Friendly Passages

Supporting Equal Access to Law in Florida

November/December 2016

A Publication of The Friends of the Rupert J. Smith Law Library of St. Lucie County Florida

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The Rule of Law

On Behalf of the Publisher

By James T. Walker President, Friends of the Rupert J. Smith Law Library

By definition ***Friendly Passages*** is committed to the promotion and advancement of the Rule of Law. Through this publication's support of law libraries generally, particularly the Rupert J. Smith Law Library of St. Lucie County, there is recognition that the law acquires moral force through its adherence to provision of justice in equal measure to all, regardless of station in life, with a correlative duty of assuring that all may find equal access to their knowledge of it, equipped with universal awareness of the obligations and rights that are the proud legacy of the freedoms bequeathed to a grateful people through the sacrifices of our forefathers.

This sense of law as a leavening force for good is embodied in the Rule of Law, loosely defined by one internet source as "… the legal principle that law should govern a nation, as opposed to being governed by arbitrary decisions of individual government officials. It primarily refers to the influence and authority of law within society, particularly as a constraint upon behavior, including behavior of government officials."

While the ideal ever remains a work in progress, one has merely to look back into the history of our country's near past to gain an appreciation for the hard won improvements made to date. One such measure is the number of lynchings that became a frequent part of the American landscape following the Civil War. According to statistics provided by the Tuskegee Institute, almost 5,000 people are known to have been lynched from 1881 through 1968. Of those, seventy-two percent were African-American. Until 1901, annual totals averaged well over one-hundred such episodes, and in the high double-digits until 1935, after which the numbers fell sharply before finally tapering off. One can hardly imagine today the terror and horror that this bloodshed imposed. But faded images from brittle, weathered photographs of triumphant mobs standing at the base of a tree well convey the depths to which justice descended in those years.

Progress is made by one little victory at a time. In this month's issue of ***Passages*** there is examination of one such case that played an outsized role by fastening the Law's rule over such summary administration of capital punishment while also imposing an expectation that officials would henceforth exert themselves in the exercise of their official duties to prevention of any recurrence. It is a story of great heroism and great villainy. Justice Thurgood Marshall called it the first instance "… in which the (United States Supreme Court) demonstrated that the Fourteenth Amendment and the equal-protection clause have any substantive meaning to people of the African-American race." Mark Curriden and Leroy Phillips; **Contempt of Court: The Turn-of-the-Century Lynching That Launched a Hundred Years of Federalism,** Random House, Inc. (1999), p. xvii.

The year was 1906. The place was Hamilton County, Tennessee. The two principle characters were Ed Johnson, a twenty-four-year-old African American, and Joseph Shipp, Sheriff of Hamilton County. In the City of Chattanooga there was a series of alleged black on white crimes committed. Racial tensions were high. In that charged atmosphere, one Nevada Taylor, young white woman, was attacked late in the evening while walking home from a streetcar stop to a cottage at the Chattanooga Forest Hills Cemetery, which she shared with her father. She was grabbed from behind and knew little beyond the fact that the assailant was a black man who wrapped a leather strap around her neck. She lost consciousness during the attack. Later a medical examination determined that she had been sexually assaulted. The next day Sheriff Shipp arrested a black man

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named James Broaden who lived in the area and who was thought to match up with the victim's recollection of the episode. But then a report was received that one Edward Johnson was seen holding a leather strap near the streetcar stop on the night of the attack. Johnson was immediately placed under arrest.

The Sheriff feared a lynching effort and removed Johnson to nearby Nashville to await trial. Indeed, that evening following the move, a crowd of fifteen-hundred showed up at the Chattanooga jail and demanded that Johnson be handed over, along with two other black men also there being held for capital crimes. The local county judge, Samuel McReynolds spoke to the crowd and promised that swift justice would be administered through the legal system. Hearing this assurance, the mob reluctantly dispersed. It must be noted that elections were coming up shortly and both Shipp and McReynolds were up for reelection.

Two weeks following the crime, Johnson was brought to trial with Judge McReynolds presiding. In preparation, the Sheriff created a two-man lineup consisting of Johnson and Broaden and brought in Nevada Taylor to make the identification. After much hesitation, she pointed to Johnson and said he was "like the man as I remember him." When asked if she recognized his voice, she said "He has the same soft, kind voice." Despite numerous attempts by the Sheriff to obtain a confession from Johnson, the defendant steadfastly maintained his innocence.

Judge McReynolds discussed with Sheriff Shipp who might be selected to represent Johnson. Use of a black lawyer was only briefly considered. The judge thought it might be "too risky" for the Court, particularly were the defendant found not guilty. He settled on a white lawyer to represent Johnson, a man who had never handled a criminal case, whose trial experience was limited to a handful of cases involving simple no-fault divorces or small real-estate disputes. His fellow lawyers considered him hardly more than a paralegal. Two additional white lawyers were added to the defense team, another without any criminal law background, and a third who did have some experience with it. Upon appointing them, Judge McReynolds told them they would have a week to prepare. They would not be compensated, it being a pro bono assignment, and he hinted broadly that no great commitment of time or effort was expected.

When trial commenced, the defense moved for continuance to allow more time. But the request was denied. The jury was all white and one of its members physically threatened Mr. Johnson, without any attempt from the judge to admonish him. The defendant testified in his own behalf, proclaiming his innocence. But every time the prosecutor made a point in the trial, people in the packed courtroom cheered. Every time the defense made an objection, the audience hissed and jeered. All the while the judge said nothing. Thirteen alibi witnesses put Johnson elsewhere, at the Last Chance Saloon, when the attack occurred. The jury found Ed Johnson guilty, and Judge McReynolds sentenced him to death by hanging.

The defense lawyers recommended against appeal. They felt an appeal would be unlikely to succeed and they expressed additional fear that in any case an acquittal might incense the public to make another attempt at lynching the defendant. However, two local black lawyers intervened in Johnson's behalf, Noah Parden and Styles Hutchins. They then filed an appeal, both to the judge and to the Tennessee Supreme Court. Both were denied. They next filed a petition for writ of habeas corpus with the United States District Court, in Knoxville. The move was unusual and an act of desperation. At that time federal courts were traditionally viewed as having no jurisdiction over state criminal proceedings. The petition was thus denied. But Parden persisted. He took the petition to Washington and met with Supreme Court Justice John Harlan. Harlan agreed that the Supreme Court would hear the appeal and the Supreme Court entered a stay to afford time to do so, directing specifically "that all proceedings against the appellant be stayed, and the custody of said appellant be retained pending this appeal." **United States v. Shipp,** 203 U.S. 563, 571 (1906).

What happened next was subsequently described by the Court, **United States v. Shipp,** supra:

> The sheriff of Hamilton County was notified by telegraph of the order, receiving the news before six o'clock on the same day. The evening papers of Chattanooga published a full account of what this court had done. And it is alleged that the sheriff and his deputies were informed, and had reason to believe, that an attempt would be made that night by a mob to murder the prisoner. Nevertheless, if the allegations be true, the sheriff early in the evening withdrew the customary guard from the jail, and left only the night jailer in charge. Subsequently, it is alleged, the sheriff and the other defendants, with many others unknown, conspired to break into the jail for the purpose of lynching and murdering Johnson with intent to

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> show contempt for the order of this court, and for the purpose of preventing it from hearing the appeal and Johnson from exercising his rights. In furtherance of this conspiracy a mob, including the defendants, except the sheriff Shipp and the night jailer, Gibson, broke into the jail, took Johnson out and hanged him, the sheriff and Gibson pretending to do their duty, but really sympathizing with and abetting the mob. The final acts as well as the conspiracy are alleged as a contempt.

On the night the court's order was received, Sheriff Shipp's chief deputy recommended that extra guards be posted at the jail to forestall any mob violence. Instead, the sheriff sent all of the officers home, except for one elderly nighttime jailer. Moreover, all prisoners, except for Johnson and one white woman, were removed from the floor where Johnson was being held. When a mob did show up that night and broke in, the sheriff made no effort to restrain it from removing Johnson. The group took him to the Walnut Street Bridge-- the idea was that the location would serve as a deterrent to blacks who lived on the opposite side and who walked over the bridge daily to get to jobs in the downtown Chattanooga area. Johnson was hung from a beam. But after waiting two minutes for him to die, some in the crowd became impatient and started shooting at him. He was struck by approximately fifty bullets. Finally, one bullet hit the rope, severing it, and he fell to the ground. When Johnson was seen to move, one member put a revolver to Johnson's head and fired five times. A note was pinned to the body which said "To Justice Harlan. Come get your n—r now." In his final moments, Johnson publicly forgave those who were about to kill him. His last words were these: "God bless you all. I am a innocent man."

In the aftermath, Sheriff Shipp and Judge McReynolds were reelected in a landslide. Shipp told the *Birmingham News* "The Supreme Court of the United States was responsible for this lynching. I must be frank in saying that I did not attempt to hurt any of the mob and would not have made such an attempt if I could."

