may arise in the course of cross-examination. As a professional engineer I have been surprised more than once to discover that a common phrase used in ordinary discourse can have a very specific and decidedly different meaning in the law. Finally, there is the difficult issue of technical jargon. Technical experts can speak a language all their own. After all of the hard work that has gone into conducting an objective, well-founded investigation, it would be a disservice to your legal strategy to let the findings get lost in a sea of jargon. Challenge your expert to translate their work into simple, everyday language. Help them select exhibits that will assist in presenting their opinions.

Closing

Practicing the law presents all sorts of challenges. The addition of an expert should help, not hinder your efforts. Engage your experts in the discovery process and debate with them the relevance of the evidence. Frequent communication is important so that the trajectory of the investigation and perhaps the litigation, can be adjusted as new facts are learned. Once the hard work of the expert investigation is done, the value of the work product must not be lost due to poor communication. Work with your expert to help them present their work in a simple, direct and compelling way.

Worker's Compensation Claims Related to Occupational Diseases After Retirement

Attorney Brandon Jubelirer, Hawks Quindel

In Milwaukee, occupational diseases most commonly affect older members of the community, which is in large part due to major workplace safety developments that began in the 1970's. Some of these developments include passage of workplace safety laws (e.g. the Occupational Safety and Health Act), efforts by employers to abate the presence of hazardous materials such as asbestos and silica in their workplaces, and the increased use of personal protective equipment.

Historically, one of the most common hazardous materials Wisconsin workers were exposed to was asbestos. From 1999 to 2013, there were an estimated 5305 asbestos-related deaths in Wisconsin. Death rates linked to asbestos are much higher near metropolitan areas of Wisconsin – especially in Milwaukee. In the time period listed above, Milwaukee County saw more deaths than any other county in Wisconsin.

Prominent Milwaukee businesses such as Miller Brewing, Wisconsin Electric Power Company, A.O. Smith, and numerous others had worksites that were laden with asbestos. This was principally due to the widescale use of asbestos as an insulator prior to the discovery that it was carcinogenic in the 1970's. As a result, many Milwaukeeans who worked in these companies through the second half of the 20th Century were inadvertently exposed. Because the latency period for an asbestos-related disease like mesothelioma can range anywhere from 10 to 50 years, many workers suffered no adverse health effects until well into their retirements. However, Milwaukee workers who were exposed to asbestos have various legal options if they are diagnosed with an asbestos-related illness, including filing a claim for worker's compensation benefits.

When a work-related disease such as asbestosis develops over time and results in the death or disability of a worker years after his or her retirement, there are often challenging legal questions as to the identity of the liable employer and their worker's compensation carrier for purposes of filing a claim under the Wisconsin Worker's Compensation Act. The issue becomes even more complex when a worker has had several employers that contributed to the condition over a long career.

Occupational Diseases & Claiming the Correct Date of Injury in a Worker's Compensation Claim

Unlike a work injury resulting from a single traumatic event (e.g. a leg break after falling from a ladder), occupational diseases develop gradually over time due to extended use of a body part or exposure to harmful substances (e.g. asbestos and silica). In order to bring a worker's compensation claim for an occupational disease, an applicant must identify one date of injury as well as one liable employer and their worker's compensation carrier. This is easy to do when a worker has been with the same employer for their whole career, or when it is known that only one employer contributed to the condition. But what if several employers contributed to the occupational disease?

Under the occupational disease standard outlined in Wis. Stat. § 102.01(2)(g)2, if the date of disability occurs after the cessation of all employment that contributed to the disability, the date of injury for purposes of bringing a worker's compensation claim is the worker's last day of work for the last employer that contributed to the occupational disease. For example, Susan worked for three companies that exposed her to asbestos throughout her career: Employer 1, Employer 2, and Employer 3. Susan's last exposure to asbestos was with Employer 3, and ten years after retirement she develops an asbestos-related illness. Despite being exposed to asbestos at Employer 1 and Employer 2, Susan may only bring her worker's compensation claim against Employer 3, because Employer 3 was the last employer that contributed to her asbestos exposure. Susan's date of injury for purposes of bringing her worker's compensation claim would be the last day she worked for Employer 3.

If more than 12 years has passed since a worker's last occupational exposure, the last contributing employer and their worker's compensation carrier are relieved from liability under the statute of limitations. In this case, a worker may instead file a claim for the same worker's compensation benefits against the Wisconsin Work Injury Supplemental Benefit Fund. There are no differences in benefits available to injured workers who file their worker's compensation claim against the Wisconsin Worker Injury Supplemental Benefit Fund as compared to a private worker's compensation carrier.

Filing a Worker's Compensation After a Loved One Dies of an Occupational Disease

If a worker dies due to an occupational disease and leaves behind a dependent, that individual may be entitled to death benefits under the Wisconsin Worker's Compensation Act. When an occupational disease causes death, the death benefit is up to four times the worker's average annual wage during his or her last year with the last employer that contributed to the occupational condition (subject to an annual cap). Under the Worker's Compensation Act, a "dependent" is a spouse, child, parent, or other close relative that was totally dependent on the affected worker at the time of death. In death benefit cases, the dependent typically takes the form of a surviving spouse.

When it comes to the 12-year statute of limitations in occupational disease death benefits cases there is an important corollary worth noting: the statute of limitations begins running on the date of death, not the date of injury. Said differently, unlike a typical occupational disease case where the statute of limitations begins running on the last day worked for the last contributing employer, the statute of limitations in death benefit claims begins running on the date of death. Nevertheless, even if a claim for death benefits is not brought against the liable employer and worker's compensation insurer within 12 years following a worker's death, a claim may still be brought against the Wisconsin Work Injury Supplemental Benefit Fund.

Milwaukee Facts Citation: http://www.asbestosnation.org/about/