Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 22 December 2011

Name: Dale Conder Jr.

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INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit seventeen (17) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Partner with the law firm of Rainey, Kizer, Reviere & Bell, PLC

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1992; BPR No. 015419

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee; BPR No. 015419; licensed October 1992; active.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any State? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Since graduating law school in 1992, I have been employed by Rainey, Kizer, Reviere & Bell PLC. From 1992 until December 31, 1999, I was an associate attorney. Beginning January 1, 2000, I became a partner with Rainey, Kizer, Reviere & Bell PLC.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

The majority of my practice involves representing municipalities and their employees in civil-rights cases and representing medical providers at Tennessee's prisons in medical-malpractice and Eighth Amendment cases. I also represent employers in employment-discrimination lawsuits. A smaller part of my practice involves representing plaintiffs and defendants in tort actions. The civil rights cases make up approximately 85% of my practice and employment law litigation represents about 10% of my practice. The remainder involves tort cases and the majority of these involve representing the defendants. I have also represented parents in juvenile court custody proceedings. Although these cases are personally very rewarding, they represent a very small part of my practice.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will

allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Between my second and third years of law school, I clerked at Rainey, Kizer, Reviere & Bell PLC. During that summer I worked on a variety of matters. At the end of my summer clerkship, the firm offered me a job and I have been an attorney at Rainey Kizer since graduating law school. From August 1992, until December 31, 1999, I was an associate attorney. Since January 1, 2000, I have been a partner. I am licensed to practice in all state courts in Tennessee. I am admitted to practice in federal courts in the Western and Middle Districts in Tennessee and I am admitted pro hac vice in several cases in federal court in the Eastern District of Tennessee. In April 2012, I will be admitted in the Eastern District of Tennessee. I am also admitted in the Sixth United States Circuit Court of Appeals and in the Supreme Court of the United States.

When I began practicing law, I worked on a variety of matters including the research and writing of summary judgment memoranda and briefs for partners in the firm. Initially, my practice involved tort cases resulting from car wrecks. As part of this practice, I tried many cases in the general sessions courts in West Tennessee. And I have tried many jury trials involving car wreck cases. In fact, my first jury trial was in Carroll County Circuit Court representing a plaintiff in a car wreck case. In the early part of my career, I also worked on workers' compensation cases. The tort cases and the workers' compensation cases allowed me the opportunity to take countless depositions of parties, lay witnesses, and expert witnesses.

As my career progressed, I took advantage of the opportunity to move into the area of civil rights. In 1997, following the death of my first wife, I stopped handling workers' compensation cases because as a single parent I found that the scheduling in workers' compensation cases made handling these cases more difficult. During this time, I began to focus my practice in civil-rights and employment-law cases. Section 1983 cases became my main area of practice. I was very fortunate in this respect because this allowed me to work in an area of the law I enjoy, constitutional law. By the very nature of this practice, I worked with local law enforcement and this exposed me to criminal law at a very practical level.

I have tried many civil-rights cases in federal court. Although I've tried some of these by myself, my partner John Burleson and I usually try these cases together. In addition, I have tried employment cases in federal and state courts. These have included jury trials and bench trials. My practice has also allowed me to argue cases in the Supreme Court of Tennessee, the Tennessee Court of Appeals, and in the Sixth United States Circuit Court of Appeals. Although I have not handled criminal

matters, as I mentioned above, the civil-rights cases often involve criminal law and constitutional issues. Most of these cases involve Fourth Amendment issues such as probable cause, the necessity of search warrants, and the use of force. The employment law cases, like criminal cases, involve the reading and application of statutes to the facts of the case.

As for my work habits, I am focused and work hard to provide my clients quality legal representation. This shows in my trial preparation and in the way I handle my cases. Particularly with the civil-rights cases, I strive to develop a strategy for getting as much of the case as possible dismissed very early in the case. It is important to keep in mind that all of the things that make up the litigation practice (depositions, motions, trials, and appeals) are my job, but all this is much more important to the client. And the client—whether paying or pro bono—deserves an attorney who works diligently on his case. If I am fortunate enough to receive this appointment I will employ these same standards as a judge. The parties, witnesses, attorneys, court reporters, bailiffs, and jurors are entitled to a judge who is prepared, starts court on time, and is ready to work a full day. The work habits I've developed in my life will enable me to do this.

Although custody cases are outside of my practice area, I have had the opportunity to represent two fathers in juvenile court who were seeking custody of their children.

Attached at Tab A is a list of representative trial and appellate experience.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Cases that have been of special note to me are those that have had an effect beyond just the legal community. For example, in 2007, two of my partners Dale Thomas and Jerry Kizer gave me the opportunity to become the primary lawyer representing the Jackson-Madison County School System in the desegregation case filed in 1963, by African-American students and their parents. I worked with the United States Department of Justice and the attorney for the private plaintiffs to resolve this case. In September 2010, the federal court declared the school system to be unitary, thus ending this forty-seven-year-old lawsuit. This gave the local school board the freedom to operate the schools without having to work with lawyers or get court approval before taking action.

In 2008, my wife received a phone call about a man who was desperately trying to get custody of his son. Because he and the mother had never been married and he had addiction problems in his past, it appeared he was going to lose his parental rights. To make matters worse, he felt his son was in an unsafe and abusive foster home. Because this was outside my usual area of practice, I was very reluctant to get involved. But I agreed to look into the case and soon found myself wanting to help the father. Unfortunately, the father's fears that his son was in a dangerous environment proved to be true. While this sixteen-month-old child was in this home, he suffered from abuse that included a broken arm, a beating that left belt marks, and an adult bite mark. We were able to get the court to put the child in the home of the father's relatives. During this time we became increasingly involved with this family and both the father and the child spent a lot of time at our house. In due course, the court returned custody to the father. Today, this little boy is five years old. My wife and I and our daughters have remained very involved in their lives and consider them to be part of our family. This experience led my wife and me to become foster parents after seeing the need for foster parents in our community. Although this case had none of the publicity associated with the desegregation case, it was one of the most rewarding cases of my career and life changing for my wife and me.

In 2009, another father came to me seeking help to get visitation with his daughter whom, until this time, he did not know about. Because the father was my brother-in-law, the case was intensely personal from the start. By this time, I knew a little about custody cases and recognized we would be in for a battle. At the first hearing, the trial court rejected the father's efforts as time-barred. It was the most painful defeat I have ever experienced. There was nothing more I could do and my brother-in-law was left with the painful reality that he would never know his daughter. Then, a decision by the court of appeals in another case took us back to court and led the court to change its decision and give the father visitation. As the case developed over the following years, the mother's circumstances continued to change, leading the court to give the father primary custody of his daughter. This was a victory not only for my brother-in-law, but for his daughter and our entire family.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

Not applicable.

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Not applicable.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Commission.

None.

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I have not applied for a state-court judgeship before.

EDUCATION

14. List each college, law school, and other graduate school which you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Jackson State Community College 1982-1984; A.S.;

University of Tennessee at Martin 1984-1986; B.S. Political Science;

University of Tennessee College of Law 1989-1992; J.D

PERSONAL INFORMATION

15. State your age and date of birth.

Age: 49

Date of Birth: **January 17, 1963**

16. How long have you lived continuously in the State of Tennessee?

I have lived in Tennessee since birth.

17. How long have you lived continuously in the county where you are now living?

Other than when I was in college and law school, I have lived in Jackson, Madison County, Tennessee, since birth.

18. State the county in which you are registered to vote.

Madison County, Tennessee.

19. Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable.

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No.

I received two speeding tickets in the early 1980s. I do not recall the year of either ticket. I paid the fines in both cases.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

Not applicable.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

The Jackson Downtown Development Corporation: 2007-2010; I served as a board member and later as secretary.

My family and I are members of Fellowship Bible Church in Jackson, Madison County, Tennessee.

Recently, I agreed to serve on the board of HOPEful Living.

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

a. If so, list such organizations and describe the basis of the membership limitation.

b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No. (a) Not applicable; (b) Not applicable.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

Tennessee Bar Association: member since 1992;

Defense Research Institute: member since 2000;

The Federalist Society: member since 2010.

The Federal Bar Association.

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school which are directly related to professional accomplishments.

None

30. List the citations of any legal articles or books you have published.

Expert Disclosures under Rule 26, For the Defense p. 41 (July 2004);

Effective Opening Statements, A Young Lawyer's Guide to Defense Practice (2006);

Law Enforcement and the Americans with Disabilities Act, For the Defense, p. 48 (June 2007);

The Admissibility of Electronically Stored Information, For the Defense p. 22 (September 2008).

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

In June 2006, I taught part of a seminar regarding excessive-force cases. Tennessee Municipal League Risk Management Pool presented the seminar. More recently, I have taught several seminars presented by my law firm and the Society for Human Resource Management. Members of the Society for Human Resource Management received continuing education credit for these seminars.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Not applicable.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings which reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

I did the research and all the writing in each of these examples.

Brief of Savannah Police Department in Opposition to Petition for Writ of Certiorari (filed in the Supreme Court of the United States) attached at Tab B;

"Expert Disclosures under Rule 26," *For the Defense* p. 41 (July 2004) attached at Tab C;

"Law Enforcement and the Americans with Disabilities Act," ***For the Defense*****, p. 48 (June 2007) attached at Tab D;**

"The Admissibility of Electronically Stored Information," ***For the Defense*****, p. 22 (September 2008) attached as Tab E;**

"Effective Opening Statements," in ***A Young Lawyer's Guide to Defense Practice*** **(2006) attached as Tab F.**

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I am seeking this position because it will allow me to do what I enjoy and what I believe I am gifted for. Max Lucado calls it the "sweet spot," the intersection of your talents and your passion. Being a judge fills this role because it allows me to use my legal talents to interpret and apply the law and to satisfy my passion to serve and to make a difference.

As a lawyer, I try to make a difference in my clients' lives by giving them the best legal representation possible. I believe I have been successful at this. As a judge, I will try to make a difference in the lives of those in my courtroom by being an honest, hard-working, prepared, and compassionate person. I am seeking this position because it will expand my capacity to positively influence the lives of others. This is the true desire of my heart.

36. State any achievements or activities in which you have been involved which demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

The custody cases I discussed above were both pro bono and demonstrate my commitment to providing equal justice under the law to those who need it despite their inability to pay. I have also handled a complaint to the Tennessee Human Rights Commission that was filed against the local Habitat for Humanity organization. And many times, I provided legal advice to persons who could not afford to pay a lawyer. Most of these situations did not lead to litigation, but provided a level of comfort to the individuals assuring them they were being treated fairly.

The school-desegregation case also demonstrates my commitment to equal justice under the law. During the final stages of this case, we were able to negotiate an

agreement to turn one of the state's low scoring high schools into a healthcare magnet school. This led to higher scores, better facilities and increased opportunities for the students.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I am seeking the Division III position for the Twenty-Sixth Judicial District. This district includes Madison, Chester, and Henderson Counties in west Tennessee. There are three circuit court judges in this district and this position opened following Governor Haslam's appointment of Judge Roger Page to the Tennessee Court of Criminal Appeals. This court deals with criminal and civil cases. If I am fortunate enough to be appointed to the court, I will bring to the court a solid work ethic and high moral code that will allow me to continue to operate the court with the efficiency and integrity exhibited by Judge Page. As a practicing lawyer of nearly 20 years, I know the importance of court beginning on time; this is important not only to the lawyers and to court personnel, but to the parties and witnesses. As a judge, I will live by the same standards I expect from others.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I believe the most effective way that I serve the community is by being a foster parent. It is all too often that I turn on the news and hear that a child in the foster-care system has been abused. This should never happen. The possibility of saving just one child from abuse motivates my wife and me to continue being foster parents even when doing so adds stress to our already hectic lives. We also believe that even if our influence on the child is brief, it could have lasting effect on the child's life.

As strange as this sounds, in 2004, I detained a stranger who was looking in my neighbor's window. This man turned out to be a registered sex offender and wanted on a parole violation in Kentucky. The Jackson police arrested him and he was incarcerated.

I served for approximately three years on the board of the Jackson Downtown Development Corporation. This is a non-profit organization dedicated to developing Jackson's downtown by bringing new businesses to the area and advocating for existing businesses. Recently, I agreed to serve as a board member for HOPEful Living. This is a charitable organization dedicated to helping low-income homeowners make necessary repairs to their homes. I will continue to serve HOPEful Living and my wife and I will continue to serve as foster parents. As other

opportunities present themselves, I will continue to be involved in the community regardless of whether I receive this judicial appointment.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Commission in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

My most lasting life experience was being raised in a Christian home by loving parents. They taught me the importance of honesty, hard work, and compassion for others. This provided me with the foundation necessary to succeed in life. This foundation is what qualifies me to be a successful circuit judge.

First, the importance my parents placed on honesty—in word and deed—equips me to maintain the integrity of the court. Because people must have confidence in our judicial system, the court's integrity must be protected. This confidence is easily jeopardized by judges who make poor decisions both in the courtroom and in their personal lives. I will always be conscious of my actions and how they might be perceived by others.

Second, the lesson of working hard taught me not only to work hard to improve my life, but to do the job I am hired to do. And this is true whether delivering newspapers as a twelve-year-old boy, working my way through college and law school, or being a judge.

Third, the best judges realize that they are dealing—not with cases—but with the lives of people. And a judge cannot deal justly with the lives of people without having compassion. The seeds of compassion my parents planted in me as a child have grown and matured throughout my life making me a better father, husband, and friend. I believe it will make me a better judge.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes, because a judge's job is to apply the law, not to make law. Although this might be difficult at times, it is a task I am willing to accept.

In the case I mentioned earlier involving my brother-in-law seeking visitation with his daughter, the court's interpretation of the statute and the cases applying the statute led the court to conclude that his petition was time-barred. I had hoped that the circumstances of the case would lead the judge to rule differently. But the judge ruled against us. Although I disagreed with the decision, I explained to my brother-in-law that based on the language of the statute the appellate courts would likely uphold the trial judge's decision. We had no choice but to accept it and move on. It was only after the court of appeals issued an opinion further clarifying the language of the statute that I filed a motion to alter the judgment.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.

A. **John Burleson, partner at Rainey, Kizer, Reviere & Bell, PLC. Contact information: jburleson@raineykizer.com; office phone: 731-426-8114; home phone 731-664-2712; Office Address 209 East Main St. Jackson, Tennessee, 38301.**

B. **Judge Christy R. Little, Madison County Division II General Sessions Judge which includes Juvenile Court; Office phone: 731-423-6073; Office Address: 110 Irby St. Jackson, Tennessee, 38301**

C. **Spencer Barnes, owner The Law Offices of Morrison & Barnes; e-mail: spencer@attorneygeorgemorrison.com; Office Address: 120 South Liberty Street, Jackson, Tennessee, 38302; Office phone: 731-422-1635.**

D. **Larry Homesley, retired; address: 42 Calumet, Jackson, Tennessee, 38305; home phone 731-668-1902;**

E. **Jeremy Little, Shelter Insurance agent (not related to Judge Little); e-mail address: jlittle@shelterinsurance.com; Home Address: 20 Greendale Drive, Jackson, Tennessee, 38305; cell phone: 731-225-5095.**

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Circuit Court of the 26th Judicial District of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is

filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: January 19, 2012

Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

TENNESSEE JUDICIAL NOMINATING COMMISSION
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE COURT OF JUDICIARY
AND OTHER LICENSING BOARDS

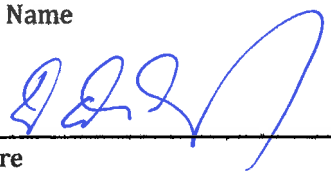
WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Court of Judiciary and any other licensing board, whether within or outside the state of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission.