The news of the lynching was not well received in Washington. President Theodore Roosevelt was incensed. His Attorney General, William Moody, sent a team of Secret Service agents to investigate. Thereafter Moody filed a petition charging Shipp, six deputies and nineteen leaders of the lynch mob with contempt of the Supreme Court. The Court agreed to accept original jurisdiction and hear the matter.

It was the first and only time that the United States Supreme Court ever convened itself to conduct trial proceedings, with special prosecutors, dozens of witnesses and a special master to take the evidence. The trial record exceeded twenty-two hundred pages. Each side was given a full day of oral argument before the justices.

At its conclusion, Shipp and two other defendants were found guilty and sentenced to ninety days in jail, while three remaining defendants got sixty days.

The harshest penalties, however, were meted out to the lawyers for Mr. Johnson, Parden and Hutchins. Their respective practices were ruined. Their homes were burned to the ground. Fearing for their lives, neither ever returned to Chattanooga. Hutchins moved to Oklahoma. Parden and his wife moved to East St. Louis. Neither man ever practiced law again.

Later, much later, in February, 2000, a Chattanooga court, the same one where Johnson was originally convicted, formally vacated the conviction. The local district attorney did not oppose a motion to set aside the conviction and dismiss the charges, saying "I have no doubt that the criminal justice system in place at that time failed Mr. Johnson, and failed us all."

Why is this case important? Why does it matter? Well, to begin with, there was an immediate impact on lynching. The total number of lynchings in the United States, in 1909, the year Shipp went to jail, dropped from ninety-seven to eighty-two. Just as important, the number of attempted lynchings, those prevented by law enforcement, went up from only six in 1906, to nineteen in 1910, and continued to increase thereafter. Curriden and Phillips, supra at 337.

Chattanooga Daily Times.

"GOD BLESS YOU ALL---I AM INNOCENT"

Ed Johnson's Last Words Before Being Shot to Death By a Mob Like a Dog

MAJESTY OF THE LAW OUTRAGED BY LYNCHERS

Mandate of the Supreme Court of the United States Disregarded and Red Riot Rampant.

Terrible and Tragic Vengeance Bows City's Head in Shame

Johnson Taken From County Jail Last Night, Marched to County Bridge and Hung While Red Blooms Complete Their Hideousness By Riddling Body With Bullets.

NIGHT OF WICKEDNESS AND WOE

DEATH IN AVALANCHE

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A Few Tips On My Way Out

By The Hon. F. Shields McManus, Circuit Judge

As I finish my service on the circuit court bench, I am reflecting on what I learned. So I'll pass along some thoughts in hope you will find something useful. Since I served mostly in family and civil divisions, my experience may be different in detail from those serving in other divisions; but the stories I hear from fellow judges assure me that trial lawyer behavior is not altered much by the court in which one practices.

Motions

Much of a judge's time is spent hearing motions. A lot of them are unnecessary. But I understand that many are made necessary because it is the only way to get the opposing attorney's attention. This is often true about motions to compel discovery. At least most of those settle on the eve of the hearing.

Of course, you know there is a rule of professionalism that lawyers should speak to their opponent before setting the hearing. It is a rule too often winked at. It is boiler plate on your notice of hearing form. If you want to get respect from a judge who doesn't know you yet, actually call your opponent before you file a motion. If you impress the judge that you actually thought about the motion and tried to work it out, the judge is more likely to take you seriously and read your motions in the future. Whatever you do, don't make it obvious that you haven't even read your own motion.

Drafting

Don't engage in exaggeration and inflammatory rhetoric in drafting your motion. If you are hot under the collar when drafting it, hold it a day and revise it before you file it. Do not make personal attacks and ascribe bad faith to your opponent frivolously. The judge will find your motion unpersuasive if you exhibit more ill will than good draftsmanship.

When you have a motion that really is worth a hearing, write a speaking motion or a memorandum that sets forth the essence of the issue. Remember that the judge will try to read the motion and memo before a hearing but there are many motions to prepare for. So make your case clearly and succinctly. Cite any law unique to the motion but not law on every legal principal on which the motion is based. For example, on a motion to dismiss a complaint for failure to state a cause of action, the judge doesn't need to be told that review of the complaint is restricted to the four corners of the complaint and its attachments, and that all allegations are taken as true for the purposes of the motion. (Also don't move to dismiss the complaint because the plaintiff failed to *prove* an element of the claim. It's a clear sign you are clueless or your legal assistant wrote the motion.)

Plan ahead. Your case may last for years having many motions and orders. Give your pleadings and proposed orders distinctive but brief titles that make indexing and retrieval quick and reliable. And please put the date of the motion or the response in any rebuttal memo and on you notice of hearings. It greatly facilitates finding the motion in the file.

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A Few Tips On My Way Out

Presentation

If it is a really, really important motion you may be tempted to submit a three-ring binder. Be assured the judge will appreciate the smallest one you can squeeze your important thoughts into. Resist the temptation to include 6 cases on the standard for deciding a motion for summary judgment. This isn't the judge's first motion for summary judgment. Save a tree. If the motion must be lengthy, make an outline and use informative subject headings. Imagine the judge is smart and busy and he or she wants to skim through your 30-page memo looking for something not previously known. Do use tabs and a table of contents for any attachments. Copies of cases unique to the facts of your case are appreciated.

When you are fortunate enough to have a big case with some real money involved, resist the urge to repeatedly fill big binders for every motion and response with the same 250 pages of documents that were attached to the complaint. Perhaps a single binder with the documents and a cover letter to the judge to prompt the judge to save the binder will suffice. References in the subsequent motions to the original filing will make a sufficient record. Remember the judge has the file at his or her fingertips in the computer. And most judicial chambers still have shelves and/or filing cabinets. Burying the judge with binders containing the same documents over and over just creates more work for the judge and causes PDST (pre-determination stress disorder). This injury is aggravated when your banker's box of big binders arrives shortly before the hearing.

Hearings

Be prepared. Judges naturally develop opinions about lawyers who appear before them. If you seek to be taken seriously by judges, you should strive to consistently appear prepared and dressed professionally. Review the motion and any response before the day of the hearing. Review the relevant discovery. Don't be looking through the motion on the day of the hearing and find you don't have all of the procedural information. For example, if it is a motion to compel, make sure you have the relevant discovery documents and any subpoena and return of service. While you are preparing, make another effort to settle the motion before the hearing. This should be your second effort, the first being before you filed the motion. Are you asking for sanctions per Rule 1.380, a striking of pleadings, or an order of contempt? This is something

I often see included in motions but rarely see properly supported at the hearing. Study the rules and the case law to understand what grounds you must show the court to get sanctions. You may need an affidavit or a verified pleading. If you are not serious about a request for sanctions, don't make it. It is not smart to attack your opponent unnecessarily, or to "cry wolf" too often.

Learn to control yourself at hearings. Practice professionalism and civility. We all can get excited and irritated sometimes, even judges, but exercising self-control is the mark of a good litigator.

Trials

Preparation is the key to a successful trial. Experience is invaluable, too. You can't start out with experience, but you can always prepare. I realize that preparation takes time, which for a lawyer means money. This is the dilemma for trial lawyers. The compensation for their work may be limited or uncertain. The out-of-pocket costs may not be reimbursed. The temptation is to scrimp on the one part of the litigation which is not required by the rules: preparation. Resist that temptation. Think of preparation as the cost of doing business. If you want to be successful in the long run, learn how to prepare and get in the habit of preparation. To get experience, make time to go to court and watch experienced lawyers. Trial practice courses are very helpful but courtroom experience is the best education.

Prepare Exhibits

Exhibits also need to be given attention in advance of trial. Many trials begin with lawyers still preparing and sharing their exhibits. The pre-trial order requires this to be done before trial but often exhibits are not organized and marked. More importantly, thought needs to be given

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A Few Tips On My Way Out

to how to display the exhibits to the judge and jury. For jury trials, exhibits should be in digital format or printed on large boards as well as a reduced-size hard copy for the clerk. The courts usually have devices to display digital copies of exhibits. In the appropriate case, a binder of exhibits could be prepared for each juror and supplemented as the trial progresses.

Consider using a flip pad or Power Point for opening statement and closing argument, and even for cross examination. This is not evidence but an aid to argument. It does not go to the jury during deliberation.
For non-jury trials, prepare a copy of all exhibits for the judge. These can be placed in a binder with tabs for the judge. In family court, many lawyers do this. In civil court, many lawyers do not. I have found it necessary to ask the lawyers to show me the exhibits they were questioning the witness about. Don't overlook the judge as a fact finder when using exhibits with a witness. Judges can be persuaded with the effective use of visual displays in non-jury trial.

Make a Record

Give attention to making a record. There are many appeals denied because the lawyer did not make a record of an objection or lay the foundation necessary to sustain the issue on appeal. For example, objections to a juror for cause require not only the colloquy with the juror to establish bias, but if the challenge is denied, you must renew the objection before the jury is sworn. The objector also must exhaust all peremptory strikes and request an additional one.

Throughout the trial, objections must be made correctly whether about testimony, evidence, or the law. Often I see mistakes in this regard. Again, a lot of mistakes are due to poor planning before trial as well as the lack of experience. Objections to particular exhibits and anticipated irrelevant or improperly prejudicial topics of testimony should be raised in a motion in limine before trial.

On the other hand, think twice about objecting often or unnecessarily as this can alienate the judge or jury. For example, it is rarely necessary to interrupt an opening statement unless the speaker is introducing a new issue beyond the pleadings or saying something so prejudicial it must be interrupted to prevent a mistrial. Objections are necessary in closing arguments when an improper and prejudicial argument is made. To preserve objections for appeal, a request for a curative instruction or a mistrial is usually necessary.

Examination of Witnesses

On direct examination, ask direct questions. This would seem obvious but many lawyers have trouble asking a direct question. Have an outline or specific questions that bring out the evidence in a logical, easy to follow pattern. The simple way to do it is in chronological order. "What happened next?" Often the question comes out a compound question that leads to a confusing answer. Perhaps it started out as a leading question which is being corrected in mid-sentence. For example, "You did see that, or is that not correct?" to which the witness answers "Yes". I hear lawyers do that and move on to something else leaving the record unclear.

On the other hand, it is improper to ask a leading question on direct, such as, "You did see that, didn't you?" A leading question is a question which suggests the answer. Often, I hear lawyers object "leading question" when it is not. A direct question which is specific is not a leading

question. For example, "Now when you turned around, did you see a man in a Yankees baseball cap holding a pistol?" It is also acceptable to start a new topic by telling the witness what you are doing. For example, "Doctor, now I want to ask about my client's first visit."

On cross exam, the rules are very different. You can ask leading questions and you should. Don't give the witness the opportunity to explain or repeat the testimony he gave on direct. Open-ended direct questions are dangerous. Never ask a question to which you do not know the answer. Use short, simple questions in a leading manner. Get the concessions you need and stop. You may write them down on a flip pad. Then you can add your interpretation in closing argument. Don't try to get the expert to admit things he won't and then get in an argument with him.

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A Few Tips On My Way Out

Before I Leave

My judicial experience has been a happy one of constant learning. And I tried to be a teacher, too. If anything, I hope lawyers learned from me to respect their profession. Lawyers are given great authority and so have great responsibility. When a lawyer agrees to represent a client, the lawyer is entrusted with the client's access to justice. The lawyer who treats his client cavalierly or handles the case carelessly not only betrays the client's trust but brings dishonor to our profession and disrespect for our system of law. Be proud of your profession. Bring honor to it.

Judge F. Shields McManus is a Nineteenth Judicial Circuit Court Judge appointed in 2007 and elected in 2010. Since then he has been assigned to many divisions and has a broad judicial experience. Judge McManus is a graduate of FSU and FSU College of Law. He is active in the legal community and has sat on several boards and served as president. Additionally, Judge McManus is active in educational, charitable and civic organizations in Stuart and Martin Counties.

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On Behalf of the Publisher

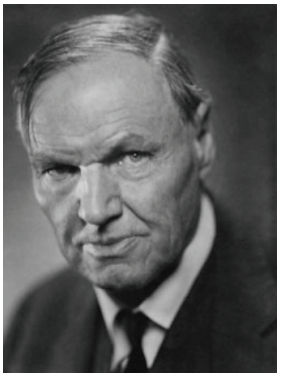
Moreover, every constitutional argument made by Pardens to the Court in his initial effort to obtain habeas corpus relief-- thwarted by his client's death-- that the right to a fair trial is undercut by the threat of mob violence, that defendants must be afforded the right to effective counsel; that criminal trials must be open to the public; that there is a federal right to a fair trial in state criminal proceedings; that states may not systematically exclude potential jurors because of race; and that state criminal defendants have a right to federal habeas corpus proceedings, were all eventually affirmed by the Supreme Court in later decisions. Curriden, Mark; "A Supreme Case of Contempt," American Bar Association Journal (June 2, 2009).

This was the first major blow to be delivered against Jim Crow, as insular southern justice was brought to account by the fourteenth amendment, due process and equal protection demands of the federal judiciary. It was a great day for the Rule of Law. Yet it is also a reminder that progress can come at a terrible price, in this instance paid for with their legal careers by two of Tennessee's earliest African American lawyers. No monuments were ever erected to either for taking on a fight on behalf of someone they barely knew. But perhaps it was with their sacrifice in mind that Theodore Roosevelt spoke the words that are now so famous:

"It is not the critic who counts, not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat."

Clarence Darrow

By Richard Wires



Clarence Darrow

The name of no criminal defense attorney in America's legal history is probably more widely recognized than that of Clarence Darrow because of his involvement in highly publicized cases. Prepared to defend often unpopular clients and ideas, he was a skillful litigator who thrived on courtroom action, and also among the last of the great courtroom orators, combining intellectual power with a sometimes disarming style. Some of his long closing arguments are justly famous for their cogent analyses of issues and justice. Both personal and professional qualities made Darrow successful in his courtroom appearances. Never intellectually able to be a comfortable conformist, too skeptical and tolerant, too disdainful of prejudice, he rejected society's contentment with platitudes and mantras. His outlook was detached and critical; his approach was focused and logical. Over time he became a noted technician in all aspects of a defense. In dozens of difficult cases, both famous and little known, his advocacy changed the outcomes.

Darrow was born in 1857 to parents of New England background in an area of northeastern Ohio once known as Connecticut's "Western Reserve." Their progressive thinking in many fields, supporting the abolitionist movement, questioning organized religion, and asserting women's rights, helped shape his beliefs and attitudes. After just a year in college, he taught school for several years, then attended law school briefly, and studied in a law office. Admitted to the Ohio Bar in 1878, he practiced locally, but in 1888 he moved to Chicago. Their membership in the Henry George Club influenced his economic views, especially with respect to property and public institutions, and his activities for the Democratic Party gave him political experience.

Darrow's main career consisted of two rather distinct periods, defending labor leaders in the 1890s and early twentieth century, then handling varied criminal cases from the late 1910s. His work for labor unions in an era of bitter and sometimes violent conflicts between big companies and their workers led many people to identify him with leftist causes. In 1894 he got mixed results defending labor organizer and socialist leader Eugene Debs against federal charges arising from the violence in the famous Pullman strike. Despite all his arguments Debs was convicted on one count. In 1906 Darrow helped the Western Federation of Miners defend three men accused of murdering former Idaho governor Frank Steunenberg. The trials stretched out over two years. Best known of the accused, William "Big Bill" Haywood, and another defendant were acquitted. Prosecutors dropped charges against the third defendant.

One incident in his early work has remained controversial and perhaps a notable blemish on his career. The case that effectively ended Darrow's labor union work was his 1911 defense of brothers John and James McNamara in connection with the 1910 bombing of the *Los Angeles Times* building during heated labor strife. Though placed behind the building, the bomb exploded early because of a faulty timer and started a huge fire, causing the deaths of twenty. The American Federation of Labor (AFL) sought Darrow's help. Efforts to reach a plea agreement to prevent the McNamaras' execution stalled over the attempted bribery of a juror. After the juror reported the offer the authorities arrested the defense's lead investigator in a sting operation. Amid the uproar the defendants pleaded guilty, one getting fifteen years, the other being sentenced to life imprisonment. The prosecutors then went after their attorney too.

Darrow was accused of arranging the bribe and faced two trials in 1912, defended by the famous Earl Rogers in the first and acquitted, and by himself in the second after Rogers had become ill, a trial that ended when jurors could not agree on a verdict. To be spared a retrial

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Clarence Darrow

Darrow came to an odd compromise: he promised not to practice in California at any time in the future. Opinions have differed on whether Darrow himself was privy to the bribery, a desperate act that was not in character, though Darrow was unhappy with the trial's course. Early biographers thought he had no part in the bribery scheme, but more recent writers have disagreed, believing that the full evidence suggests that Darrow had been involved. Certainly the situation tarnished his public image. He also lost union work. Just why labor leaders though he had betrayed or failed them is unclear.

Aware that his forte lay in courtroom strategy and persuasion, he turned instead to defending anyone accused of crimes, especially where he believed that justice might otherwise be threatened. As he said, "You can only protect your liberties in this world by protecting the other man's freedom. You can only be free if I am free." Over time he compiled an impressive record of favorable verdicts. Success did not necessarily mean gaining an acquittal, however, only an outcome that represented a fair resolution.