Dale Conder Jr.

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

Printed Name



Signature

January 19, 2012
Date

015419
BPR #

EXHIBIT A

REPRESENTATIVE TRIAL EXPERIENCE

1. *Stone v. City of Grand Junction*, No. 10-1088, jury trial U.S. District Court, Jackson, Tennessee, (civil rights claims against Grand Junction, Tennessee, and its police chief)

2. *Brunt v. City of Lexington,* No. 09-1231, jury trial U.S. District Court, Jackson, Tennessee, (age-discrimination and retaliation claims against Lexington, Tennessee; my partner John Burleson was the lead attorney);

3. *Jonathan Parker v. City of Lexington*, No. 05119, bench trial, Henderson County Circuit Court, (governmental tort liability claim against Lexington, Tennessee, and one of its officers);

4. *Hays v. City of Lexington*, No. 19757, bench trial, Henderson County Chancery Court, (sex discrimination case against Lexington, Tennessee; my partner John Burleson was the lead attorney);

5. *Todd v. City of Lexington*, No. 03-157, bench trial, Henderson County Circuit Court, (retaliation claim against Lexington, Tennessee);

6. *Cunningham v. Reid*, No. 03-1055, jury trial, U.S. District Court, Jackson, Tennessee, (civil rights case against police officers for Humboldt, Tennessee);

7. *Connell v. Webb Realty*, No. 03-1012, bench trial, U.S. District Court, Jackson, Tennessee, (claim against a realty company for race discrimination);

8. *Dunavan v. City of Jackson*, No. 02-1298, jury trial, U.S. District Court, Jackson, Tennessee, (retaliation and discrimination case against Jackson, Tennessee; my partner John Burleson was the lead attorney);

9. *Jacox v. Sain*, No. 02-1163, jury trial, U.S. District Court, Jackson, Tennessee, (civil-rights action against two of Jackson, Tennessee's police officers; my partner John Burleson was the lead attorney);

10. *Lane v. City of Jackson*, 02-1008, jury trial, U.S. District Court, Jackson, Tennessee, (civil-rights action against several police officers with the Jackson, Tennessee, police department;

11. *Gardner v. Tatum*, No. 7808, jury trial, Gibson County Circuit Court, (car wreck case);

12. *Williams v. Jackson Transit Authority*, No. 01-409, Div. I, bench trial, Madison County Circuit Court, (governmental tort liability action against the transit authority for injuries sustained when the passenger fell from her seat);

13. *Linam v. Richard,* No. 4792, jury trial, McNairy County Circuit Court, (car wreck case);

14. *Murphy v. Jackson Transit Authority*, No. 01-53, bench trial, Div. I, Madison County Circuit Court, (governmental tort liability action against the transit authority for injuries sustained when the passenger fell from her seat);

REPRESENTATIVE APPELLATE EXPERIENCE

1. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422 (Tenn. 2011), (I filed an amicus brief on behalf of the Tennessee Defense Lawyers Association regarding whether the *Ashcroft-Iqbal* standard applied in state cases);

2. *Lynn v. City of Jackson*, 63 S.W.3d 332 (Tenn. 2001), (I wrote the brief and argued the case addressing the issue of whether the savings statute applied to a governmental entity when the tort claim was dismissed in federal court);

3. *Winchester v. Little*, 996 S.W.2d 818 (Tenn.Ct.App. 1998), (I wrote the brief and argued the case regarding the immunity of guardians ad litem);

4. *Hayes v. City of Lexington*, 334 S.W.3d 207 (Tenn.Ct.App. 2009), (I wrote the brief and argued the case in the court of appeals);

5. *Todd v. Jackson*, 213 S.W.3d 277 (Tenn.Ct.App. 2006), (I wrote the brief and argued the case in the court of appeals);

6. *Tucker v. Tennessee*, 539 F.3d 526 (6th Cir. 2008), (I wrote the brief and argued the case regarding the applicability of the Americans with Disabilities Act in situations in which the police are making arrests. I also wrote the brief opposing the writ of certiorari to the Supreme Court of the United States.)

EXHIBIT B

No. 08-1291

In The Supreme Court of the United States

ODIS TUCKER; VONNIE TUCKER; and BLAKE TUCKER,

Petitioners,

v.

HARDIN COUNTY, political subdivision of the State of Tennessee; SAVANNAH POLICE DEPARTMENT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF SAVANNAH POLICE DEPARTMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Issues not raised, or developed in the argument in the court of appeals are waived and will not be considered by the Supreme Court. The Tuckers did not develop in their brief in the court below the issue of the standard of proof required for the recovery of compensatory damages under the Americans with Disabilities Act. Because the issue was not raised below, should the Petition for Writ of Certiorari be denied on this issue?

2. The Americans with Disabilities Act does not apply in the context of an in-the-field arrest before the scene is secure. Blake Tucker was arrested because he assaulted a police officer and a citizen, and committed disorderly conduct; his step-father, Odis Tucker, was arrested for attempting to interfere with the arrest. Under these circumstances were the officers required to accommodate the Tuckers' disabilities before securing the scene?

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OPINION BELOW

The opinion of the court of appeals is published at 539 F.3d 526 (6th Cir. 2008). The opinion of the district court granting the Savannah Police Department's motion for summary judgment is published at 443 F.Supp.2d 971 (W.D.Tenn. 2006).

STATEMENT OF JURISDICTION

The judgment and opinion of the court of appeals was entered on August 29, 2008. The Petition for Rehearing En Banc was denied on January 16, 2009, and the Certiorari Petition was filed on April 16, 2009. Odis, Vonnie, and Blake Tucker invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOKED

The Tuckers have cited the applicable statutory and regulatory provisions involved in this case.

STATEMENT OF THE CASE

I. Introduction.

Blake and Odis Tucker[1] claim that their arrests by police officers of the City of Savannah, Tennessee, violated the Americans with Disabilities Act. 6th Cir. Joint Apx. pg. 14. Because the Tuckers are deaf and mute they are qualified individuals with a disability as defined by 42 U.S.C. §12131(2). They claim they were "in need of the services, programs and activities of law enforcement . . . of . . . the City of Savannah" and the City discriminated against them by failing to provide an effective means of communication. 6th Cir. Joint Apx. pgs. 14 and 17.

II. The police officers communicated effectively enough for the Tuckers to accomplish the purpose of the trip, i.e., to pick up Blake's wife and child.

Blake and Odis Tucker came to Savannah to pick up Lauren Tucker and Kayla Tucker, the minor child of Blake and Lauren. 6th Cir. Joint Apx. pg. 16. Lauren and Kayla had been visiting Lauren's mother, Donna Spears, in Savannah, Tennessee. *Tucker v. Hardin County,* 443 F.Supp.2d 971, 973 (W.D.Tenn. 2006). Sometime after Blake and Odis Tucker arrived

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[1] Vonnie Tucker had no involvement with the City's officers and her lawsuit is only against Hardin County, Tennessee. *Tucker v. Hardin County,* 443 F.Supp.2d 971, 972 n. 3 (W.D.Tenn. 2006).

at Ms. Spears's home, one of the neighbors called the Savannah Police Department and Officers Mike Pope, John Sylvester, and T.J. Barker responded to the call. *Tucker v. Hardin County,* 443 F.Supp.2d at 973; 6th Cir. Joint Apx. pgs. 16; 43; 112-13; 145; and 150.

When Officer Pope arrived, he saw Blake and Odis using sign language. 6th Cir. Joint Apx. pgs. 113-14. Officer Pope then began using his pad and pen to communicate with Blake and Odis. Petition at pgs. 7-8. He asked if they had called the police and Blake responded that he did not know who called the police. 6th Cir. Joint Apx. pg. 114. Officer Pope then told Blake and Odis to wait while he tried to find out what was going on. Petition for Writ of Certiorari at pg. 8.

Donna Spears told Officer Pope that the Tuckers had come to pick up Lauren and the baby, but that Lauren did not want to go with them. 6th Cir. Joint Apx. pg. 114. Officer Pope separated Donna Spears from Blake and Odis by telling her to go in her house. 6th Cir. Joint Apx. pg. 114. This is standard procedure in a domestic case. 6th Cir. Joint Apx. pg. 146.

By communicating in writing Officer Pope learned that the Tuckers had come to Savannah to pick up Lauren and her baby, but Donna Spears would not let them leave. 6th Cir. Joint Apx. pgs. 114-15. Officer Pope then told the Tuckers to wait outside while he went in to talk with Donna Spears. 6th Cir. Joint Apx. pg. 115.

Officer Pope went inside with Donna Spears and her daughter, Lauren Tucker, to find out what was going on. 6th Cir. Joint Apx. pg. 115. Donna Spears repeated that Lauren did not want to leave with the Tuckers. 6th Cir. Joint Apx. pg. 116. At first, Lauren refused to communicate with Officer Pope. *Id.* Officer Pope continued trying to communicate with Lauren by writing. *Id.* He explained he could not help her if she would not communicate with him. *Id.* Lauren finally agreed to communicate with Officer Pope if her mother left the room. *Id.* at pgs. 116-17. Officer Pope then asked Mrs. Spears to leave and, after she left, Lauren began communicating with him. *Id.* at pg. 117. Lauren Tucker told Officer Pope that she wanted to leave with Blake and Odis. *Id.*; Petition at pg. 8. Officer Pope then told Ms. Spears that if her daughter wanted to leave, he could not stop her. 6th Cir. Joint Apx. at pg. 117.

Officer Pope, again using written communication, told the Tuckers that Lauren would be leaving with them. *Id.* at pgs. 118-19. The Tuckers understood that the purpose of the trip had been met. Petition at pgs. 8-9. The police officers walked with Lauren Tucker to the van. Donna Spears and her friend Judy Crotts also walked to the van. *Id.* Ms. Spears wanted to hold her granddaughter one final time before Kayla and Lauren left. After Ms. Spears held her granddaughter, Lauren began putting Kayla in her car-seat and at about the same time Blake attacked Judy Crotts.

III. Blake Tucker was arrested for assault, resisting arrest, and disorderly conduct; and Odis Tucker was arrested for interfering with police officers.

As Lauren was putting Kayla in the van, Officer Pope saw Blake Tucker swing his fist and hit Judy Crotts. 6th Cir. Joint Apx. pgs. 119-20 and 129-30. Officer Pope then pulled Donna Spears behind him and held up his hands indicating for Blake Tucker to stop. *Id.* at pg. 120. Blake then hit Officer Pope in the chest. *Id.* After struggling with the officers, Blake Tucker was taken to the ground, but he continued to resist by trying to prevent the officers from handcuffing him. *Id.* at pgs. 120-21. Officer Pope then struck Blake Tucker twice on the right shoulder to get control of his right hand. *Id.* at pgs. 120-21 and 151. During the time the officers were on the ground struggling with Blake, Odis Tucker approached the officers as if he might be about to interfere with the arrest. *Id.* at pgs. 121-23 and 127.

Blake was arrested and charged with assaulting Judy Crotts and Officer Pope, disorderly conduct, and resisting arrest. *Id.* at pgs. 138 and 154-61. He pleaded guilty to both assault charges and to disorderly conduct. *Id.* at pgs. 176-77. Odis Tucker was arrested and charged with interference with an officer, resisting arrest, and disorderly conduct. *Id.* at pgs. 138 and 162-67. The charges against Odis were dismissed by the state as part of the plea agreement with Blake Tucker.

REASONS FOR DENYING THE PETITION

I. The Tuckers waived the issue regarding the standard of proof for compensatory damages.

The district court noted that the Tuckers would have to prove intentional discrimination to recover compensatory damages. *Tucker v. Hardin County,* 443 F.Supp.2d at 973 (W.D.Tenn. 2006). The Tuckers take issue with intentional discrimination as the standard for recovery of compensatory damages under the Act. Petition at pg. 15.

The Tuckers knew the district court had concluded that proof of intentional discrimination was necessary to recover compensatory damages, but they did not raise this issue in the court of appeals. The closest they came to raising the issue was in their brief where they stated the following issue:

> As to the Plaintiffs' claims against the City of Savannah Police Department, what is the standard for evaluating an ADA claim of discrimination as to hearing and speech disabled persons and their rights to 'auxiliary aids' in the context of a police confrontation with them and other non-disabled member (sic) of the public

Brief of Appellants Odis Tucker, Vonnie Tucker and Blake Tucker, at pgs. 1-2.

To the extent this raised the issue, it did so only in a perfunctory way. Beyond this one-time mention of the standard, the Tuckers made no effort to develop

this argument. *Id.* The Tuckers' failure to develop this issue in their argument (*Id.* at pgs. 24-30 and 32-43) results in the issue being waived. *See Vallejo Piedrahita v. Mukasey,* 524 F.3d 142, 144-45 (1st Cir. 2008). Issues not raised in the court of appeals will not be addressed by the Supreme Court of the United States. *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). Because the Tuckers did not raise or develop this issue in the court of appeals, their petition should be denied as to the correct standard for recovering compensatory damages.

II. The arrests were because of the commission of crimes and not "because of" or "solely because of" the Tuckers' disabilities.

The opinions below recognize that police officers are expected to react to the individuals and the changing circumstances they encounter. *Tucker v. Hardin County, et al.*, 539 F.3d 526, 536 (6th Cir. 2008); *Tucker v. Hardin County, et al.,* 443 F.Supp.2d 971, 975-76 (W.D.Tenn. 2006). The courts should not add to the often dangerous nature of police work by requiring that they measure their actions when making in-the-field arrests by the requirements of the Act before the scene is secure. The Act may apply in the context of some arrests, but not in the context of the arrests in this case in which the officers had not yet gained control of the situation. The Tuckers' conduct forced the officers to act to protect themselves and others.

A. Arrests made because an officer misperceives the effects of a disability may violate the Act.

Arrests made because an officer misperceives the effects of a disability such as a stroke, may violate the Act. *See, e.g., Lewis v. Truitt*, 960 F.Supp. 175, 178 (S.D.Ind. 1997). A determination as to whether the Act creates a cause of action under these circumstances is a fact specific determination.

B. If the injury results from the failure to accommodate a disability following an arrest unrelated to the disability, the Act may provide a cause of action.