Darrow is probably best known for defending Chicago thrill killers Nathan Leopold and Richard Loeb in their kidnap-murder trial in 1924. Both precocious students from wealthy families, they were just 18 and 17 respectively when they killed 14-year-old Bobby Franks as a test, to discover how committing a murder felt. There was never any question of innocence, because both confessed, and the state sought the death penalty. As a lifelong opponent of executing criminals Darrow agreed

to undertake the defense of the pair. To avoid a jury trial and likely death sentence Darrow had them plead guilty so a judge heard the case. He then focused on the defendants' youth and used expert psychiatric testimony to convince the judge that the defendants lacked the normal mental safeguards to control emotions and make sound decisions. His contention was that psychological and societal factors rather than conscious choices dictate how some people act. His powerful twelve-hour closing argument swayed the judge. The defendants received life sentences plus 99 years to make future release unlikely. Sensational press stories about a "million-dollar defense" had been fabricated for effect. Darrow's fee was actually set by an impartial committee and for his expenses and services he received just $70,000.

Soon Darrow became the star member of John Scopes' defense team at his trial in 1925—what writer and wit H.L. Mencken would help label the "Money Trial." The Tennessee science teacher was accused of teaching evolution and thus violating the new Butler Act which forbade the teaching of anything but divine creation in publicly funded Tennessee schools. Darrow realized the trial promised to become something of a circus, but he joined the defense because he firmly opposed such narrowness in education, and his agnosticism had long rejected literal interpretation of the Bible. His presence would expand the purview and character of the case. It ceased to be about the law's constitutionality, or even the defendant's breach of it, but instead about creationism versus human evolution. The prosecution relied on a nationally prominent figure and three-time presidential candidate, William Jennings Bryan, known for religious fundamentalism based on acceptance of biblical writings as the truth. Darrow welcomed an intellectual duel with Bryan. He called him as a witness and they argued their views through questions and answers. Finally the judge ruled the testimony inadmissible, along with that of the experts whom the defense had called, declaring it irrelevant to the essential issue. Belatedly he insisted that the trial was limited to deciding the defendant's guilt or innocence. Though Scopes was found guilty and given a nominal fine, the conviction was soon overturned on a technicality, and the state took no further legal action against Scopes.

While religious fundamentalists claimed a victory based on the defendant's conviction, and many vilified Darrow as the enemy, their new champion Bryan died almost immediately, and the trial's arguments and publicity would ultimately undermine their position. Darrow swept aside criticism of his role in defending Scopes: "I do not consider it an insult, but rather a compliment to be called an agnostic. I do not pretend to know where many ignorant men are sure—that is all that agnosticism means." In January 1931 he debated related religious issues with famed British author G.K. Chesterton.

Within just several months of the Scopes trial Darrow agreed to help in another case. Again his concern was justice. He joined in the defense of eleven blacks being prosecuted for protecting themselves, after a white mob attacked a black family in Detroit which had bought a house in a white area, the eleven charged with murder

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Clarence Darrow

of a white man killed in the violence. All of the accused claimed self-defense. The first prosecution, of the group, ended in a mistrial. Separate trials were begun, starting with probably the strongest case, which produced an acquittal, and the further prosecutions were dropped. By emphasizing that the case rested on racial prejudice Darrow persuaded jurors that nothing but acquittal would be justice. Both of his masterful closing arguments, one seven hours long, became milestones in civil rights history. The trial judge was Frank Murphy, subsequently Michigan's governor, and later a Supreme Court justice. Semi-retired in later years, Darrow worked on his memoirs published in 1932, taking a few special cases. In 1931 a prominent white woman, Thalia Massie, was raped and beaten in Hawaii. When the jury trying several men accused of the crime could not reach a verdict, since their guilt was not clear, members of her family arranged to murder one defendant and were caught with the body. The Massies' victim, Joseph Kahahawaii, was native Hawaiian. Darrow was enlisted by friends to defend the family amid nationwide press coverage of the racially tense "honor killing." His eloquent final argument helped bring in the curious verdict of manslaughter. He had saved the defendants from a severe punishment but was obviously not responsible for what later happened: the governor commuted the sentences to one hour's detention in his office. It was an outcome which must have deeply dismayed the attorney.

Darrow died at age eighty in 1938. A few of his judgments and actions have been considered questionable; some of his methods like lengthy courtroom oratory have become dated. Many of the cases and stands on issues that he took made him unpopular with certain groups, as he knew they would, but he believed his clients however hated deserved fair hearings and the best defense he could provide. With his exceptional ability to explain situations and their implications, to sway opinions and views, he played a major role in shaping the nation's conscience.

Richard Wires holds a doctorate in European History and a law degree. He served in the Counter Intelligence Corps in Germany and is Professor Emeritus of History at Ball State University, where he chaired the department and later became Executive Director of the University's London Centre. His research interests include both early spy fiction and actual intelligence operations. His books include "The Cicero Spy Affair: German Access to British Secrets in World War II."

Breaking News! Our Law Day Heroes!

St. Lucie County Bar Association
Searcy Denney Scarola Barnhart & Shipley
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Kim Cunzo
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We thank those who have generously donated to help underwrite the prize money awarded to our St. Lucie student artists. For the thirteenth year, the Friends of the Rupert J. Smith Law Library has sponsored a county-wide student art contest to celebrate Law Day. Hundreds of students compete for prize money by interpreting the ABA chosen Law Day theme each year. Mark your calendars for May 1.

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Let The Punishment Fit The Crime: Halo Electronics, Inc. v. Pulse Electronics, Inc.

Endnotes for this article can be found on page 25 of the online edition of Friendly Passages.

By Adrienne Naumann

In Halo Electronics, Inc. v. Pulse Electronics, Inc., 136 S. Ct. 1923 (2016) [hereinafter 'Halo'] and Stryker et al. Zimmer Inc., et. al, 136 S.Ct.1923 (2016) [hereinafter 'Stryker'] the U.S. Supreme Court [hereinafter the Court] restored a trial court's discretion to award treble damages for patent infringement with evidence solely for subjective bad faith. The statutory language of 35 U.S.C. section 284 [hereinafter 'section 284'] does not explicitly limit a court's discretion in the award of treble damages as evidenced by its phrase 'may award.' The question before the Court was whether the U.S. Court of Appeals for the Federal Circuit [hereinafter the 'Federal Circuit'] requirements for treble damage awards were consistent with this statutory language.

Procedural history

Patent owner and petitioner Halo Electronics, Inc. [hereinafter 'Halo'] and respondent Pulse Electronics [hereafter 'Pulse'] each supply and distribute electronic components. After Pulse produced and sold Halo's patented electronic packages with transformers without permission, Halo offered Pulse a license to continue these activities. However, after an engineer concluded that Halo's patents were invalid, Pulse continued its production and sale of the allegedly infringing products without a licensing agreement.

As a result, in 2007, Halo filed a patent infringement lawsuit against Pulse. At trial, the jury found that Pulse had infringed Halo's patents and had most likely done so in a willful manner. However, the trial court declined to award treble damages, because in its opinion Pulse's defenses at trial were not objectively baseless. The Federal Circuit affirmed the trial court's decision on treble damages by relying upon its two-part test for willful infringement, found in In re Seagate Technology, LLC, 497 F.3d 1300, 1371 (Fed. Cir. 2007) (en banc) [hereinafter 'Seagate'].

In the companion case to Halo, a 2010 patent owner and petitioner Stryker Corporation and its affiliates [hereinafter 'Stryker'] filed a patent infringement lawsuit against respondents Zimmer, Inc. and Zimmer Surgical, Inc. [hereinafter 'Zimmer']. Stryker alleged that Zimmer infringed its patents for devices that clean tissues by spray and suction during surgery. The jury found that Zimmer had willfully infringed these patents and the trial court trebled Zimmer's damages to over $228 million pursuant to section 284. In making this award the district court relied upon trial testimony demonstrating that Zimmer instructed its design team to copy Stryker's products as part of its business strategy. As the second part of Zimmer's business strategy, it then marketed these copied products immediately and aggressively.

Although the Federal Court affirmed the judgment of infringement, it vacated the award of treble damages by relying upon Seagate. In particular, the Federal Circuit held that that treble damages were not justified because Zimmer had presented reasonable defenses at trial.

Discussion

The Court addressed three problems with the Seagate decision, which it then proceeded to resolve: the test for willful infringement that required an objectively high likelihood of

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By Shont'a McCord

We are pleased to present the essay that was awarded second place honors in this year's Alto Adams Writing Competition.

Growing Gains To Growing Pains:

The Ongoing Plight Of Children In Entertainment

Part 2 of 2

Part One of this article can be found in the last edition of Friendly Passages.

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Endnotes for this article can be found on page 25 of the online edition of Friendly Passages.