What about the situation in which the officer makes an arrest not related to the disability and then the failure to accommodate the disability subsequent to the arrest causes an injury? Under these circumstances the injured person may have a cause of action under the Act. For example, transporting a wheelchair-bound arrestee in a van that lacks wheelchair restraints may establish a cause of action for injuries received. *See, e.g., Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998). But these circumstances are different from the circumstances confronting the City's officers in this case. *See, Bircoll v. Miami-Dade County*, 480 F.3d 1072 (11th Cir. 2007).

Also, the facts of this case distinguish it from the factual scenario discussed by the Tuckers at pg. 19 of their Petition. That factual scenario is more like

Center v. City of West Carrollton, 227 F.Supp.2d 863 (S.D.Ohio 2002). In *Center* the police did not call an interpreter to assist in interviewing a victim; and, despite the victim's lack of proficiency in English, the officer persisted in using written communications.

C. An officer's in-the-field arrest is not governed by the Act prior to the officer securing the scene.

But the facts of this case remove it from the scenarios discussed above. This case falls into a separate category, i.e., the arrest is not based on the disability, but rather on the Tuckers' independent criminal acts. In this case, the arrest was not based on the misperceived effects of the Tuckers' disabilities and the Tuckers were not injured because the officers failed to accommodate their disabilities after securing the scene. Furthermore, the communications preceding Blake's assault of Ms. Crotts were effective.

1. The police officers communicated effectively enough for Blake and Odis to receive the very thing they came for, i.e., Lauren and the baby.

This case consists of two parts: (1) before Blake Tucker assaulted Judy Crotts; and (2) after he assaulted Judy Crotts. If Blake Tucker had not assaulted Judy Crotts, the Tuckers would have been on their way to Alabama and no one would have claimed a failure to accommodate. Why? Because the

communications were effective. It was Blake Tucker's criminal conduct, not a lack of communication, that gave rise to this case.

Before the assault, the officers arrived on the scene and communicated with Blake, Odis, and Lauren in writing. 6th Cir. Joint Apx. at pgs. 114-17; Petition at pg. 8. The communications were effective enough that Lauren and the baby were preparing to leave with Blake and Odis. 6th Cir. Joint Apx. at pgs. 118-19. The Tuckers understood that Lauren and her daughter would be leaving with them. Petition at pgs. 8-9. After Ms. Spears held her granddaughter one last time, Blake Tucker assaulted Ms. Crotts and part 2 began.

2. Blake Tucker was arrested because he assaulted Judy Crotts and Officer Pope, he resisted arrest, and committed disorderly conduct.

Blake Tucker was arrested for assaulting a police officer and a citizen. He was also charged with disorderly conduct and resisting arrest. These charges did not result from the failure of the officers to call for an interpreter, but rather because Blake Tucker committed the crimes. The officers treated him like any non-disabled person who assaulted a citizen and a police officer.

a. The Tuckers misstate the facts in their petition regarding the assault.

In their Petition, Blake claims he did not assault Judy Crotts but merely "put his arm out to keep her from interfering and she fell back to the ground." Petition at pg. 9. He also claims the officers "hit him in the mouth with a gun chipping his tooth, and he was punched in the face three or four times." *Id.*

There is one problem with the Tuckers' recitation of the facts: It is wrong. Blake Tucker admitted he assaulted Ms. Crotts and Officer Pope, and that he committed disorderly conduct. 6th Cir. Joint Apx. pgs. 176-77. He cannot now approach this case as if he had not committed these crimes. The Tuckers also contradict themselves regarding the communications between Blake and the police. The Tuckers claim that after Blake's initial encounter with Officer Pope, there were no further written communications between Blake and the police. Petition at pg. 9. But on the next page the Tuckers say that Officer Pope communicated in writing with Blake after Lauren decided to leave with Blake. *Id.* at pg. 9.

b. Blake Tucker cannot deny he committed the crimes.

Not only is he prevented from denying he committed the crimes, but he is also prevented from relitigating these matters by claiming the officers used excessive force. Excessive force is an affirmative

defense to the charges of assault. Tenn. Code Ann. §39-11-611(e)(1)-(2). The conviction means that Blake Tucker did not have a self-defense justification. *See, Sappington v. Bartee*, 195 F.3d 234 (5th Cir. 1999). It is too late for him to assume the role of victim.

Blake Tucker was arrested because he assaulted two persons and committed disorderly conduct. He was not arrested because of his disability. On the contrary, just before his criminal outburst the Tuckers were preparing to leave Tennessee and return to their home in Eastaboga, Alabama, with Lauren and the baby.

3. Odis Tucker was arrested because the officers reasonably believed he was about to interfere with the arrest of Blake.

Odis Tucker was not arrested because of his disability. He was arrested because he attempted to interfere with the officers as they struggled on the ground with Blake. 6th Cir. Joint Apx. pgs. 121; 123-27; 147; and 151-52. Officer Pope, who had already been assaulted by Blake, believed Odis Tucker was a threat to the officers when he approached them from behind. 6th Cir. Joint Apx. pgs. 123; 125; and 127. The officers had never dealt with Blake or Odis and were forced to make their decisions based on events occurring at the scene. 6th Cir. Joint Apx. pgs. 148; and 152.

4. Under these circumstances the officers had no duty to stop during the arrest and concern themselves with calling an interpreter.

It was based on these events that the officers arrested Blake and Odis. The officers were not under a duty to stop and determine whether they were complying with the Act before the scene was secure. "To require the officers to factor in whether their actions are going to comply with the [Act], in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and nearby civilians, would pose an unnecessary risk to innocents." *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir.), *cert. denied*, 531 U.S. 959 (2000). To do so would require "fulfillment of [the Act's] objective . . . at the expense of the safety of the general public." *Id.*

This is particularly true in this case. Blake Tucker had assaulted a bystander and a police officer, and he committed disorderly conduct which necessarily involves fighting or violent behavior. Tenn. Code Ann. §39-17-305(a)(1). His violent behavior made it necessary for the officers to gain control of the situation; the arrests were not because of the Tuckers' disabilities.

5. There is no conflict among the courts as to whether the Act applies in the context of an in-the-field arrest before the officers have secured the scene.

The Tuckers do not address the issue of whether the Act applies to arrests made under the circumstances of this case. Petition at pgs. 14-26. The Sixth Circuit's opinion in this case is in agreement with other courts that have decided this issue. *See, Bircoll v. Miami-Dade County*, 480 F.3d 1072 (11th Cir. 2007); *Thompson v. Williamson County,* 219 F.3d 555 (6th Cir. 2000); *Rosen v. Montgomery County*, 121 F.3d 154 (4th Cir. 1996); *Patrice v. Murphy*, 43 F.Supp.2d 1156 (W.D.Wash. 1999). It is unclear why the Tuckers did not raise as an issue whether this arrest is covered by the Act; but perhaps it is because the case law is to the contrary.

III. The "serious conflicts" among the circuits as to whether the effectiveness of the auxiliary aid is a question of law or fact need not be resolved in this case.

The Tuckers argue that the lower courts erred because the effectiveness of the aid is a question of fact. Petition at pgs. 21-25. But all questions of fact do not have to be resolved by the jury. If no reasonable jury could accept the Tuckers' factual claims, then the court does not have to adopt their version for purposes ruling on the motion for summary judgment. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

The Tuckers claim that despite there being "numerous genuine issue (sic) of material fact" the Sixth Circuit decided that the accommodations were effective. Petition at pgs. 20-22. The Tuckers did not identify the genuine issues of material fact that the Sixth Circuit overlooked. *Id.* But the undisputed fact is that the communications between the officers and the Tuckers were effective. Ineffective communication did not disrupt their mission. Blake's assault on Judy Crotts was the disruption in the Tuckers achieving their stated purpose. A reasonable jury could not conclude otherwise. Therefore, the Sixth Circuit committed no error that could be remedied by this Court.

Because the Act does not apply to the arrest, this Court does not need to resolve the issue of whether the effectiveness of the communication is a question of law or fact.

CONCLUSION

The Tuckers never raised the issue of the standard of proof required for the recovery of compensatory damages under the Act. Perhaps it was raised in a perfunctory manner in the court of appeals but we really don't know because it was never developed in their argument. Issues that are not developed in the argument are normally considered waived because it is not the job of the court to develop a party's argument. Likewise, the Supreme Court of the United States does not address issues not raised in

a substantive manner in the lower courts. Because the issue was not raised in a substantive manner, this Court should deny the Petition for Writ of Certiorari as to the standard of proof.

The Act does not apply to this case to the extent the City and its employees were involved. The City's police officers arrested Blake Tucker because of his violent behavior and Odis Tucker was arrested because the officers believed he was about to interfere with their attempt to arrest Blake. The Act does not apply to an in-the-field arrest in which the scene has not yet been secured and the safety of the officers and others is at stake. The district court and the court of appeals held that the Act does not apply under these circumstances. The Tuckers do not raise this as an issue in their petition.

According to the Tuckers there is a split in the circuits as to whether the effectiveness of the auxiliary aid is a question of fact or law. But the court need not reach this issue because it was correctly decided by the courts below. Just because it is a question of fact does not mean it cannot be resolved at the summary judgment stage. If the facts are such that a reasonable jury could reach only one conclusion, then even factual questions can be resolved by the court. The facts of this case establish that the written communications were effective enough for the Tuckers to be on their way home, but for Blake Tucker's criminal behavior. Therefore, this Court need not resolve the issue of whether the effectiveness of

the auxiliary aid is a question of fact, or of law; either way, the issue was correctly decided.

Respectfully submitted,

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Prepare for the Most Demanding Standard

The Admissibility of Electronically Stored Information

By Dale Conder, Jr.

Learn what to look for, what questions to ask during discovery, and how to use ESI to your advantage.

It is late on Friday and, after working for months on a big case that was just settled, you are looking forward to a weekend away from the office. As you finish up a few last-minute items before leaving the office, you are suddenly brought back to reality by a ringing phone—your phone. According to the caller I.D., the call is from one of the senior partners in your firm. She has practiced law for almost 30 years and is legendary in your firm. With some hesitation, you answer the phone.

She has a problem, and she thinks you can help her. She explains that she has several cases of files with a lot of electronically stored information (ESI), and she needs some quick research outlining the admissibility of this "stuff." According to her, the files include everything from chat room logs to webpage content to instant messaging. Good thing you went to all of those seminars on electronic discovery. At least you know what ESI means, because on a Friday night, every little bit helps.

A Review of the Rules of Evidence

If the issue in a case involves a constitutional provision, a statute, or the application of a rule or regulation, it is always wise to review the applicable constitutional provision, statute, rule or regulation before deciding how best to proceed. The same is true when it comes to the admissibility of evidence, especially in the world of ESI.

The Federal Rules of Evidence do not specifically address the admissibility of ESI, but the rules are intended to promote "growth and development of the law of evidence" as our world changes and technology advances. FED. R. EVID. 102. Certainly the evidence, whether it is ESI or a plaintiff's handwritten diary, must be relevant. If the "evidence [has] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence[,]" it is relevant. FED. R. EVID. 401.

Once you have decided the ESI satisfies Rule 401, your next step is to decide how to authenticate the evidence. Simply put, can sufficient evidence be identified to establish that the evidence to be authenticated

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is what its proponent claims it is? FED. R. EVID. 901(a). In most cases, the parties can stipulate that the evidence is what one party claims it to be. For example, in a car wreck case, parties can agree the car depicted in particular photographs represent the condition of the car before and after the wreck or particular medical records are records from the doctor regarding the plaintiff's treatment. But, dealing with ESI may not be as cut-and-dried.

Just because document evidence, such as ESI, is authentic, does not mean the information in the documents is true. Establishing the authenticity of ESI and the truth of the information contained in the files are two different matters. *See United States v. Brown*, 688 F.2d 1112, 1116 (7th Cir. 1982). In *Brown*, the defendant produced documents to a grand jury. Following his indictment, the documents were admitted into evidence at his trial despite his refusal to testify as to the authenticity of the documents. On appeal, he challenged the admissibility of the records on the grounds that they were not properly authenticated and their admission violated his right against self-incrimination. The court held that (1) his production of the records to the government was sufficient to authenticate the records, and (2) his Fifth Amendment right against self-incrimination was not violated because authentication is not the same as vouching for the accuracy of the information in the documents. *Id.*

Rule 901(b) provides a list of ways in which evidence can be authenticated. But the list is not exhaustive and is intended only to illustrate ways in which Rule 901 can be satisfied. FED. R. EVID. 901(b). Rule 902 sets forth 12 situations in which extrinsic evidence of authenticity is not required "as a condition precedent to admissibility...." FED. R. EVID. 902. The codification of these 12 areas, however, does not prohibit your opponent from contesting the authenticity of a document. FED. R. EVID. 902 (1972 advisory committee's notes).

The next hurdle that must be cleared is hearsay. You have a hearsay problem if the real witness is not the person in the witness chair and you are offering the statement to prove the truth of a matter. For example, you are defending an employer in a sex discrimination case, and the plaintiff's attorney calls a witness to describe an incident he saw. So far all is well, at least from the point of view of hearsay. Then your opponent asks the witness about the contents of an e-mail he received from another employee regarding what she saw. It is time to object (unless the statement fits into one of Rule 803's 23 exceptions to the rule against admitting hearsay). If the real witness, or declarant, is unavailable, the hearsay may still be admissible if Rule 804's hearsay exceptions are satisfied. But even if the evidence does not fit within Rules 803 or 804, all is not lost; you still might be able to fit the evidence into the residual exception found at Rule 807.

Finally, our review will bring us to the "original writing rule." FED. R. EVID. 1001, *et seq.* The "original writing rule" was developed and intended to avoid inaccuracies and fraud by requiring the introduction as evidence of the original document. FED. R. EVID. 1001 (1972 advisory committee's notes). Rule 1002 still requires the production of the original document, but the very next rule provides that "[A] duplicate is admissible to the same extent as the original" provided there are no questions about its authenticity or no other reasons for requiring the original. FED. R. EVID. 1003.

Authentication of ESI

How do the rules of evidence reviewed above apply to the admissibility of ESI? In *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534 (D. Md. 2007), the court commented, "There is no form of ESI more ubiquitous than e-mail...." *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. at 554. In *Lorraine*, the dispute centered on whether an arbitration agreement limited the arbitrator's "authority to determine only whether the... damages [to the boat] were caused by the lightning strike or if [the arbitrator] was authorized to determine the amount of the damages as well." *Id.* at 537. The district court determined the language of the agreement was ambiguous, and extrinsic evidence could be considered by the court in determining the parties' intent. *Id.*

The parties each filed motions for summary judgment and supported their motions with various forms of documentary evidence, including e-mail communications between the attorneys. *Id.* The court found the e-mails to be relevant to the court's determination of the scope of the arbitration agreement. *Id.* at 541. However, the parties failed to authenticate the e-mails. *Id.* In other words, the parties failed to satisfy the requirement of FED. R. CIV. P. 56(e) that their motions be supported by admissible evidence. Therefore, the district court dismissed both motions without prejudice. *Id.* at 537.

Establishing the authenticity of ESI and the truth of the information contained in the files are two different matters.