Problems that Remain with Coogan Law

In 1872, prior to Coogan Law's enactment, the California legislature passed Civil Code Sections 35 and 36 allowing minors the right to void contracts, but limiting the disaffirmance by minors in the entertainment industry.[1] The amendment made in 1927, enacted on the heels of the Jackie Coogan disaster, allowed courts to exercise discretion in binding minors to contracts they made within the entertainment industry.[2] Unfortunately, most states remain free to regulate the employment of children in the entertainment industry because the Coogan Law's reach does not extend much farther than California and New York.[3] This means that the law enacted to "protect" children entertainers only shields a portion of those minors.

The Coogan Law allows that a maximum of fifty percent of the child's net earnings be set aside in a trust for the child's benefit.[4] However, the statutory deposit requirement is only fifteen percent of a minor's earnings and does not provide adequate financial protection for minors in entertainment.[5] The disparity between fifteen to fifty percent makes a tremendous difference considering the financial welfare of a minor.

Children working in entertainment usually require a team of professionals from attorneys to publicists and are faced with costs such as acting lessons and transportation that a typical child does not require.[6] Although the amounts can prove costly, many contractual disputes arise between children and their parents. Cases like those of Jackie Coogan and Shirley Temple centered on the mismanagement of a minor's earning by the child's parents. Requiring only fifteen percent of financial earnings to be placed in trust affords parents and guardians excessive amounts of discretion and in many cases the authority to pilfer the wealth of their children at their leisure.

The issue of percentages highlights another problem with the Coogan Law: the problem of parents. So often, parents become the predators when dealing with minor contracts and not the producers and recording executives. The Coogan Law requires that at least one parent or legal guardian be appointed as a trustee of the funds deposited on behalf of the minor, but many times such designation facilitates the ability of parents to waste the minor's small fortune.[7] Instances where courts believe it is in the best interest of the minor to appoint someone other than a parent or guardian seem to take place once it has been proven that such an individual does not have the minor's best interest at heart. Inevitably, such intervention may be too little, too late.

The infamous "Octomom," Nadya Suleman, received much attention after giving birth to octuplets, but garnered even more notice after being sued by a complete stranger in reference to her right to serve as fiduciary trustee of her eight babies.[8] The Court addressed the constitutional rights of Suleman as a parent and provided that void of any clear indication of misconduct, she was free to raise her children in the way she desired. The court stated, "the right to raise one's own children as one sees fit is a matter of federal due process" and argued that court decisions should respect "the private realm of family life which the state cannot enter."[9] The alleged contractual agreements Suleman had entered into for pictures and other exclusives with regard to her children could cause many to inquire into the welfare of her, then, infant children. However,

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Growing Gains To Growing Pains

court intervention requires much more tangible evidence in order to interfere with a parent's right to make decisions for their children.

The statutory termination of the trust at the age of majority is also a problematic component of the Coogan Law. According to the legislation, sixty days after turning eighteen years old an entertainer is notified of her entitlement to the funds deposited in her trust.[10] At this point, creditors can go after the earnings of adolescents in satisfaction of outstanding claims from contracts entered into by the child's parent or guardian during the child's minority and hold them accountable for such debt.[11] Additionally, placing a fortune into the hands of an eighteen year old would likely prove to have the same result as providing parents infinite discretion to the way those funds are spent. The probability of depleting the child's earnings is more likely under the current age of majority.

Solutions to Problems with The Coogan Law

Stronger, more uniform regulation is necessary to ensure the protection of minors in the entertainment industry because the Coogan Law of 1927, 1992, 2000 or even 2004, has yet to catch up to the constantly expanding entertainment industry.[12] The largest loophole is the lack of attention states have spent on similar legislation to protect the financial welfare of their minor residents who contract for reality TV, music or athletic exposure. In addition to strengthening the soundness of the present Coogan Law, legislators must acknowledge that the "entertainment industry" does not reside solely in New York and California. Statutory inclusion of the Coogan Law throughout the nation would resolve some of the most apparent problems that rest in the Coogan Law.
Resolution of the current Coogan Law also lies in the

Nadya Suleman , or "Octomom" and her children

courts' level of intervention in the contract process prior to there being disputes. Currently, courts are provided with the discretion to approve contracts with minors and whether to allow disaffirmance or bind minors to such contracts. The courts should require that each contract be under judicial review. The infancy doctrine was created to protect minors and that reasoning should be extended to minors who contract in such specialized and nuanced areas, such as sports and entertainment. As it currently stands, a minor cannot disaffirm contracts that have been court approved, but most contracts have not been court approved.[13] The Coogan Law does not apply to agency or management contracts either, thereby addressing the minor's contracting for employment but not the services related to such employment.[14] This encourages parties to in turn contract with parents in lieu of contracting with the minor, creating a conflict of interest between parents, who are parties to contracts for professional services provided for their children, and the children who are recipients of those services.[15]

Additionally, the statutory requirement of fifteen percent of each child's earnings should be increased to more considerably protect the financial assets of children in entertainment.[16] Although the cost for management and other fees are common in entertainment contracts, they are not compulsory. An incremental formula for the required cost of such services should be implemented based on the minor's earnings in order to allow for such benefits without providing guardians with the unmitigated discretion to spend the child's finances freely.[17] Furthermore it is recognized that parents do bear a burden once they commit their child to being an entertainer; however, they should not be allowed to live lavishly based on the financial earnings of their child prodigy. Providing a capped percentage on of a child's income to be allowed for parents or guardians would further alleviate the exploitation of children from potential financial abuse.[18]
The importance of more court intervention also plays a part in resolving the issue of parents as trustees to their children's trust funds. The dueling realities were quoted best: "on the one hand, they are likely to be in the best and most efficient position to manage their children's money without having to involve a third party;" "on the other hand, it is too easy for their interests to become directly adverse to the interests of the children."[19] New York law has implemented legislation allowing the parent or guardian to act as the trustee on the account, but appointing a trust company as custodian of the account once it reaches $250,000.[20] Although an admirable advent in the ongoing amendments to the Coogan Law, waiting until an account reaches $250,000 before appointing an outside fiduciary to regulate the account still allows for plenty of mismanagement by opportunistic or inexperienced parents who oversee the financial futures of their children. Mandatory appointment of a party, who stands nothing to gain from the success of the minor, would more effectively protect minor entertainers from not only their parents or guardians but may benefit the management of the children's earnings because of a third party's expertise in finances.

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Let The Punishment Fit The Crime: Halo Electronics, Inc. v. Pulse Electronics, Inc.

infringement; the evidentiary standard for willful infringement; and the scope of appellate review for an award or denial of treble damages.

Criteria for awarding treble damages under section 284

With respect to the Court's first concern, Seagate held that for an award of treble damages, a trial court must find that:

(1) the infringer acted despite an objectively high likelihood that its acts were infringement of a valid patent; and

(2) the existence of this infringement was either known or so obvious that it should have been known to the accused infringer.

Because of the Seagate requirements, if any reasonable basis for the infringer's activities is raised, such as patent invalidity, then a trial court need not address whether there was subjective bad faith by the infringer. The result for the patent holder is that there can be no treble damages award, even if evidence clearly establishes that the infringer was aware of the patents at the time of the infringing acts!

Because even blatant willfulness was trumped by an 'after the fact' objective rationale, the Court found that the objective likelihood requirement was too restrictive of the exercise of a trial court's discretion. In particular, section 284 explicitly provides that a court may increase damages, and these words clearly connote discretion guided by long-standing judicial principles and specific litigation circumstances. The Court concluded that the Seagate criteria were flawed because
(i)the inquiry into subject bad faith was foreclosed despite evidence of the most blatant infringement, and
(ii) objective reasons for infringing activity could always be created and depended solely upon the ingenuity of the infringer's legal team.

The Court also relied upon the history of enhanced patent infringement damages in the United States for eliminating Seagate's objective recklessness requirement. For example, the 1870 amendment to the Patent Act recognized a trial court's discretion to award treble damages based upon the facts of each case. The Court further observed that there was traditionally a distinction between (i) persons who were aware that they were infringing; and (ii) those who were unaware of patents and did not otherwise intend to infringe. Under this distinction punitive remedies, such as more than actual damages, were intended for 'aware' infringers, while 'unaware' infringers were exclusively liable for actual damages such as lost profits. Most judicial decisions continued to preserve this distinction between innocent infringers and whose were aware of patents and yet willfully infringed.[1]

In 1952, Congress enacted section 284 to the Patent Act to explicitly allow treble damages for willful infringement, and the Court interpreted section 284 to exclusively require willful or bad faith infringement for this award. It was not until the 2007 Seagate decision that the test for willful infringement required clear and convincing evidence of objective recklessness in addition to evidence of subjective bad faith.