The court noted the burden of authentication "is not a particularly high barrier to overcome." *Id.* at 542. It requires only a prima facie showing that the evidence is what its proponent claims. *Id.* E-mail can be authenticated by a person with personal knowledge (FED. R. EVID. 901(b)(1)), comparison with an authenticated exemplar or by expert testimony (FED. R. EVID. 901(b)(3)), the e-mail's distinctive characteristics, such as content or internal patterns (FED. R. EVID. 901(b)(4)), or establishing it is a self-authenticating business record (FED. R. EVID. 902(11)). *Id.* at 554–55.

In *United States v. Siddiqui*, 235 F.3d 1318 (11th Cir. 2000), the defendant was convicted of fraud, false statements to a federal agency, and obstruction of a federal investigation. *United States v. Siddiqui*, 235 F.3d. at 1320. The defendant nominated himself for the National Science Foundation's Waterman Award. He submitted his nomination as if it had been made by an acquaintance, Dr. Yamada. *Id.* As if that were not enough, he fraudulently submitted a reference for himself, forging the signature of Dr. von Guten. *Id.*

When the National Science Foundation confirmed the reference with Dr. von Guten, he informed the foundation that he had not submitted the reference. *Id.* Things unraveled quickly for Dr. Siddiqui and, despite his decision to withdraw his

fraudulent nomination, he found himself on trial. *Id.* at 1320–21. Before the trial, the government deposed Dr. Yamada, in Japan, and Dr. von Guten, in Switzerland. *Id.* Dr. Yamada testified she received an e-mail asking her to "'please tell good words about me[ ]'" in the event she received a telephone call from the foundation. *Id.* at 1321. She testified she knew the e-mail was from Dr. Siddiqui because it included his e-mail address, and he signed it "Mo." He had previously told her Mo was his nickname. He had also used this nickname in previous e-mail messages. *Id.* Dr. Yamada also testified she received a second e-mail from Dr. Siddiqui asking her to tell the investigator that she had authorized him to sign her name to the nomination. *Id.* On cross-examination, Dr. Siddiqui's attorney introduced an e-mail from Dr. Yamada to Dr. Siddiqui. This e-mail used the same e-mail address as was used in the e-mails sent to Drs. Yamada and von Guten. *Id.*

> The court noted the burden of authentication "is not a particularly high barrier to overcome."

Dr. von Guten testified he "received an email from what appeared to be Siddiqui's email address asking him to tell the Foundation that Siddiqui had permission to use von Guten's name." *Id.* Dr. Von Guten testified that he replied by e-mail to the same address, saying he could only tell the truth. *Id.*

It comes as no surprise that Dr. Siddiqui objected to the admission of the e-mail messages. The admission of the e-mails at trial was part of the basis for his appeal. *Id.* On appeal, the court noted the authenticity of the e-mails was supported by a number of factors: (1) the e-mail sent to Drs. Yamada and von Guten bore Dr. Siddiqui's e-mail address; (2) this e-mail address was the same as the address on the e-mail introduced by Dr. Siddiqui's attorney during the deposition; and (3) when Dr. von Guten used the "reply" function, his e-mail system automatically pulled up Dr. Siddiqui's address. *Id.* Furthermore, the content of the e-mail "show[ed] the author... to have been someone who would have known the very details of Siddiqui's conduct..." vis-à-vis the Waterman Award. *Id.* The e-mail to Dr. von Guten also contained statements that accurately described contact between Drs. Siddiqui and von Guten a few years earlier. *Id.* at 1323. In addition, Drs. Yamada and von Guten testified they received telephone calls from Dr. Siddiqui shortly after the e-mails were received making the same requests as those contained in the e-mails. Finally, the use of a nickname Dr. Siddiqui previously revealed to Drs. Yamada and von Guten sealed the authentication. *Id.* These circumstances were sufficient to establish authenticity. *Id.*

It has been argued that e-mail poses a novel set of authentication concerns. *Id.* For example, how can anyone establish that the e-mail was actually sent from the purported sender? *Id.* Anyone with the password could have accessed Dr. Siddiqui's e-mail account and sent the messages attributed to him. After all, while an e-mail message can be traced to a particular computer, it cannot be traced to the fingertips of a specific author. *See In re F.P.*, 878 A.2d 91, 95 (Pa. Super. Ct. 2005).

While legitimate, concerns about electronic evidence authenticity do not render its authentication impossible. As noted by the *Siddiqui* court, "[T]he same uncertainties exist with traditional written documents. A signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationary can be copied or stolen." *Id.* The party opposed to admitting an e-mail exhibit is still free to put forth evidence calling its authenticity into question. A prima facie showing of authenticity is not the same as a court finding "that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so." *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006). In addition, an e-mail, like any other type of document, can be deemed authentic if produced by a party during discovery, and subsequently offered by a party-opponent. *See Sklar v. Clough*, 2007 WL 2049698 at *4–5 (N.D. Ga.) (holding that e-mails produced by the defendants during discovery were deemed authentic when offered by the plaintiffs in support of their motion for summary judgment).

What about other forms of electronic communication, such as chat room logs? A chat room is a site on the Internet where a number of users communicate in real time, usually dedicated to one topic, which can range from the benign and possibly helpful to the most vile and repulsive.

In *United States v. Tank*, 200 F.3d 627 (9th Cir. 2000), the defendant, Mr. Tank, was convicted of various child pornography-related offenses. He belonged to an Internet chat room devoted to child pornography. *Id.* at 629. One of the defendant's fellow chat room members, Mr. Riva, saved all online chat room conversations on his computer. *Id.* Before any investigation into this sordid group began, Mr. Riva deleted any nonsexual conversations and the date and time stamps from his text files to decrease the size of the saved files. *Id.* When Mr. Riva was arrested on child molestation charges, law enforcement officials discovered these edited conversation files on his computer. *Id.*

Finding Mr. Riva's conversation files resulted in the arrest and eventual prosecution of Mr. Tank. *Id.* Mr. Tank objected to the admission of the chat room logs because they were incomplete and Mr. Riva might have made undetectable changes to the substance of the conversations or in the names used in the correspondence. *Id.* at 630. In authenticating the chat room logs, the government presented testimony from Mr. Riva describing how he prepared the logs and that the exhibits accurately represented the conversations. *Id.*

In addition, the screen name "Cessna" appeared throughout the conversations. The authenticating evidence presented by the government established that Mr. Tank used the screen name "Cessna" when he participated in the chat room conversations. *Id.* Other chat participants testified that when they arranged to meet "Cessna," it was the defendant who appeared for the meeting. *Id.* at 630–31. Therefore, the court held that the government met its prima facie showing of authentication. Mr. Tank's argument about the potential incompleteness of the conversations was relevant to the weight of the evidence, not its admissibility. The government's responsibility was to present proof that the logs were com-

plete and the substance was unaltered. The defendant was free to counter the government's proof with evidence to establish the logs had been altered.

When authenticating chat room conversations or instant messages, it's critical to establish the author's identity—the identity of the actual person behind the screen name pseudonym. Establishing author identity can be achieved by offering testimony of someone who knows the party and his or her screen name. Just as we saw with Dr. Siddiqui's e-mail, if content is peculiar to a particular person, content of messages can be used to connect the messages to that person and to establish authorship.

The way characteristics of a particular person's e-mails can be used is highlighted in *People v. Pierre*, 838 N.Y.S.2d 546 (App. Div. 1st Dept. 2007), a case in which the defendant was convicted of murdering his girlfriend because she refused to have an abortion. *Id.* at 548. Mr. Pierre's undoing was instant messaging. *Id.* at 548–49. One witness, a friend of the defendant and his accomplice, testified as to his personal knowledge of Mr. Pierre's screen name. *Id.* The deceased's cousin testified she sent an instant message to that particular screen name and received a reply that would have made no sense unless the reply had been sent by Mr. Pierre. *Id.* at 549. The court found the message constituted an admission of the defendant and permitted testimony as to the message's content even though the witness had neither printed the message nor saved it. *Id.* at 548–49.

The failure to present evidence identifying the e-mail's author can be fatal to authentication. For example, in *People v. Von Gunten*, 2002 WL 501612 (Cal. Ct. App.), the defendant was charged with assault with a deadly weapon. *Id.* at *1. The defendant claimed an individual named Beever committed the assault. He attempted to introduce a "cut and pasted" transcript of a series of instant messages between a friend and an individual using the screen name BuckaRoo 20. *Id.* at **4–5. The defendant's friend testified she knew at one time Beever used BuckaRoo 20 as his screen name. The evidence also established that anyone with the correct password could send messages under the screen name BuckaRoo 20. Software that would allow a third party to decode a particular screen name's password was also discussed. The conversations' transcript did not contain the subject header, date, or time at which the instant messages. Therefore, because of the slim evidence connecting the screen name to the individual, Beever, the court refused to admit the transcript as evidence. *Id.* at *5.

Today, it is the exception rather than the norm, to find a business or governmen-

tal agency without a website. Organizations, clubs, and individuals have websites. Often, the information that is posted on a website can prove useful in the litigation of your case. Some courts, however, are very skeptical of the trustworthiness of information found on the Internet. In *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773 (S.D. Tex. 1999), the court was less than impressed with the information from the Internet.

An e-mail, like any other type of document, can be deemed authentic if produced by a party during discovery, and subsequently offered by a party-opponent.

In *St. Clair*, the plaintiff filed suit for injuries he received while working aboard a boat he claimed was owned by the defendant. *Id.* at 774. The defendant filed a motion to dismiss, contending it did not own the boat. *Id.* The plaintiff responded with "'evidence'—taken off the Worldwide Web...—revealing that Defendant..." owned the boat. *Id.* The "evidence" was from the United States Coast Guard's on-line vessel database. *Id.* In rejecting the evidence, the court noted that it viewed the Internet "as one large catalyst for rumor, innuendo, and misinformation." *Id.* The court rejected the ownership evidence because the plaintiff had failed to "overcome the presumption that the information discovered on the Internet is inherently untrustworthy." *Id.* The presumption could have been overcome with evidence authenticating the information as having come from the website and having been posted to the site by the Coast Guard. *Id.* at 775. Without such evidence, the court rejected the "voodoo information" from the Internet. *Id.* The *St. Clair* court's colorful comments about Internet information's untrustworthiness recognized, as have other courts, that "information on [the] internet... presents special problems of authentication." *Terbush v. United States*, 2005 WL 3325954 at *5 n. 4 (E.D. Cal.).

Can the presumption of the untrustworthiness of information on the Internet be overcome if a witness testifies that he or she went to a particular website, viewed its information, printed it, and the printout accurately represents what he or she viewed? The answer varies, depending on the court. Some courts require verifying testimony from an employee of the website's owner to overcome concerns that a hacker may have put the information on the website. An example of a case in which a court believed a hacker might have authored and posted particular website information is found in *United States v. Jackson*, 208 F.3d 633 (7th Cir. 2000).

In *Jackson*, the defendant, Ms. Jackson, apparently had packages sent to her address via United Parcel Service. The packages contained artwork depicting African American culture. Evidence established that the packages arrived at her address, and when they did, they were undamaged. The defendant, however, claimed that not all of the packages arrived, and those packages that did arrive were damaged and contained racial epithets. *Id.* at 634–35. She filed a claim with UPS for $572,000, although she only paid $2,000 for the artwork. *Id.* at 635. UPS denied the claim. The defendant alleged that UPS denied the claim because of racist elements within the company. *Id.* In addition, the evidence showed that she also sent letters containing racially charged language to various prominent African Americans via UPS. *Id.* The letters showed return addresses to various white supremacist organizations. *Id.*

During her trial for, among other things, wire fraud, Ms. Jackson sought to introduce web postings from the websites of the white supremacist organizations which purportedly showed these organizations took credit for the racist mailings. *Id.* at 637. The court sustained the government's objection for various reasons, one of which was a lack of authentication. The court concluded that the defendant failed to show that the web postings were posted to the website by the groups, rather than "being slipped onto the groups' websites by [the defendant]..., who was a skilled computer user." *Id.* at 638. In other words, the defendant had not produced evidence to overcome the presumption of the untrustworthiness of information on the Internet.

Some courts allow admission of web postings or printouts without testimony from the owner of the website. These courts tend to view FED. R. EVID. 901(a)'s requirements as more elastic than courts that require verifying testimony about the origins of a website's information. In *United States v. Standring*, 2006 WL 689116 (S.D. Ohio), the court accepted printouts from various websites based upon a witness' declaration that he visited various websites, accessed the information, and printed the information. The printouts contained the dates on which the websites were accessed and the web addresses of the various sites. Perhaps this additional information gave the court a level of comfort it might not otherwise have found in the witness's declaration alone.

On the other hand, some courts have been willing to accept electronic documents as evidence based upon the affidavits of witnesses who retrieved them. For example, in *Kassouf v. White*, 2000 WL 235770 (Ohio App.) the plaintiff filed a defamation action against Cleveland, Ohio's mayor because the mayor, in opposition to the plaintiff's proposed construction of a hotel, referred to the hotel as a "$39.95 flophouse." In support of his motion for summary judgment, the mayor submitted documents from the hotel chain's website showing rooms in the Cleveland area rented for anywhere from $35 per night to $119 per night. The documents, which were accepted by the court, were authenticated by an individual's affidavit that he accessed the chain's website, retrieved the attached documents, and the documents accurately reflected information on the website. *See also, Moose Creek, Inc. v. Abercrombie & Fitch*, 331 F. Supp. 2d 1214, 1225 n.4 (C.D. Cal.), *aff'd*, 114 Fed. Appx. 921 (9th Cir. 2004); *Johnson-Wooldridge v. Wooldridge*, 2001 WL 838986 at *4–5 (Ohio Ct. App.).

Printouts from private websites are not self-authenticating; therefore, testimony from a witness knowledgeable about the website is required. *See In re Homestore.com Securities Litigation*, 347 F. Supp. 2d 769 (C.D. Cal. 2004). Printouts from government websites, however, can be self-authenticating. Rule 902(5) provides that "[b]ooks, pamphlets, or other publications purporting to be issued by public

authority[ ]" are self-authenticating. FED. R. EVID. 902(5). In determining whether Rule 902(5) applies to documents from government websites, courts have applied the plain meaning to the terms "books, pamphlets, or other publications" and concluded the rule does cover such documents. *See United States v. Premera Blue Cross*, 2006 WL 2841998 at *3–4 (W.D. Wash.).

Unless you know your judge and his or her authenticity standard, it is best to depose the webmaster or another sufficiently knowledgeable employee to establish the website evidence's authenticity. If you are unable to secure this testimony, include the URL address (*i.e.*, the www._____) on the printout, the date on the printout, and any other evidence distinctive to the website to establish its authenticity.