In view of this legislative and judicial history, the Court concluded that section 284 does not require a high objective likelihood of infringement. Instead, subjective bad faith infringement, i.e., the second prong of the Seagate test, is an adequate basis for awarding patent infringement damages and does not require evidence of objective recklessness. On this point the Court relied upon its analysis in Octane Fitness LLC v. Icon Health and Fitness, Inc., 134 S. Ct. 1749, 188 L.Ed.2d 816(2014) [hereinafter "Octane"] (awarding attorney fees for party misconduct in 'exceptional cases' under a less strict standard for 35 U.S.C. section 285).[2] In Octane, the Court held that evidence of subjective bad faith is sufficient for exceptional case status and that evidence of objective baselessness is not necessary. The Court also held that a prevailing patent owner need only prove that the defendant harbored subjective bad faith when infringing, and that this bad faith awareness occurred at the time of the infringing activities. In sum, Octane and Halo are in accord that only subjective bad faith is necessary to obtain a punitive remedy such as attorney fees and/or treble damages [3]

Evidence necessary for willful infringement

According to Seagate, to obtain a treble damage award, a patent holder must establish the relevant facts with clear and convincing evidence. The Halo Court disagreed and lowered the evidentiary standard from clear and convincing to a preponderance of the evidence standard for the reasons articulated in Octane. In particular, the Court observed that if there was a higher standard of proof necessary, then Congress would have explicitly included this standard in section 284. To substantiate its conclusion, the Court referred to section 273(b) of the Patent Act which (i) provides a defense to infringement based upon prior commercial use and (ii) explicitly requires clear and convincing evidence. However, because section 284 does not explicitly include an evidentiary standard, then the traditional preponderance of evidence for patent infringement proceedings is also sufficient for a treble damages award.

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Let The Punishment Fit The Crime: Halo Electronics, Inc. v. Pulse Electronics, Inc.

Scope of appellate review of treble damages award or denial

The Halo Court rejected Seagate's appellate review that comprised three parts

(I)de novo review of the objective likelihood of non-infringement;

(ii) substantial evidence for the subjective bad faith determination; and

(iii) abuse of discretion for the actual decision to award or deny treble damages.

The Court reasoned that section 284 implies deference to a trial court's discretion in view of precedent on the scope of this discretion. In doing so, the Court relied upon it analysis on this point in Highmark, Inc. v. Allcare Health Management Systems, Inc.,134 S. Ct. 1744 (2014). The Court then held that an abuse of discretion standard is the appellate review standard that applies to all aspects of an award appeal, even if issues of law are combined with specific factual litigation circumstances.

Technical innovation policy

In their arguments before the Court, Pulse and Zimmer contended that a threat of treble damages allows patent owners or their representatives to intimidate business competitors into settlements where there is no *bona fide* infringement. Pulse and Zimmer also argued that the increased possibility of treble damage awards would motivate patent enforcement entities to instigate frivolous patent infringement lawsuits. The Court found that based upon these arguments, Zimmer's primary legal position in this litigation was one of policy: that treble damage awards would stifle innovation because companies would avoid even a possible conflict with holders of patent rights. Nevertheless, the Court concluded that these concerns, although serious, did not justify the Seagate restrictions upon a district court's exercise of discretion under section 284.

Epilogue

The Federal Circuit has addressed both decisions after the Court's remand. In Halo Electronics, Inc. v. Pulse Electronics et al., Nos. 2013-1472 and 2013-1656 (Fed. Circ. August 5, 2016) the Federal Circuit in turn remanded the case for evidence of subject willfulness to the trial court under the modified standard. Specifically, the Federal Circuit instructed the trial court to consider (i) subjective willfulness based upon the knowledge of the infringer at the time of the challenged conduct (ii) among other factors.

For Stryker Corp. et al. v. Zimmer, Inc. et al., No. 2013-1668 (Fed. Cir. September 12, 2016) the Federal Circuit affirmed the jury's finding of willful infringement. It then vacated the original award of enhanced damages, and remanded the case to the trial court to exercise its discretion according to the Court's new standard for section 284. The good news is that within a relatively short time period, patent owners received a deterrent to patent infringement under section 284, and prevailing parties received a greater likelihood of attorney fee awards as a deterrent under section 285 following Octane. It remains to be seen whether these changes result in a significant reduction in patent infringement litigation in the United States.

Endnotes for this article can be found on page 25 of the online edition of Friendly Passages.

Adrienne B. Naumann has practiced intellectual property for almost twenty years in Chicago. She graduated from Chicago-Kent College of Law with high honors. She attended the University of Chicago where she received her bachelor's degree and the University of Illinois where she received her master's degree. Ms. Naumann provides trademark, copyright and patent applications as well as supporting areas of law. http://home.comcast.net/~adrienne.b.naumann/IP/

Library Holiday Schedule

The library will be closed:
December 23rd -26th
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Last Issue's Cryptoquote Answer

ZK AKJ BLBI EBS SYB FBBGDOE SYVS SYB KOGA IBVMKO RB YVLB BGBCSDKOM DM SK FDOZ KJS DF SYB WKGGM RBIB IDEYS? -IKNBIS KINBO

Do you ever get the feeling that the only reason we have elections is to find out if the polls were right?
- Robert Orben

See page 22 for this month's puzzle

Post Traumatic Stress Disorder (PTSD), Suicide, And Necessary Societal and Individual Responses

By Art Ciasca

The tragic death of firefighter, Indian River State College Instructor, and community hero Fire Rescue Battalion Chief David Dangerfield of Vero Beach by suicide underscores several harsh realities, with the first and most important being that the Treasure Coast of Florida lost a true hero and friend. David was loved by many people and his death is a major loss for the residents of the Treasure Coast. Heartfelt condolences go to all who knew him, his family, his friends, his co-workers, his students, and all those who were reached and touched by his work.

There are several other messages and realities that come immediately to mind: even strong, successful, intelligent, caring people may end their lives by suicide; our society needs to do a much better job about educating its citizens about mental health issues; we need to reduce the stigma associated with receiving mental health treatment and care; and we need to increase funding and access to mental health care.

First, what is PTSD? Posttraumatic stress disorder (PTSD) can occur after you have been through a trauma. A trauma is a shocking and dangerous event that you see or that happens to you. During this type of event, you think that your life or others' lives are in danger.

Going through trauma is not rare. About 6 of every 10 men (or 60%) and 5 of every 10 women (or 50%) experience at least one trauma in their lives. Women are more likely to experience sexual assault and child sexual abuse. Men are more likely to experience accidents, physical assault, combat, disaster, or to witness death or injury.

David Dangerfield

PTSD can happen to anyone. It is not a sign of weakness. A number of factors can increase the chance that someone will develop PTSD, many of which are not under that person's control. For example, if you were directly exposed to the trauma or injured, you are more likely to develop PTSD.

We tend to think of PTSD and veterans. According to RAND, at least 20% of Iraq and Afghanistan veterans have PTSD and/or Depression. The statistic for Vietnam Veterans is at 31%. In times of peace, in any given year, about 4% of the general population have PTSD (caused by natural disasters, car accidents, abuse).

It should be noted that first-responders such as firefighters, paramedics, and those in law enforcement often times can experience PTSD. In addition, victims of sexual assaults are prone to suffer with PTSD. PTSD is often a precursor to suicide. At the Inner Truth Project in Port St. Lucie, it is reported by Mindi Fetterman, Founder and Executive Director, that 52% of the sexual abuse and rape survivors assisted at Inner Truth Project have reported a suicide attempt at least once in their life.

In regards to suicide, the sad statistics, according to the CDC in Atlanta, reveal that suicides are on the increase in the United States, topping over 42,000 in 2014. Florida had over 1,900. These numbers are on the increase, particularly in the white, middle-aged male category, and in pre-teen females. Particularly alarming across the country is the rate of young people under age 24, as 11 A DAY will end their lives through suicide, and our veterans are ending their lives through suicide at the rate of 22 A DAY. Surely we as a society can do better than this.

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Post Traumatic Stress Disorder (PTSD), Suicide, And Necessary Societal and Individual Responses

Often times there are no signs that an individual is about to end his or her life. But for many, there are a few signs, such as changes in sleep or eating patterns, neglect of personal appearance, depressed, sad, angry, aggressive, job or financial loss, alcohol or drug abuse, self-mutilation, isolation, loss of interest in activities/hobbies, trouble with school or work. Some urgent danger signs could include: hopelessness or hopelessness, talking, writing, or hinting about suicide, lethargy, apathy, or sadness, extreme changes of behavior, putting one's affairs in order, relationship breakup, buying weapons or stockpiling drugs, reckless behavior, and/or suddenly happier or calmer.

We as a society need to begin providing true and effective mental health education in our schools, delving in to the various mental health disorders that we as human beings might experience during a lifetime, such as signs, symptoms, and ways to treat and deal with mental health issues. Very little in the way of true mental health education is offered to students, so as adults, we have a population of people with little to no real knowledge of mental health issues and how to treat them, which in turn creates a lack of knowledge and understanding about mental health disorders and stigma about receiving care. As a result of stigma and not understanding this a true medical condition, people do not seek out mental health care, leading to people living their lives in despair, chaos, hopelessness, and sadness, and many ending their lives due to the feeling of extreme distress.