Business records maintained in an electronic format also require authentication. The language in both Rule 902(11) for authentication and Rule 803(6) about an exception to the rule against hearsay, is very similar. Therefore, the authenticity analysis and the business record exception analysis are merged into one inquiry. *See In re Vee Vinhee*, 336 B.R. 437, 444 (9th Cir. BAP 2005). As we have seen, the authentication standards vary by court. With respect to electronic business records, some courts have adopted Professor Imwinkelreid's 11-step process:

1. The business uses a computer.
2. The computer is reliable.
3. The business has developed a procedure for inserting data into the computer.
4. The procedure has built-in safeguards to ensure accuracy and identify errors.
5. The business keeps the computer in a good state of repair.
6. The witness had the computer readout certain data.
7. The witness used the proper procedures to obtain the readout.
8. The computer was in working order at the time the witness obtained the readout.
9. The witness recognizes the exhibit as the readout.
10. The witness explains how he or she recognizes the readout.
11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.

In re Vee Vinhee, 336 B.R. 437, 444 (quoting Imwinkelreid, Evidentiary Foundations §4.03[2] (5th ed. 2005)). As noted in *In re Vee Vinhee*, "The 'built-in safeguards to ensure accuracy and identify errors' in the fourth step subsume details regarding computer policy and system control procedures, including control of access to the database, control of access to the program, recording and logging changes, backup practices, and audit procedures to assure the continuing integrity of the records." *In re Vee Vinhee*, 336 B.R. at 446–47.

In *In re Vee Vinhee*, the court found the testimony of the records custodian was lacking. His testimony failed to establish "his job title or anything about his training or experience...." *Id.* at 448. Furthermore, his testimony revealed that he did not know the type of computer used by American Express, nor did he know the type of software used. The court found the testimony to be too general and conclusory to authenticate the electronic records. *Id.* at 447 n. 9 and n. 10.

Other courts, however, have been more lenient in authenticity rulings. These courts have generally required only the testimony of a witness familiar with the record-keeping system who was able to verify that the retrieved records were produced from the electronic information generated contemporaneously with the transaction at issue. *See Sea-Land Serv., Inc., v. Lozen Int'l.*, 285 F.3d 808 (9th Cir. 2002); *United States v. Meienberg*, 263 F.3d 1177 (10th Cir. 2001). As with everything involving litigation, you must know your audience. If you err, err on the side of providing the court with more information than needed for authentication rather than less.

Sometimes, no matter how prepared you are, things go wrong. A witness changes his or her testimony. Your client suddenly becomes the worst possible witness. A potential juror was not forthcoming during *voir dire*. But authentication is a different kind of a problem. If your exhibit is rejected because it lacks authentication, you probably have only yourself to blame. Thoughtful, advance preparation can avoid such a painful and embarrassing moment.

Preparation should start during discovery. During discovery, ask questions designed to aid authentication later. For example, does the opposing party have an e-mail address, if so what is it, and how long has he or she used it? Ask questions about the opposing party's prior e-mail addresses and who has access to the various e-mail accounts, both active and inactive. Ask about the screen names he or she uses and what the names mean. Has he or she ever had a problem with others accessing his or her accounts and sending messages attributed to him or her? Does he or she have a website, and if so, who is the webmaster, and who controls the content of the website? If he or she can make some website changes, find out what types he or she is authorized to make. Find out what types of website changes his or her employees are authorized to make. Does he or she maintain a blog or have a MySpace account? If so, find out as much information as you can about it. All of the information mentioned above can be very useful later when you are trying to authenticate evidence.

Some courts... are very skeptical of the trustworthiness of information found on the Internet.

Hearsay

Once the authentication requirement has been satisfied, you have to address the rule against hearsay. If a statement is offered for its truth and the real witness, or declarant, is not in the witness chair, you must either establish that it is nonhearsay, or fits a hearsay exception.

A statement is not hearsay if it is an admission by a party-opponent. The statement must be "offered against a party and is... the party's own statement, in either an individual or representative capacity." FED. R. EVID. 801(d)(2)(A). Remember our friend Dr. Siddiqui? Some of the e-mails at issue in his case were written by him, and as such, could be offered as an admis-

sion by Dr. Siddiqui to establish truth that worked against him.

This rule—that a party's own admission in an e-mail can be offered as a statement—generally holds, unless the party can establish the e-mail was sent as the result of a computer malfunction. In *Ermolaou v. Flipside*, 2004 WL 503758 (S.D.N.Y.), the plaintiff entered an Internet lottery game in which

In the world of electronic mail, merely forwarding an e-mail to another recipient may be enough to make a statement contained in it an adoptive admission.

she picked numbers for the one million dollar, ten million dollar, and twenty million dollar games. She received two e-mails from the operator of the lottery. The first e-mail provided her with the winning numbers in each game, and to her surprise, she matched every number in each game. Sadly, the second e-mail notified her that the first e-mail had been sent in error and provided her with the actual winning numbers, none of which she matched. The plaintiff sued the operator of the lottery and argued that the first e-mail constituted an admission of the defendant. The court rejected her argument because the evidence established the first e-mail was sent as the result of a computer error. Therefore, it did not constitute an admission.

A second rule is that the "statement offered against a party... is... a statement of which the party has manifested an adoption or belief in its truth..." FED. R. EVID. 801(d)(2)(B). In the world of electronic mail, merely forwarding an e-mail to another recipient may be enough to make a statement contained in it an adoptive admission. In *Sea-Land Serv., Inc., v. Lozen Int'l*, one employee sent an e-mail to a second employee and the latter forwarded the e-mail to the defendant and included her own comments, which manifested her own belief in the statements made by the e-mail originator in the original e-mail. The court found the act of forwarding an e-mail with comments indicating agreement with beliefs expressed by the e-mail chain originator, constituted an adoptive admission under FED. R. EVID. 801(d)(2)(B). *Sea-Land Serv., Inc., v. Lozen Int'l*, 285 F.3d at 821. Similarly, if the evidence shows that the e-mail was written by "a person authorized by the party to make a statement concerning the subject, or... a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[ ][,]" then the e-mail qualifies as nonhearsay. FED. R. EVID. 801(d)(2)(C)-(D). In *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1155 (C.D. Cal. 2002), the court addressed whether e-mail messages sent by Cybernet's employees were nonhearsay under Rule 801(d)(2)(D). Because the messages were sent by employees, concerned matters within the scope of their employment, and were prepared during the existence of the employment relationship the court held the messages were nonhearsay.

E-mail, however, can also satisfy one or more of the 23 exceptions to the rule against hearsay. For example, if the HR director for your client sent an e-mail to her superior detailing an interview with an employee making a sexual harassment complaint, the e-mail might be admissible in subsequent litigation. Under Rule 803(1), provided the e-mail was prepared during the conversation, or very shortly thereafter, it could be admitted into evidence as a present sense impression. *See United States v. Ferber*, 966 F. Supp. 90, 98–99 (D. Mass. 1997).

Could the e-mail also be admitted under the business records exception? Perhaps, but not every document made in a business setting falls within the business records exception. The critical questions to be answered are whether the business routinely required the HR director to report to her supervisor and hence whether she had a business duty to report these matters. Without affirmative answers to these questions, the e-mail would not be admissible under 803(6).

The various exceptions should be examined in detail, in light of the facts of your case and the circumstances of the e-mail, to determine if they apply. For example, a text message sent from a witness to an accident might fit the excited utterance exception.

Often when e-mail is received it has been forwarded by various recipients, each of whom may add his or her own comments to the original. Each message in this e-mail chain must be analyzed and found to fit within an exception. In *Rambus Inc. v. Infineon Tech. AG*, 348 F. Supp. 2d 698 (E.D. Va. 2004), the court held that for an e-mail chain to be admissible under the business records exception, the proponent of the e-mail must show that each declarant was acting in the course of regularly conducted business. Of course, it might be possible to fit each part of the chain within other exceptions.

The rules against hearsay and its exceptions apply to websites as well. If a website belongs to a party-opponent, the information taken from the website can be considered an admission. If the information is hearsay, it can fit one or more of the exceptions. A printout from a website, such as Kelley Blue Book, is admissible under FED. R. EVID. 803(17) to establish the value of a car. In *Neloms v. Empire Fire & Marine Ins. Co.*, 859 So. 2d 225, 232 (La. Ct. App. 2003), the plaintiff submitted a printout from the website to establish the value of her car. The court held that the printout was admissible because these types of publications are widely relied upon to determine the values of cars.

Original Writing Rule

If you must "prove the content of a writing, recording, or photograph, the original... is required, except as otherwise provided..." in the rules of evidence. FED. R. EVID. 1002. In other words, if you are not proving the veracity of the content of the writing, recording, or photograph, this rule does not apply. For example, if you called a witness to testify in a car wreck case as to what the plaintiff's car looked like following the wreck, and you used a photograph as part of the testimony, the rule would not apply. *See* FED. R. EVID. 1002 (1972 advisory committee's notes). The rule would apply in a medical malpractice case to X-rays or MRI images. *Id.*

The rules provide that a printout of data stored in a computer or similar device is an "original" provided it accurately reflects the data. FED. R. EVID. 1001(3). For this reason, in *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002), the court permitted a police officer to present a "cut and pasted" version of his text messages

with the defendant. The officer "cut and pasted" the text of the conversations from the chat room into a word processing program and printed the document from the word processing program. The court concluded that based upon 1001(3) the printout was an original.

When the rule applies, however, you need not produce the original if a duplicate is available. FED. R. EVID. 1003. If, however, the authenticity of the original is genuinely questionable, or doubts exist about the reliability of the method used to make the duplicate, the duplicate cannot be used.

Can evidence other than an original or duplicate be used to prove the veracity of the content of the writing, recording, or photograph? Yes, provided the original or duplicate is lost or destroyed, not obtainable, or is in the possession of the opponent. FED. R. EVID. 1004. An example of a case in which a duplicate sufficed to prove content accuracy, can be seen in *King v. Kirkland's Stores, Inc.*, 2006 WL 2239203 (M.D. Ala.). In *King*, the plaintiffs sued the defendant alleging they were fired because of their race. One of the plaintiffs was permitted to testify as to the contents of an e-mail from a customer complaining the defendant employed too many African Americans at the store where the plaintiffs worked. The plaintiff claims she saw the e-mail when it was forwarded to the store. According to the plaintiffs, they were terminated shortly after the e-mail was forwarded to the store's management. The court held that because the e-mail was allegedly in the possession of the defendant, the plaintiff could testify as to its contents.

Conclusion

The role that electronic evidence plays will vary from case to case. But with camera phones, PDAs, laptops, traffic cameras, websites, and chat rooms, our chance of having to deal with electronic evidence continues to increase. Not only must we learn what to look for and what questions to ask during discovery, but we must learn how to use the evidence to our advantage.

The applicable standards regarding the authenticity and admissibility of evidence can vary from court to court. This is particularly true with electronic evidence, given the doubts some courts hold regarding its reliability in certain forms. Therefore, "[u]nless [you] know what level of scrutiny will be required, it would be prudent to analyze electronic [evidence] that [is] essential to [your] case by the most demanding standard." *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534, 574 (D. Md. 2007). Failure to prepare for the most demanding standard may cost you the benefit of the electronic evidence you diligently collected during the pretrial phase of your case. FD

Tennessee Commission on Continuing Legal Education And Specialization

Affidavit of Sole Authorship

In application for MCLE credit in Tennessee for written articles pursuant to Supreme Court Rule 21, Section 4.07 (b), I, Dale Conder Jr., BPR Number 015419 being first duly sworn, do hereby affirm as follows:

I am the principal author of:

Title of Article: The Admissibility of Electronically Stored Information

Published in: DRI's For the Defense

Publication date: September 12, 2008

This article was not principally researched or written by anyone other than myself. I have submitted a word count to the Commission showing the article contained 6,354 total words.

Based upon Commission Regulations, I request 8 hours of general and _____ hours of ethics/professionalism credit for the authorship of this article.

A copy of this article ✓ is _____ is not (attach reason) attached.

Dale Conder Jr.
Affiant's Signature

9/12/08
Date

State of: Tennessee

County of: Madison

Sworn to and subscribed before me this 12th day of September, 2008.

Dorinda J. Thornsberry
Notary Public

My Commission Expires: Aug. 21, 2012.

DORINDA J. THORNSBERRY
STATE OF TENNESSEE
NOTARY PUBLIC
MADISON COUNTY

EXHIBIT C

FRCP Requirements

Expert Disclosures under Rule 26

by Dale Conder, Jr.

In 1993, Federal Rule of Civil Procedure 26 was amended to impose "on parties a duty to disclose... certain basic information that is needed... to prepare for trial or make an informed decision about settlement." Fed.R.Civ.P. 26(a) Advisory Committee Notes (1993). The purpose of the 1993 amendments was to speed up the discovery of this information, while at the same time, reducing the amount of paperwork involved in discovering this information. *Id.* Paragraph 1 of Rule 26(a) requires disclosure of information regarding witnesses, documents, damages and insurance. Fed.R.Civ.P. 26(a)(1)(A)–(D). Paragraph 2 requires the disclosure of certain information regarding expert testimony. Fed.R.Civ.P. 26(a)(2) Advisory Committee Notes (1993). This article focuses on the expert disclosure requirements of Rule 26.

Rule 26 expert disclosure requirements can be divided into three parts. You must know *when* to make your disclosure, *what* must be disclosed, and *who* must be disclosed. Failure to understand the expert disclosure requirements may result in your expert's testimony being excluded at trial. Fed.R.Civ.P. 37(c)(1). Mastery of the Rule 26 requirements may enable you to exclude all, or at least part, of the expert testimony offered by your opponent. Finally, this article looks at sanctions available for failure to satisfy the Rule 26 disclosure requirements.

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When Must Disclosures Be Made

Rule 26(a)(2) requires a party to disclose "the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. Fed.R.Civ.P. 26(a)(2)(A). The expert disclosures must be made by the deadline set forth in the Rule 16(b) Scheduling Order. Fed.R.Civ.P. 26(a)(2)(C). If the court fails to set a deadline, then the disclosures must be made at least 90 days before the trial date, or the date the case is to be ready for trial. *Id.* The party with the burden of proof on an issue should be required to disclose its expert testimony on the issue before the other party is required to disclose its expert testimony on that particular issue. Fed.R.Civ.P. 26(a)(2) Advisory Committee Notes (1993). This is an important point because occasionally your opponent will try to persuade the court to set simultaneous expert disclosure deadlines. If an expert is retained solely to rebut or contradict the testimony that may be presented by another party's expert, then an additional 30 days (unless the court sets another time) is allowed for this disclosure. Fed.R.Civ.P. 26(a)(2)(C). Finally, if you are required to supplement your expert's information under Rule 26(e)(1), then the supplementation is due no later than your pre-trial disclosure deadline. Fed.R.Civ.P. 26(e)(1).

What Must Be Disclosed

Once you have mastered the requirements of *when* disclosures must be made, you must now review Rule 26 to understand exactly *what* must be disclosed. Understanding what must be disclosed requires you to keep in mind that Rule 26 recognizes two distinct types of experts and treats them differently as to what must be disclosed. *Sullivan v. Glock*, 175 F.R.D. 497, 500 (D.Md.1997). A party is required to "disclose... the identity of *any person* who *may* be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. Fed.R.Civ.P. 26(a)(2)(A) (emphasis added). Rule 26(a)(2)(A)'s requirement covers a broader range of "expert witnesses" than does the written report requirement in Fed.R.Civ.P. 26(a)(2)(B). *Sullivan v. Glock*, 175 F.R.D. at 500. Rule 26(a)(2)(A) applies to the "hybrid" fact/expert witness which would include not only a treating physician, but also an employee who, while he or she may be exempt from submitting a written report, must, nevertheless, be disclosed because his or her testimony may be in the form of expert opinion testimony. *Id.*

For a certain group of experts, the disclosure must be "accompanied by a written report *prepared and signed by the witness*." Fed.R.Civ.P. 26(a)(2)(B) (emphasis added). The report must be "detailed and complete... stating the testimony the witness is expected to present during direct examination, with the reasons" for the testimony. Fed.R.Civ.P. 26(a)(2)(B) Advisory Committee Notes (1993). These requirements further the underlying purpose of the 1993 Amendments, which is to enable the opposing party to prepare for effective cross-examination. The information disclosed under the former rule was so vague that it rarely dispensed with the need to depose the expert and was of no help in preparing for cross examination. Fed.R.Civ.P. 26(a)(2) Advisory Committee Notes (1993).

Beyond containing a "statement of all opinions to be expressed and the basis and reasons therefor, the report must also set forth...

> the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Fed.R.Civ.P. 26(a)(2)(B). Failure to provide the written report and the required information "will... ordinarily [prevent a party from using] on direct examination any expert testimony not so disclosed." Fed.R.Civ.P. 26(a)(2)(B) Advisory Committee Notes (1993). This exclusion is "self-executing" and may result in exclusion without further action by your opponent. *Sullivan v. Glock*, 175 F.R.D. at 503–04. When your expert is preparing his or her report you should work closely with him or her to see that all of the required information is included. You simply do not want to be in the position of trying to persuade the court that your omission was substantially justified, or your opponent was not prejudiced by the omission.

When your expert is preparing his or her report, the question may come up as to whether you are allowed to assist in preparing the report. The answer is clearly "yes." Fed.R.Civ.P. 26(a)(2)(B) Advisory Committee Notes (1993). In fact, assistance may be necessary if your expert is someone who lacks experience as an expert witness. *Id.* If you assist your expert in preparing his or her report, then you should keep in mind that the report must "be written in a manner that reflects the testimony to be given by the witness and must be signed by the witness." *Id.* This is because "the report... is intended to set forth the substance of [the expert's] direct examination...." *Id.* Finally, if there are "any material changes made in the opinions of the expert from whom a report is required, whether the changes are in the written report or in testimony given in a deposition," then these changes shall be disclosed by the time the party's pre-trial disclosures under Rule 26(a)(3) are due. Fed.R.Civ.P. 26(a)(2)(B) Advisory Committee Notes (1993); Fed.R.Civ.P. 26(e)(1).

When deciding what to disclose in the written report, remember you must disclose all "data or other information considered by" your expert in forming the opinions. Fed.R.Civ.P. 26(a)(2)(B). This may very well include correspondence between you and your expert.

Because the "what" of expert disclosures is so broad, be careful how you communicate with your expert and what you tell him or her. Remember, if it is not something you would want your opponent learning, then it may be best not to include it in a letter to your expert. In some courts, core work product, *i.e.*, mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party, are still protected in the context of expert disclosure. *See Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich.1995). Other courts, however, do not protect the core work product when it concerns the type of information which must be disclosed under Rule 26(a)(2)(B). *See, e.g., TV-3, Inc. v. Royal Ins. Co. of America*, 193 F.R.D. 490 (S.D.Miss.2000).

You do not want to be in the position of trying to persuade the court that your omission was justified.

In *TV-3* the plaintiff served subpoenas *duces tecum* on the defendants' experts seeking, among other things, copies of all correspondence between counsel for defendants and defendants' experts. *TV-3, Inc. v. Royal Ins. Co. of America*, 193 F.R.D. at 490. The district court concluded, based upon the language of the Rule and the Advisory Committee Notes, that the correspondence was discoverable, even if it contained work product. *Id.* at 491. Before communicating with your expert, you should be familiar with how your federal circuit or the assigned district judge deals with this issue. If there is any doubt, then you should err on the side of caution and not suggest theories to your expert, or put anything in writing to your expert if you would not want to sit through a deposition while your expert is cross-examined on your letter.

Who Must Be Disclosed

Once you understand *when* the disclosure must be made and *what* must be disclosed, you must turn to the issue of *who* is required to be disclosed. Failure to fully understand *who* must provide a report can result in your expert being excluded from testifying.

The term "expert" refers to witnesses "who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters." Fed.R.Civ.P. 26(a)(2)(B) Advisory Committee Notes (1993). As noted above, not all experts are required to provide written reports. Written reports are required only from "a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony...." Fed.R.Civ.P. 26(a)(2)(B).

For example, in a 42 U.S.C. §1983 case you may want to call the training officer for the defendant police department to give his opinions on the adequacy of the department's training requirements. Must he submit a signed written report? Probably not. As an employee of the defendant he was not "retained or specially employed" for the purpose of providing expert testimony in a particular case. As an employee of the defendant police department, he would not be required to submit the written report unless his duties regularly involved giving expert testimony. These individuals would, however, have to be disclosed under Fed.R.Civ.P. 26(a)(2)(A). In a products liability action, your client's engineer who regularly testifies as an expert for the client probably *would* be required to provide such a report.

Also keep in mind, though, that the requirements under Rule 26 are subject to being waived or expanded by local rule, stipulation or court order. Fed.R.Civ.P. 26(a)(2)(B) Advisory Committee Notes (1993). Therefore, you must be completely familiar with the local rules of the court in which you practice, as well as with the judge assigned to your case and how he or she handles expert disclosures.

You can expand the universe of witnesses from whom you can obtain the detailed information set forth in Rule 26(a)(2)(B) by using interrogatories. Also, interrogatories can be useful in obtaining information beyond that which must be disclosed in the written report. For example, an expert's report must contain information regarding testimony for the prior four years, but with interrogatories you could expand this time period. Fed.R.Civ.P. 26(a) Advisory Committee Notes (1993). Although Rule 26 has various disclosure requirements, it still allows use of interrogatories, and other traditional discovery devices to obtain additional information. Fed.R.Civ.P. 26(a)(5). By

drafting interrogatories based on the information required in a Rule 26(a)(2)(B) report, and defining expert under Rule 702, you can get information from a broader class of experts who, while they must be identified under Rule 26(a)(2)(A), may not be required to submit a written report. Remember, the Rule 26(a)(2)(A) identification does not provide you with the type of detailed information required under Rule 26(a)(2)(B). The most common example is the treating physician.

"A treating physician... can be deposed or called to testify at trial without any requirement for a written report." Fed.R.Civ.P. 26(a)(2)(B) Advisory Committee Notes (1993). Simple enough, right? Not so fast. Whether a treating physician must provide a signed written report depends on the substance of the testimony and not the status of the witness. *Hawkins v. Graceland*, 210 F.R.D. 210, 211 (W.D.Tenn. 2002). If the physician's opinions are acquired directly through his treatment of the plaintiff, then he is not required to submit a written report. *Salas v. United States*, 165 F.R.D. 31, 33 (W.D.N.Y.1995). "[W]hen the doctor's opinion testimony extends beyond the facts disclosed during care and treatment of the patient, and the doctor is specifically retained to develop opinion testimony," then the Rule 26(a)(2)(B) written report requirements apply. *Peck v. Hudson City School Dist.*, 100 F.Supp.2d 118, 121 (N.D.N.Y.2000). Similarly, a treating physician can testify as to his opinion regarding causation, diagnosis, and prognosis without providing a Rule 26 report. *See Martin v. CSX Transportation, Inc.*, 215 F.R.D. 554, 557 (S.D.Ind. 2003) (citing *McCloughan v. City of Springfield*, 208 F.R.D. 236, 242 (C.D.Ill.2002)). The reason being, such matters are integral to treatment.

In a medical malpractice action, the plaintiff must prove that the defendant's care deviated from the applicable standard of care. Can the plaintiff rely upon the treating physician to establish this critical element without providing a Rule 26 report? Maybe.

In *Riddick v. Washington Hosp. Ctr.*, 183 F.R.D. 327 (D.D.C.1998), the plaintiff failed to submit any expert reports and represented that he would not call any experts to whom the written report requirement applied. *Id.* at 329. Plaintiff intended to rely solely on his treating physician to support his medical malpractice action. *Id.* The court entered an order prohibiting plaintiff from relying on any experts other than his treating physicians. *Id.*

Defendants moved for summary judgment on the basis that the plaintiff had no expert testimony to establish causation. *Id.* The court held that a treating physician is not required to submit a written report under Rule 26. *Id.* at 330. The treating physician can testify to any opinions she formed during her treatment and diagnosis of the plaintiff. *Id.* This would include opinions regarding causation and injury. *Id.* at 331. The issue comes down to whether the treating physician reached her opinions strictly during the course of treatment and diagnosis, rather than at the request of counsel and close in time to the litigation. *Id.* at 330–31.

The *Riddick* case highlights the importance of obtaining and reviewing the entire file of the

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expert witness, including correspondence. If, for example, you find a letter from the attorney to the doctor forwarding additional medical records, or asking the doctor to formulate an opinion on causation, then you may be able to exclude at least part of the treating physician's opinions if the plaintiff failed to submit a written report. The plaintiff's attorney should not be able to conceal this information by arguing it is privileged. Fed.R.Civ.P. 26(a)(2) Advisory Committee Notes (1993) ("[L]itigants should no longer be able to argue materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.") The possibility of obtaining access to letters between your opponent and his or her expert, who might not have provided a written report, highlights the need to use traditional discovery devices to obtain this information from the expert. The information obtained may aid in converting this witness into a Rule 26(a)(2)(B) expert, and thus the triggering of the written report requirement.

Sanctions for Failure to Comply

Under Rule 37, "[a] party that without substantial justification fails to disclose information required by Rule 26(a)... is not, unless such failure is harmless, permitted to use as evidence at a trial... any witness or information not so disclosed." Fed.R.Civ.P. 37(c)(1). This sanction, as noted earlier, is self-executing. Fed.R.Civ.P. 37(c)(1) Advisory Committee Notes (1993). If the failure to disclose is not substantially justified, your opponent may still be allowed to use the expert if the failure to disclose is harmless. *Id.* at Advisory Committee Notes (2000).

The failure to disclose is considered harmless if the non-disclosure has not prejudiced the other party. *See Hawkins v. Graceland*, 210 F.R.D. at 211. If, for example, you were aware through discovery or other disclosures that your opponent was going to rely on a particular witness, then you will probably not be able to show prejudice. *Id.*

In determining whether there was substantial justification for non-disclosure, courts consider whether the party acted in good faith; was the failure the result of willfulness or negligence; did conditions beyond the control of the proponent change, causing a change in the evidence; and was the failure to disclose the result of surprise, *e.g.*, did the proponent believe the issue was not disputed. Joseph, *Emerging Issues Under The 1993 Disclosure Amendment to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 100. Similarly, in determining whether the failure was harmless, courts consider the good faith of the parties; was the opponent prejudiced because the evidence was not otherwise known; did your opponent intentionally or negligently turn a blind eye to the non-disclosure; and what impact does the non-disclosed evidence have on the case. *Id.* at 100–101.

Whether to exclude an expert because of a failure to comply with Rule 26 and the scheduling order is within the broad discretion of the trial court. *Hawkins v. Graceland*, 210 F.R.D. at 210; *Sullivan v. Glock*, 175 F.R.D. at 505. The result is dependent on the particular facts in each case. *Sullivan v. Glock*, 175 F.R.D. at 505–06.

Conclusion

Rule 26 disclosures are necessary in preparing for the defense of your client and evaluating the settlement value of the case. The expert disclosures are a critical part of the Rule 26 disclosure requirements. The disclosures, however, can be a trap if you are not aware of the various requirements. When you are preparing your disclosures you should review Rule 26 and the Rule 16(b) Scheduling Order to ensure that you have met the requirements and the deadlines. Although courts may be inclined to exercise their discretion not to exclude or to only partially exclude, you want to be vigilant to see that your experts are properly and timely disclosed. If someone is going to have to sweat out whether part or all of an expert's testimony is going to be excluded, then it should be your opponent, not you. FD

EXHIBIT D

Disabled Rights

Law Enforcement and the Americans with Disabilities Act

By Dale Conder, Jr.

Police departments must train officers and implement policies to comply with ADA requirements.

It is 4:00 a.m. and a police officer on patrol decides to stop a car after seeing the car run a stop sign. The officer stops the car and orders the driver to "show her hands." The driver, however, fails to comply with the officer's commands. When the officer approaches the car, he smells alcohol and orders the driver to get out of the car. After conducting a field sobriety test, the officer determines the driver is intoxicated and places her under arrest. As part of the field sobriety test, the officer had the driver perform the one leg stand exercise. Does this scenario present any problems for the officer or his employer?

Under the Fourth Amendment, the officer has probable cause for the initial stop and subsequent arrest. *See United States v. Garrido*, 467 F.3d 971, 977–78 (6th Cir. 2006) ("[A] roadside detention is lawful so long as the officer has probable cause to believe that the motorist has violated the traffic laws."); *Babers v. City of Tallassee*, 152 F. Supp. 2d 1298, 1306–07 (M.D. Ala. 2001) (holding that results of a field sobriety test provided officer with probable cause). But, is it a different result if the driver is deaf; suffers from a condition that so interferes with her ability to walk that she appears intoxicated; has a condition affecting equilibrium; or an old leg injury that interferes with her ability to walk and balance on one leg? Under the Americans with Disabilities Act (ADA), the driver might very well have a cause of action. Likewise, she might have a claim under the Rehabilitation Act. (The elements under both Acts are substantially similar; therefore, this article focuses on the ADA. *See, Wisconsin Correctional Service v. City of Milwaukee*, 173 F. Supp. 2d 842, 849 (E.D. Wis. 2001)).

The Americans with Disabilities Act Scope of the ADA

In 1990, Congress enacted the ADA in a comprehensive effort to remedy discrimination against the disabled. 42 U.S.C. §12101(b). The ADA is divided into three titles, each directed at specific areas of disability discrimination. Title I prohibits disability discrimination in employment; Title II prohibits a public entity from excluding a disabled person from participating in or from denying to such person the benefits of

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the services or programs of the public entity; and Title III prohibits discrimination "by public accommodations involved in interstate commerce such as hotels, restaurants, and privately owned transportation services." *Gorman v. Bartch*, 152 F.3 907, 911 (8th Cir. 1998). If our driver has a cause of action, then it must be under Title II of the ADA. Any such action, however, can only be brought against the public entity. The plain language of the statute establishes that individual defendants cannot be held liable under Title II. *See, Calloway v. Borough of Glassboro Department of Police*, 89 F. Supp. 2d 543, 557 (D.N.J. 2000).