We cannot predict death by suicide but we can identify people who are at increased risk for suicidal behavior, take precautions, and refer them for effective treatment. Ask the person directly if he or she is having suicidal thoughts/ideas, if they have a plan to do so, and if they have access to lethal means. Take seriously all suicidal threats and all suicide attempts. A past history of suicide attempts is one of the strongest risk factors for death by suicide. Listen and look for red flags mentioned above. Be ready to act, such as do not leave the person alone, say "I'm going to get you some help", call the National Suicide Prevention Lifeline 800-273-TALK, and/or go to SAMSHA's Mental Health Services Locator at www. Mentalhealth.samsha.gov/databases/. Hospital emergency rooms can screen a person for suicidal ideation, and there are mental health organizations that can assist an individual with mental health disorders prior to reaching suicidal ideation or a suicide attempt, with services ranging from assessment, mental health therapy, case management, and psychiatric services if indicated. In looking at depression, research indicates that 80-90% of those treated for depression have a positive outcome with therapy and/or medication, but just 33-40% of those with depression will receive treatment.

As mentioned above, many first responders, veterans, and victims of sexual assaults suffer from PTSD. David Dangerfield's chilling Facebook Post from just before his death, "PTSD for firefighters is real, 27 years of deaths and babies dying in your hands is a memory that you will never get rid of. It haunted me daily until now", demonstrates the importance of monitoring our mental health status and that of our loved ones and those we care about, and reaching out for help when needed, just as we do when physical health is challenged.

Sadly, Indian River County Fire Rescue Battalion Chief David Dangerfield suffered from PTSD from the nature of his giving and life-saving work in our community. It has been confirmed by the father of David Dangerfield that David was receiving mental health treatment for PTSD. This has caused some to question the efficacy of receiving mental health care. My response has always been that mental health disorders are true medical conditions, like diabetes, cancer, or heart disease, and there are many individuals who receive care from a cardiologist and die from heart attacks or heart disease, and many see oncologists but ultimately succumb to cancer.

Unfortunately, as with other medical conditions, this is the same in the mental health field.

Rest in peace David Dangerfield. You are a true community hero and will not be forgotten.

Prior to serving as the Chief Executive Officer at Suncoast Mental Health Center, Art Ciasca worked for New Horizons of the Treasure Coast, Savannas Psychiatric Hospital, and The Wound Healing Center at Indian River Medical Center. He also taught and coached high school baseball and girls volleyball. Art holds a Masters Degree in Health Services Administration and Bachelors Degree in Health and Physical Education. Art Ciasca has resided in Vero Beach since 1986.

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Growing Gains To Growing Pains

The age of majority should be increased to the age of twenty-one to fully protect the adolescents from the creditors that their parents or guardians created and from their own misguidance. At the age of eighteen, regardless of how much exposure a child has received, becoming an adult is overwhelming enough. The potential for financial ruin would seem likely to decrease with a few more years of experience and growth. Jackie Coogan was twenty-one when he pursued litigation against his mother and stepfather for his earnings. To prevent the onset of more child stars growing up with nothing to show for their work throughout their childhood, increasing the age of majority would further secure the financial welfare of children in entertainment from depleting their fortune or from their parents' misappropriations.

Conclusion

Resolving the child's interest and employer's interest is a challenging feat and by most accounts has remained uncertain since the plight of Jackie Coogan. Nevertheless, there is much to be said about the progress that has developed from a time when a child actor's financial future was not guaranteed by law but rather placed in the hands of his parents who controlled all assets he recovered. Conversely, the Coogan Law still remains moderately inadequate in protecting the class it was created to protect. The outcries following Coogan's suit against his mother and stepfather were not to afford provisions to benefit the entertainment industry or the parents of child entertainers. The Coogan Law was enacted to address the void in then-current law regarding contracting with minors in the entertainment industry. Unfortunately, the Coogan Law has not kept up with modern issues on contracting with minors in entertainment.

Minors are faced with the inevitable: they will become adults. This reality, which is daunting to ordinary adolescents, coupled with the increased burden of immense wealth, could prove fatal if not managed with the utmost care. Jackie Coogan may have been the first, but his story has proven to be the principal in a line of child tragedies in Hollywood, surmounted by the likes of child stars like Shirley Temple, Gary Coleman and Macaulay Culkin.

From 1927 until the present, legislation has "assumed the responsibility" to protect the welfare of minors who contract as entertainers. As each decade has progressed the question has remained, "Is there anyone we (minors) can trust?" The New Edition song penned with the real-life struggles of child entertainers in mind, still rings true for most minors in "the industry;" the protections apparently afforded to them have been more beneficial to everyone else involved in the contractual transactions except for them. Eighty-eight years seems to be adequate time to correct the failures of the past and proactively address the potential concerns; however, without close analysis of the legislation and its widespread scope beyond film studios in Hollywood and playhouses in New York, more "Coogans" will continue to emerge. Adopting more uniform and comprehensive regulations of minor entertainment contracts by increased judicial intervention, along with increasing the amount required to be deposited in trust could be just the answer to prevent a child entertainer's "growing pains."

Endnotes for this article can be found on page 25 of the online edition of Friendly Passages

Shont'a J. McCord is a third year law student at Dwayne O. Andreas Law School, Barry University, and will graduate in December 2016. She is the second place winner in the 2016 Alto Adams Legal Writing Competition and this is her contribution. Shont'a is a native Floridian, served an internship with the St. Lucie School Board's Attorney last summer, and enjoys studying Sports and Entertainment Law as well as other areas of the law.

From Our Clerk Smith

Property Fraud Alerts Now Available to St. Lucie Property Owners

According to the FBI, mortgage fraud and other property fraud are growing crimes that threaten homeowners, businesses and our economy. The 2008 financial crisis was the catalyst to a drastic increase in white collar crime across the country, even in St. Lucie County.

After the economic collapse, criminals found an avenue to defraud victims by falsifying documents and recording them with Clerks' offices. These false documents changed the ownership of real estate property and allowed criminals to sell or take out loans on the property. Meanwhile, any debts or liens were unknowingly applied to the real homeowners.

Current Florida law requires Clerks to record documents, regardless of their validity. A recent example of the challenges with the law occurred when Louis Lewis recorded fraudulent Certificates of Title and Quitclaim Deeds with our office for multiple properties, and then sold the properties with the fraudulent ownership changes. Our office determined that something must be done.

That's why I am excited to announce the launch of a new free service designed to protect St. Lucie County citizens from property fraud. Property Fraud Alert by TRIESHIELD detects all documents being recorded and sends email and text notifications within 24 hours to registered users. This innovative system protects property owners from scammers who record fraudulent deeds, mortgages and other documents.

If you own property in St. Lucie County, I urge you to register your personal or business name today. As legal counsel to thousands of our citizens, I also encourage you, our local lawyers, to inform your clients about this valuable new resource.

Go to www.stlucieclerk.com/fraudalert and follow the instructions. Once registered, you'll receive an email and text alert when a document is recorded matching your name(s). The notification will include the document's instrument number and book/page number, allowing you to easily view the document online in the Clerk's Official Records Search, https://acclaimweb.stlucieclerk.com.

If you become a victim of fraud, you are encouraged to contact your local law enforcement agency immediately.

- St. Lucie County Sheriff's Office: 772-462-7300
- Port St. Lucie Police Department: 772-871-5000
- Fort Pierce Police Department: 772-461-3820

To learn more about Property Fraud Alert, please visit www.stlucieclerk.com/fraudalert.

Poet's Corner

My childhood's home I see again

By Abraham Lincoln

My childhood's home I see again,
And sadden with the view;
And still, as memory crowds my brain,
There's pleasure in it too.
O Memory! thou midway world
'Twixt earth and paradise,
Where things decayed and loved ones lost
In dreamy shadows rise,
And, freed from all that's earthly vile,
Seem hallowed, pure, and bright,
Like scenes in some enchanted isle
All bathed in liquid light.
As dusky mountains please the eye
When twilight chases day;
As bugle-tones that, passing by,
In distance die away;
As leaving some grand waterfall,
We, lingering, list its roar--
So memory will hallow all
We've known, but know no more.
Near twenty years have passed away
Since here I bid farewell
To woods and fields, and scenes of play,
And playmates loved so well.
Where many were, but few remain
Of old familiar things;
But seeing them, to mind again
The lost and absent brings.
The friends I left that parting day,
How changed, as time has sped!
Young childhood grown, strong manhood gray,
And half of all are dead.
I hear the loved survivors tell
How nought from death could save,
Till every sound appears a knell,
And every spot a grave.
I range the fields with pensive tread,
And pace the hollow rooms,
And feel (companion of the dead)
I'm living in the tombs

New Family Law Clinics Offered at the Rupert J. Smith Law Library

Child Support Modification & Custody/Timesharing/Paternity - Receive forms and general instructions.