Elements of a Title II Action

In order to prevail under Title II, the plaintiff must show that she "(1) has a disability, (2) is otherwise qualified, and (3) is 'being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely because of her disability.'" *Tucker v. State of Tennessee*, 443 F. Supp. 2d 971, 973 (W.D. Tenn. 2006) ("*Tucker I*") A plaintiff is a "qualified individual" if she has a disability and, "with or without reasonable accommodations to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or participation in programs or activities provided by a public entity." *Id.* at 972–73 (quoting 42 U.S.C. §12131(2)).

A police department qualifies as a "public entity" under Title II of the ADA. 42 U.S.C. §12131(1) (a "'public entity' includes... local governments, as well as their departments...."); *see also, Gorman v. Bartch*, 152 F.3d at 912. Under the ADA, "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities...." *Felix v. New York City Transit Authority*, 324 F.3d 102, 104 (2nd Cir. 2003) (quoting 42 U.S.C. §12102(2) (A)). Major life activities are defined as "'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'" *Treiber v. Lindbergh School District*, 199 F. Supp. 2d 949, 958–59 (E.D. Mo. 2002) (quoting *Otting v. J.C. Penney Company*, 223 F.3d 704, 708 (8th Cir. 2000)). Therefore, our driver, with a hearing impairment or an impairment in her ability to walk, qualifies as disabled under the ADA.

What Is a Program, Service or Activity of a Police Department? Is an Arrest a Service?

Assuming the plaintiff is disabled under the ADA, the issue then becomes whether she has been prevented from participating in or denied the benefits of the services, programs or activities of the police department and, if so, was it because of the plaintiff's disability. *Bircoll v. Miami-Dade County*, ___ F.3d ___, 2007 WL 677764 at *8 (11th Cir.). Cases analyzing whether an arrest is covered by the ADA fall generally into one of two categories. The first category involves a situation in which the police officer "wrongly arrest[s] someone with a disability because [he] misperceive[s] the effects of that disability as criminal activity." *Gohier v. Enright*, 186 F.3d 1216, 1220 (10th Cir. 1999). The second category involves a situation in which the "police properly investigate[ ] and arrest[ ] a person with a disability for a crime unrelated to the disability, [but] they fail[ ] to reasonably accommodate the person's disability in the course of the investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees." *Id.* at 1220–21.

The first category is demonstrated by *Jackson v. Town of Sanford*, 1994 WL 589617 (D. Me. 1994), in which the plaintiff was arrested when the officer misperceived the effects of a stroke as indications that the plaintiff was intoxicated. In denying the town's motion for summary judgment, the court noted that the legislative history of the ADA demonstrated that one of the concerns motivating Congress was the fact that "persons who have Epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed" because of a lack of training. *Id.* at *6 n. 12; *see also* H.R. Rep. No. 101-485(III), 101st Cong., 2d Sess. 50, reprinted in 1990 U.S.C.C.A.N. 473. The second category is demonstrated in *Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998), in which a wheelchair bound arrestee brought suit alleging a violation of the ADA because he was transported to jail in a van that was not equipped for wheelchair transport and, as a result, he suffered injuries. *Id.* at 909–10.

However, yet another category does not fit neatly within the two categories discussed above. *Gohier v. Enright*, 186 F.3d at 1221. In *Gohier*, the officer shot the plaintiff's decedent because the officer reasonably feared for his safety. *Id.* at 1222. The officer shot the decedent when he approached the officer and acted as if he had a knife and was going to stab the officer. *Id.* at 1217–18. Under the circumstances, the court held that the ADA was not violated. *Id.* at 1222. In *Gohier*, however, the court did not express an opinion as to whether the plaintiff could have prevailed under a theory that more training should have been provided to the officers. *Id.*

It is not reasonable to accommodate a claimed disability in a situation involving an aggressive or violent individual.

In such a case, however, the plaintiff's claims might very well fail on the issue of causation. *See, Thompson v. Williamson County*, 219 F.3d 555 (6th Cir. 2000). In *Thompson*, the police were called to the home of Charles Thompson Jr. by a relative because Mr. Thompson Jr., who was mentally handicapped, had "flipped his wig" and was threatening family members with a machete. *Thompson*, 219 F.3d at 556. The police left the scene when they were unable to locate Mr. Thompson Jr. because he had fled into a wooded area behind his house. *Id.* Shortly after the officers left, they were called back to the scene after Mr. Thompson Jr. returned armed with two machetes. *Id.* One of the officers encountered the suspect behind the house and, when Mr. Thompson Jr. began to approach, the officer ordered him to stop and to drop his weapons. *Id.* Rather than comply, however, the suspect raised one of the machetes and continued to approach. *Id.* At this time, the officer fatally shot Mr. Thompson Jr.

Id. Mr. Thompson Sr. filed suit, alleging, among other causes of action, a violation of the ADA. *Id.* at 558. The court concluded that if the decedent was denied a public service, it was not because he was disabled, but rather because he threatened the police officer and tried to kill him. *Id.* Similarly, the court concluded that the plaintiff's son was killed, not because the officer was inadequately trained to deal with a mentally disturbed individual, but because the plaintiff's decedent came at the officer in a violent and threatening manner. *Id.* at 558. The court noted that before Mr. Thompson Jr. could be provided with the emergency services his family claims he was denied, the officers had to disarm Mr. Thompson Jr. *Id.* at 558. Mr. Thompson Jr.'s violent behavior was the cause of any denial of public services. *Id.*

When a police officer has an encounter with a disabled individual under circumstances that do not present a threat to the safety of the officer, the officer must make reasonable accommodations for the disability.

While it is true there is no *per se* rule that makes the ADA inapplicable in the context of an arrest, it is also true that the ADA does not apply "to an officer's on-the-street responses to reported disturbances or other similar incidents... *prior* to the officer securing the scene and ensuring there is no threat to human life." *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000). For example, in the case of our intoxicated driver, it would not be reasonable to summon an interpreter to the roadside stop before administering the field sobriety test. *See, Bircoll v. Miami-Dade County*, ___ F.3d ___, 2007 WL 677764 at *11. Likewise, it is not reasonable to accommodate a claimed disability in a situation involving an aggressive or violent individual. *See Thompson v. Williamson County*, 219 F.3d 555 (6th Cir. 2000); *Tucker I*, 443 F. Supp. 2d 971 (W.D. Tenn. 2006).

Therefore, in the hypothetical fact situation set forth at the beginning of this article, the officer would not have violated the ADA by conducting a field sobriety test before calling for an interpreter. The officer, however, should take the appropriate steps to communicate as effectively as he can under the circumstances by using notes, demonstrating what the officer wants the suspect to do during the field sobriety test, etc. *Bircoll*, ___ F.3d ___, 2007 WL 677764 at *12; *see also, Tucker I*, 443 F. Supp. 2d at 976 (W.D. Tenn. 2006) (finding that the officers' communications by writing were sufficiently effective under the circumstances). Similarly, if the driver disclosed to the officer a condition that interfered with her ability to stand or to balance, then the officer would be obligated to modify his field sobriety test to accommodate the disability.

In *Rosen v. Montgomery County*, 121 F.3d 154 (4th Cir. 1997), the court rejected the notion that a drunk driving arrest was a "program or activity" under the ADA. *Rosen v. Montgomery County*, 121 F.3d at 157. In *Rosen*, one of the factors the court considered in rejecting the claim that an arrest was within the ADA was the fact that arrests are usually not voluntary from the point of view of the person arrested. *Id.* The Supreme Court's decision in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 211 (1998), however, removed any doubt that voluntariness is a factor in determining whether a particular action is a service or program.

In *Yeskey*, the Supreme Court was called upon to decide if Title II of the ADA protected inmates in state prisons from discrimination based on disability. *Yeskey*, 524 U.S. at 208. Mr. Yeskey was convicted and sentenced to serve 18 to 36 months in a Pennsylvania correctional facility. *Id.* At his sentencing, the judge recommended that he be sent to a boot camp for first time offenders. If Mr. Yeskey successfully completed this program, then he would be eligible for release in six months. *Id.* The Pennsylvania Department of Corrections, however, denied Mr. Yeskey admission to the boot camp because of his history of hypertension. *Id.* Mr. Yeskey then filed suit under the ADA against, among others, the Pennsylvania Department of Corrections ("Pennsylvania"). Mr. Yeskey argued that Pennsylvania had discriminated against him on the basis of his disability. *Id.*

Pennsylvania argued that the ADA did not cover state prisons. *Id.* at 209–10. The Court, in rejecting the argument, held that the term "public entity," as defined in 42 U.S.C. §12131(1) (B), included state prisons. *Id.* at 210. The Court held that prisons provide activities, services, and various programs that, at least arguably, benefit the inmate. *Id.* Therefore, it rejected Pennsylvania's argument that the use of the phrase "benefits of the services, programs, or activities of a public entity" in 42 U.S.C. §12132 did not include the programs, services, or activities of prisons. *Id.* Similarly, the Court rejected the argument that the term "'qualified individual with a disability'" did not include prisoners. *Id.*

Finally, Pennsylvania argued that the use of the words "eligibility" and "participation" in the definition of a "qualified individual with a disability," (42 U.S.C. §12131(2)) implied a voluntariness on the part of the individual seeking benefits from the state. *Id.* at 211. The Court held that "the words do not connote voluntariness." *Id.* In reaching its conclusion, the Court relied upon the common definitions of the two terms and concluded that "[w]hile 'eligible' individuals 'participate' voluntarily in many programs, services, and activities, there are others for which they are 'eligible' in which 'participation' is mandatory." *Id.* For example, a drug addict might be compelled to participate in a drug rehabilitation program as part of his sentence. As a drug addict, he is eligible, but his participation is not voluntary. *Id.* Furthermore, even if the words did carry a connotation of voluntariness, "it would still not be true that all... 'services,' 'programs,' and 'activities' are excluded from the ADA because participation in them is not voluntary." *Id.*

To the extent the *Rosen* decision was based on a lack of voluntariness in concluding that arrests are not covered by the ADA, it has been overruled by *Yeskey*. The decision, however, is still viable for the proposition that an officer need not necessarily

accommodate a disabled suspect while trying to effectuate an arrest.

Perhaps the issue is more correctly analyzed as whether the modification is reasonable, rather than whether an arrest is a service. *Bircoll v. Miami-Dade County*, ___ F.3d ___, 2007 WL 677764 at *11. 42 U.S.C. §12132 provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." The final clause of 42 U.S.C. §12132, which provides that "no qualified individual with a disability shall, by reason of such disability... *be subjected to discrimination by any such entity*," has been interpreted as a catch-all phrase that prohibits discrimination by a public entity because of a disability regardless of the context. *Bircoll*, ___ F.3d ___, 2007 WL 677764 at *6 and *10 (quoting 42 U.S.C. §12132) (emphasis added). In other words, "the final clause of §12132 'protects qualified individuals with a disability from being subjected to discrimination by any such entity, and is not tied directly to the services, programs, or activities of the public entity.'" *Bircoll*, ___ F.3d ___, 2007 WL 677764 at * 10 (quoting *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 821–22 (11th Cir. 1998)) (internal quotation marks omitted). If the modification is unreasonable, then the plaintiff's claim would fail. *Id.* at *11. Even if the plaintiff were to establish that the modification was reasonable, she would still have to prove causation. Regardless of the context of the police/citizen encounter, the alleged discrimination must still be because of the disability. If not, then the plaintiff's claim fails. *See, e.g., Tucker I*, 443 F. Supp. 2d at 976 (finding that "the trigger for everything that happened that evening" was the plaintiff's assault of a bystander and not discrimination because of a disability).

The ADA and the Station-house

In *Rosen*, however, the court recognized that once the officer arrives at the police station, the accommodation requirement is heightened. *Id.* at 158. While it is true that the ADA requires "reasonable modification," this principle

> does not require a public entity to employ any and all means to make auxiliary aids and services accessible to persons with disabilities, but only to make "reasonable modifications' that would not fundamentally alter the nature of the service or activity of the public entity or impose an undue burden.

Bircoll v. Miami-Dade County, ___ F.3d. ___, 207 WL 677764 at *7 (citing *Tennessee v. Lane*, 541 U.S. 509, 531–32 (2004)).

The Department of Justice regulations prohibit public entities from "'provid[ing] a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.'" *Tucker v. Hardin County*, 448 F. Supp. 2d 901, 906 (W.D. Tenn. 2006) ("*Tucker II*") (quoting 28 CFR 35.130(b)(1)(iii)). In other words, "[t]he purpose of the [ADA] is to place those with disabilities on an equal footing, not to give them an unfair advantage." *Kornblau v. Dade County*, 86 F.3d 193, 194 (11th Cir. 1996); *see also Bircoll v. Miami-Dade County*, ___ F.3d ___, 2007 WL 677764 at *12.

For example, in the context of the hearing impaired, the officer would be required to provide communication that is as effective as communication with a non-hearing impaired individual. In deciding whether effective communication has been established with a hearing-impaired person, the following should be taken into consideration:

(1) The abilities of, and the usual and preferred method of communication used by, the hearing impaired arrestee;
(2) The nature of the criminal activity involved and the importance, complexity, context, and duration of the police communication at issue;
(3) The location of the communication and whether it is a one-on-one communication; and
(4) Whether the arrestee's requested method of communication imposes an undue burden or fundamental change and whether another effective, but non-burdensome, method of communication exists.

Bircoll v. Miami-Dade County, ___ F.3d ___, 2007 WL 677764 at *12.

There is no bright-line rule for determining what steps are required to achieve effective communication because the "inquiry is highly fact specific." *Id.* at *13. However, an interpreter is not required in every circumstance and, depending on the facts of the case, oral communication plus gestures and visual aids or note writing may be sufficiently effective. *Id.* Similarly, although the use of a TTD or TTY device may be preferable, the use of jail personnel or police officers to act as relay operators may be sufficient. *See id.*; *Tucker II*, 448 F. Supp. 2d at 906–07. The question is whether the hearing-impaired individual receives the same benefit a non-disabled person would have received. *Tucker II*, 448 F. Supp. 2d at 906.

Other Services of the Police Department

Although the issue of whether an arrest is a service, program, or activity under the ADA is fact specific (*Tucker I*, 443 F. Supp. 2d at 975), other police activities clearly fall within the ADA. *See, e.g., Salinas v. City of New Braunfels*, 2006 WL 3751182 (W.D. Tex.). In *Salinas*, the plaintiff, who was hearing impaired, returned home to find her boyfriend lying motionless on the couch. *Salinas*, 2006 WL 3751182 at *1. The plaintiff's neighbor called 911 and requested the services of a qualified interpreter. *Id.* The police arrived on the scene, but a qualified interpreter was not allowed access to the plaintiff until much later. *Id.* at *2. The plaintiff filed suit, alleging that the failure to provide an interpreter violated the ADA. *Id.* The court, in rejecting the city's motion to dismiss, held that the police officers were under a duty to reasonably accommodate the plaintiff's disability, provided the area was secure. *Id.* at *5. Perhaps communication by writing would have been effective; however, the effectiveness of the communication under such circumstances is often a question of fact. *See Center v. City of West Carrollton*, 227 F. Supp. 2d 863, 870 (S.D. Ohio 2002).