Covered topics: Child support modification, custody/timesharing, and paternity.

2nd Thursday of Every Month at 5:30 PM
Register with FRLS by calling 772-466-4766

Dissolution of Marriage (Divorce) - Receive forms and general instructions from local attorneys.

Learn about FL dissolution of marriage including issues involving children and property.

4th Thursday of Every Month

4:30-5:30 PM – without children
6:00-7:00 PM – with children
Register with FRLS by calling 772-466-4766

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For the impatient, e-mail your answer to nora@rjslawlibrary.org for confirmation. For the patient, the decoded quote will appear in the next issue.

Addressing the Needs of Our Aging Population with Compassion and Dignity

Endnotes for this article can be found on page 25 of the online edition of Friendly Passages

By Tom Genung

Many of us during our lifetime will have the incredible opportunity to assist in transition planning for an elderly or vulnerable loved-one. This can be a very challenging process as we intrude, even if ever so gently, upon the independence and autonomy of our loved-one, and perhaps experience conflict with our elderly or vulnerable loved-one or other family members. Many such situations become intertwined in court cases often fraught with high emotions, escalating attorney fees, and more conflict.

The elderly population in the 19th Judicial Circuit, comprised of Indian River, Martin, Okeechobee and St. Lucie Counties is growing at a rapid rate. The State of Florida Office of Economic and Demographic Research estimates the 2015 population of residents 65 and over for Indian River, Martin, Okeechobee and St. Lucie Counties at 152,411.[1] In the year 2020, the estimated population for residents 65 and over will increase to 173,728.[2] By the year 2025, the estimated population for residents 65 and over will be 206,175.[3] This would constitute a 35.3% increase in the population of residents 65 and over between 2015 and 2025. Needless to say, we will need a substantial increase in services to meet the needs of our aging population, as well as qualified individuals trained to assist in transition planning in cases where there is high conflict, or those cases where the individuals involved are seeking a compassionate and dignified process.

In an attempt to address the needs of our aging population, and minimize conflict in transition planning, in October 2014, the Florida Chapter of the Association of Family and Conciliation Courts (FLAFCC) established Guidelines for Eldercaring Coordination in conjunction with the Association for Conflict Resolution Task Force on Eldercaring Coordination.[4] The FLAFCC indicated that the process of eldercaring coordination will:

> help manage high conflict family dynamics so that the elder, family and stakeholders can address their non-legal issues independently from the court, and the court will not have to micromanage their family decision-making;
>
> ready the elder and family to work with collaterals to address medical and financial issues, avoiding delays and resulting in better decisions for the elder;
>
> promote the self-determination of the elder to the extent of his or her ability as fully as possible;
>
> provide a support system for the elder and family during times of transition;
>
> promote safety by monitoring situations at high risk for abuse or neglect;
>
> free precious judicial time to address matters for which dispute resolution processes have been unavailable or have been ineffective;
>
> promote interdivisional court collaborations to conserve court and community resources;
>
> enhance the definition and perception of "family" within the court to include older families with aging parents;
>
> expand the use of "coordination" as a dispute resolution method to address high conflict cases involving various situations and issues.[5]

Eldercaring Coordination is gaining traction throughout Indiana, Idaho, Ohio, and Minnesota, and is being implemented in a number of pilot sites throughout Florida.[6] Eldercaring Coordination is modeled after Parenting Coordination, and seems to be a greatly needed resource for our aging population and their families.[7]

For more information about Eldercaring Coordination, please visit the Florida Chapter of Association of Family and Conciliation Courts website at www.flafcc.org, or contact Tom Genung, Trial Court Administrator at genungt@circuit19.org.

Thomas Genung, Esq., Trial Court Administrator, Nineteenth Judicial Circuit, Port St. Lucie (2006 to present). B.S. in Forestry, University of Massachusetts at Amherst (1984); J.D., City University of New York Law School (1989); trained mediator and peacemaker. Member, The Florida Bar (1989). Tom has made a career of working in the public interest, including: The Connection offender re-entry program, Legal Services of Connecticut, 15th Judicial Circuit Public Defender, Department of Health and Rehabilitative Services, 17th Judicial Circuit Court, and the 19th Judicial Circuit Court. He has 23 years of experience with the administrative offices of the court in Florida, and serves on numerous court related boards, commissions and committees.

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Course #	TITLE	EXPIRATION DATE	GENERAL HOURS	ETHICS HOURS
1962	"Arbitration, Effective Joint Opening Sessions, and Ethical Issues for Mediators and Attorneys"	12/24/2016	3	1
1968	Differences Among the DCA's	12/24/2016	2	0
1871	Florida Law Update 2015	12/25/2016	8	0
1931	2015 Masters Seminar on Ethics	12/26/2016	4	4
1964	Electronic Discovery and Digital Evidence Pre-Discovery Through Trial	12/26/2016	4.5	1
1980	"The Income, Estate and Gift Tax Consequences of Divorce"	1/5/2017	2	0
1982	"35th Annual RPPTL Legislative & Case Law Update Seminar"	1/31/2017	8	1
1989	Annual Ethics Update 2015	4/2/2017	5	2
1996	Estate & Trust Planning / Asset Protection: Tricks, Treats and Really Scary Things	4/23/2017	7.5	1
1991	How to Be an Estate Planning Wizard	4/9/2017	0	9
2104	Same-Sex Marriage and Estate Planning: Nope It's Not Over Yet!	4/17/2017	1	0
1984	"2015 Case Law Update: Stay up to Date and Learn about Recent Developments and Notable Decisions in Family Law that Will Impact Your Practice"	4/22/2017	2	0.5
1997	Bankruptcy Law & Practice: View From the Bench 2015	5/5/2017	4.5	0
2084	Basic Personal Injury 2015	5/13/2017	7	0
2015	Top Mistakes Attorneys Make in Family Law	6/16/2017	2	0
2020	Advanced Federal Practice 2016	7/15/2017	5	0
2021	Elder Law Annual Update and Hot Topics - 2016	7/15/2017	15	1
2022	Solo & Small Firm Conference – Wild, Wild Tech: Taming the Technology Beast	7/22/2017	10	2
2024	16th Annual Labor and Employment Certification Review	7/28/2017	17.5	0
2032	Advanced Real Estate Law & Certification Review	8/8/2017	17.5	0
2036	Litigation and Trust Law Symposium 2016	9/4/2017	7.5	1
1992	Times They Are A Changing: Family Law Trends	9/17/2017	7	1
2044	2016 Wills Trusts and Estates Certification Review	10/8/2017	18	1.5
2342	Don't Let Someone Take a Byte Out	11/3/2017	1	0

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Growing Gains To Growing Pains

(Endnotes)

1 Some earlier judicial decisions also advocated attorney fees as compensation for the unnecessary expense of defending or instigating a frivolous lawsuit. This concern became moot when the 1952 Patent Act enacted section 285 for awarding attorney fees to prevailing parties in exceptional cases. The requirement for status as an exceptional case includes activities such as litigation misconduct, frivolous litigation and fraud on the patent office in addition to willful infringement.

2 The Octane Court observed that litigation misconduct that was culpable under F.R.C.P. 11 was too narrow in scope to include all litigation misconduct that qualifies as an exceptional case under section 285. Instead, the Court concluded that a trial court may award attorney fees whenever a party's conduct, while perhaps not reachable under Fed. R. Civ. P. 11, is nonetheless exceptional under section 285.

3 In Lumen View Technology LLC v FindTheBest.com, Inc.,811 F.3d 479 (Fed. Cir. 2016), the Federal Circuit affirmed a finding of an exceptional case (i) based upon Octane criteria the case(she thought he earned ort guidelines created by Kuczler way back when. Mom had told Jenny what she thought he earned (ii) where Lumen View Technology LLC instituted unsubstantiated infringement allegations. However, there was also an appeal of the amount of attorney fees, and the Federal Circuit remanded the case to the trial court for a reassessment of the amount. This decision underlines the different legal criteria between (i) finding a case exceptional and eligible for an attorney fee award and (ii) assessing the actual amount of these fees which must be reasonable under section 285. The amount of the attorney fee award is generally not intended to be the punitive element of the award, but rather to compensate the prevailing party.

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Addressing the Needs of Our Aging Population with Compassion and Dignity

(Endnotes)

1 pp 73-84, Source: Florida Demographic Estimating Conference, December 2015 and the University of Florida, Bureau of Economic and Business Research, Florida Population Studies, Bulletin 175, June 2016

2 Id. at pp 133-144

3 Id. at pp 193-204

4 p. 4

5 Id. at p. 5

6 http://www.flafcc.org/

7 Id.