Similarly, investigative questioning at the police department is a program, service or activity covered by the ADA. *See, Calloway v. Borough of Glassboro Department of Police*, 89 F. Supp. 2d 543 (D.N.J. 2000). In *Calloway*, the plaintiff, a deaf and functionally illiterate woman, arrived at the police department to file a complaint for assault against her neighbor. *Calloway*, 89 F. Supp. 2d at 547. The police had already received information indicating the plaintiff in fact

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ıd committed the assault. *Id.* The police formed the plaintiff, through her sister, ıout the allegations. *Id.* The police, how-er, were unable to locate a sign language terpreter. *Id.* at 547–48. An uncertified terpreter was used to try to communicate .th the plaintiff. *Id.* at 548. Then the plain-f was arrested after she invoked her right ıt to speak with the officers. *Id.* The court ld that the questioning of the plaintiff at e police station was an "activity" of the po-e department under the ADA. *Id.* at 555.

When a police officer has an encounter th a disabled individual under circum-nces that do not present a threat to the ety of the officer, the officer must make ısonable accommodations for the dis-ility. For example, if the individual is aring impaired and the officer is taking eport, then the officer may be required secure the services of a qualified Amer-n Sign Language interpreter. A lot of the es deal with police encounters with hear-impaired subjects, however, the duty to ommodate can arise in a number of situa-ıs. For example, in *Gorman v. Bartch*, 152 d 907 (8th Cir. 1998), the transportation rrestees was held to be a program under ADA. *Gorman v. Bartch*, 152 F.3d at 913. plaintiff was paralyzed and confined to heelchair. The police department failed to ommodate his disability by transporting ı in a van that was not designed to trans-t individuals confined to wheelchairs. *Id.* 13. As was noted in *Thompson*, an indi-ıal might well be entitled to an accommo-on if the officers could have safely made a reasonable accommodation. *Thompson v. Williamson County*, 219 F.3d at 558.

Recommendations

Police officers face very difficult and often dangerous situations when dealing with the public. After all, it is rare that someone calls for a police officer because he or she is having a good day and wants to share it with the officer. When a police officer stops a motorist, often the individual is upset or, at the very least, annoyed that his or her travels have been interrupted. These problems may be compounded if the individual is disabled.

In order to help alleviate these problems, police departments should incorporate training as to how to deal with an individual who is disabled. For example, on a routine stop, the officer may expect the occupant of the car not to make any sudden moves, but if the individual is handicapped, he or she may reach for a cane or other mobility device. Police departments should train the officers to be aware of signs indicating the individual is handicapped, such as a license tag and how to anticipate and deal with the situation the officer may encounter. Similarly, a hearing-impaired person, who is trying to communicate with sign language, may appear to be aggressive and training in this area could be beneficial to officers who confront such situations. As was the case in *Gorman*, the standard techniques for transporting arrestees may be dangerous or at least problematic with a disabled individual.

Police departments also need to revise their policies to take into consideration the ADA and the reality that the officers will confront these situations. For example, departments may need to revise policies when it comes to how an individual may be transported. Departments should have available a list of sign language interpreters and inform the officers of the availability of the interpreters.

Furthermore, officers should be trained to keep any notes they use when communicating in writing with a hearing-impaired individual. If the notes are not maintained, then the effectiveness of the communication may very well become a factual dispute. Maintaining the notes provides a very effective means of establishing what was actually said.

Conclusion

The ADA and its regulations clearly apply to police departments. And, as is discussed above, may apply to arrests. Even if an arrest is not a service or program as defined under the ADA, the ADA may still be applicable to the situation under the concluding catch-all phrase found in 42 U.S.C. §12132. For these reasons, it is important that police departments be familiar with the requirements under the ADA, provide adequate training to their officers and implement policies designed to protect the rights of the disabled. For further information regarding frequently asked questions about the ADA and law enforcement, a Model Policy for Law Enforcement on Communicating with the Hearing Impaired, and videos on the ADA and law enforcement, visit http://www.usdoj.gov/crt/ada/. FD

ip Search, from page 40

ıretrial detainees. The parties in *Dodge* ed on experts to point out the relevance ıe data and how it justifies a strip search cy in order to combat issues created by entry of contraband into the jail's gen-population. The purpose of an expert ı help the court understand that the demonstrates that a strip search pol-s justified in order to ensure the jail is re. Establishing justification is neces-in order for a court to find the strip ch policy constitutional.

the court is persuaded that the blan-trip search is not prohibited under *Bell olfish*, and the policy is demonstrated to be justified for the jail at issue, then the third and final step is to establish that the manner in which the strip search occurs is reasonable, not abusive.

Conclusion

Currently, the majority of the federal courts continue to hold that strip searching pretrial detainees charged with a misdemeanor or violation is unconstitutional unless there is reasonable suspicion that the detainee is hiding contraband or a weapon. Moreover, the courts are broadening the definition of what constitutes a strip search.

In light of this trend, if defending the municipality with a blanket strip search policy, the defense attorney may present the *Evans* concurrence before the courts so that eventually the Supreme Court can have the opportunity to revisit and specifically address the issue of whether reasonable suspicion is necessary to strip search a pretrial detainee charged with a minor crime. Only then will we know whether the majority of circuits are misinterpreting the Supreme Court's holding in *Bell* by requiring that there be reasonable suspicion to strip search pretrial detainees prior to introducing them into the jail's general population.

Finally, it may legitimately be argued that the constitutional standard is not so clearly established that liability can be placed on a municipality. FD

EXHIBIT E

Prepare for the Most Demanding Standard

The Admissibility of Electronically Stored Information

By Dale Conder, Jr.

Learn what to look for, what questions to ask during discovery, and how to use ESI to your advantage.

It is late on Friday and, after working for months on a big case that was just settled, you are looking forward to a weekend away from the office. As you finish up a few last-minute items before leaving the office, you are suddenly brought back to reality by a ringing phone—your phone. According to the caller I.D., the call is from one of the senior partners in your firm. She has practiced law for almost 30 years and is legendary in your firm. With some hesitation, you answer the phone.

She has a problem, and she thinks you can help her. She explains that she has several cases of files with a lot of electronically stored information (ESI), and she needs some quick research outlining the admissibility of this "stuff." According to her, the files include everything from chat room logs to webpage content to instant messaging. Good thing you went to all of those seminars on electronic discovery. At least you know what ESI means, because on a Friday night, every little bit helps.

A Review of the Rules of Evidence

If the issue in a case involves a constitutional provision, a statute, or the application of a rule or regulation, it is always wise to review the applicable constitutional provision, statute, rule or regulation before deciding how best to proceed. The same is true when it comes to the admissibility of evidence, especially in the world of ESI.

The Federal Rules of Evidence do not specifically address the admissibility of ESI, but the rules are intended to promote "growth and development of the law of evidence" as our world changes and technology advances. FED. R. EVID. 102. Certainly the evidence, whether it is ESI or a plaintiff's handwritten diary, must be relevant. If the "evidence [has] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence[,]" it is relevant. FED. R. EVID. 401.

Once you have decided the ESI satisfies Rule 401, your next step is to decide how to authenticate the evidence. Simply put, can sufficient evidence be identified to establish that the evidence to be authenticated

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is what its proponent claims it is? FED. R. EVID. 901(a). In most cases, the parties can stipulate that the evidence is what one party claims it to be. For example, in a car wreck case, parties can agree the car depicted in particular photographs represent the condition of the car before and after the wreck or particular medical records are records from the doctor regarding the plaintiff's treatment. But, dealing with ESI may not be as cut-and-dried.

Just because document evidence, such as ESI, is authentic, does not mean the information in the documents is true. Establishing the authenticity of ESI and the truth of the information contained in the files are two different matters. *See United States v. Brown*, 688 F.2d 1112, 1116 (7th Cir. 1982). In *Brown*, the defendant produced documents to a grand jury. Following his indictment, the documents were admitted into evidence at his trial despite his refusal to testify as to the authenticity of the documents. On appeal, he challenged the admissibility of the records on the grounds that they were not properly authenticated and their admission violated his right against self-incrimination. The court held that (1) his production of the records to the government was sufficient to authenticate the records, and (2) his Fifth Amendment right against self-incrimination was not violated because authentication is not the same as vouching for the accuracy of the information in the documents. *Id.*

Rule 901(b) provides a list of ways in which evidence can be authenticated. But the list is not exhaustive and is intended only to illustrate ways in which Rule 901 can be satisfied. FED. R. EVID. 901(b). Rule 902 sets forth 12 situations in which extrinsic evidence of authenticity is not required "as a condition precedent to admissibility...." FED. R. EVID. 902. The codification of these 12 areas, however, does not prohibit your opponent from contesting the authenticity of a document. FED. R. EVID. 902 (1972 advisory committee's notes).

The next hurdle that must be cleared is hearsay. You have a hearsay problem if the real witness is not the person in the witness chair and you are offering the statement to prove the truth of a matter. For example, you are defending an employer in a sex discrimination case, and the plaintiff's attorney calls a witness to describe an incident he saw. So far all is well, at least from the point of view of hearsay. Then your opponent asks the witness about the contents of an e-mail he received from another employee regarding what she saw. It is time to object (unless the statement fits into one of Rule 803's 23 exceptions to the rule against admitting hearsay). If the real witness, or declarant, is unavailable, the hearsay may still be admissible if Rule 804's hearsay exceptions are satisfied. But even if the evidence does not fit within Rules 803 or 804, all is not lost; you still might be able to fit the evidence into the residual exception found at Rule 807.

Finally, our review will bring us to the "original writing rule." FED. R. EVID. 1001, *et seq.* The "original writing rule" was developed and intended to avoid inaccuracies and fraud by requiring the introduction as evidence of the original document. FED. R. EVID. 1001 (1972 advisory committee's notes). Rule 1002 still requires the production of the original document, but the very next rule provides that "[A] duplicate is admissible to the same extent as the original" provided there are no questions about its authenticity or no other reasons for requiring the original. FED. R. EVID. 1003.

Authentication of ESI

How do the rules of evidence reviewed above apply to the admissibility of ESI? In *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534 (D. Md. 2007), the court commented, "There is no form of ESI more ubiquitous than e-mail...." *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. at 554. In *Lorraine*, the dispute centered on whether an arbitration agreement limited the arbitrator's "authority to determine only whether the... damages [to the boat] were caused by the lightning strike or if [the arbitrator] was authorized to determine the amount of the damages as well." *Id.* at 537. The district court determined the language of the agreement was ambiguous, and extrinsic evidence could be considered by the court in determining the parties' intent. *Id.*

The parties each filed motions for summary judgment and supported their motions with various forms of documentary evidence, including e-mail communications between the attorneys. *Id.* The court found the e-mails to be relevant to the court's determination of the scope of the arbitration agreement. *Id.* at 541. However, the parties failed to authenticate the e-mails. *Id.* In other words, the parties failed to satisfy the requirement of FED. R. CIV. P. 56(e) that their motions be supported by admissible evidence. Therefore, the district court dismissed both motions without prejudice. *Id.* at 537.

Establishing the authenticity of ESI and the truth of the information contained in the files are two different matters.

The court noted the burden of authentication "is not a particularly high barrier to overcome." *Id.* at 542. It requires only a prima facie showing that the evidence is what its proponent claims. *Id.* E-mail can be authenticated by a person with personal knowledge (FED. R. EVID. 901(b)(1)), comparison with an authenticated exemplar or by expert testimony (FED. R. EVID. 901(b)(3)), the e-mail's distinctive characteristics, such as content or internal patterns (FED. R. EVID. 901(b)(4)), or establishing it is a self-authenticating business record (FED. R. EVID. 902(11)). *Id.* at 554–55.

In *United States v. Siddiqui*, 235 F.3d 1318 (11th Cir. 2000), the defendant was convicted of fraud, false statements to a federal agency, and obstruction of a federal investigation. *United States v. Siddiqui*, 235 F.3d.at 1320. The defendant nominated himself for the National Science Foundation's Waterman Award. He submitted his nomination as if it had been made by an acquaintance, Dr. Yamada. *Id.* As if that were not enough, he fraudulently submitted a reference for himself, forging the signature of Dr. von Guten. *Id.*

When the National Science Foundation confirmed the reference with Dr. von Guten, he informed the foundation that he had not submitted the reference. *Id.* Things unraveled quickly for Dr. Siddiqui and, despite his decision to withdraw his

fraudulent nomination, he found himself on trial. *Id.* at 1320–21. Before the trial, the government deposed Dr. Yamada, in Japan, and Dr. von Guten, in Switzerland. *Id.* Dr. Yamada testified she received an e-mail asking her to "'please tell good words about me[ ]'" in the event she received a telephone call from the foundation. *Id.* at 1321. She testified she knew the e-mail was from Dr. Siddiqui because it included his e-mail address, and he signed it "Mo." He had previously told her Mo was his nickname. He had also used this nickname in previous e-mail messages. *Id.* Dr. Yamada also testified she received a second e-mail from Dr. Siddiqui asking her to tell the investigator that she had authorized him to sign her name to the nomination. *Id.* On cross-examination, Dr. Siddiqui's attorney introduced an e-mail from Dr. Yamada to Dr. Siddiqui. This e-mail used the same e-mail address as was used in the e-mails sent to Drs. Yamada and von Guten. *Id.*

The court noted the burden of authentication "is not a particularly high barrier to overcome."

Dr. von Guten testified he "received an email from what appeared to be Siddiqui's email address asking him to tell the Foundation that Siddiqui had permission to use von Guten's name." *Id.* Dr. Von Guten testified that he replied by e-mail to the same address, saying he could only tell the truth. *Id.*

It comes as no surprise that Dr. Siddiqui objected to the admission of the e-mail messages. The admission of the e-mails at trial was part of the basis for his appeal. *Id.* On appeal, the court noted the authenticity of the e-mails was supported by a number of factors: (1) the e-mail sent to Drs. Yamada and von Guten bore Dr. Siddiqui's e-mail address; (2) this e-mail address was the same as the address on the e-mail introduced by Dr. Siddiqui's attorney during the deposition; and (3) when Dr. von Guten used the "reply" function, his e-mail system automatically pulled up Dr. Siddiqui's address. *Id.* Furthermore, the content of the e-mail "show[ed] the author... to have been someone who would have known the very details of Siddiqui's conduct..." vis-à-vis the Waterman Award. *Id.* The e-mail to Dr. von Guten also contained statements that accurately described contact between Drs. Siddiqui and von Guten a few years earlier. *Id.* at 1323. In addition, Drs. Yamada and von Guten testified they received telephone calls from Dr. Siddiqui shortly after the e-mails were received making the same requests as those contained in the e-mails. Finally, the use of a nickname Dr. Siddiqui previously revealed to Drs. Yamada and von Guten sealed the authentication. *Id.* These circumstances were sufficient to establish authenticity. *Id.*

It has been argued that e-mail poses a novel set of authentication concerns. *Id.* For example, how can anyone establish that the e-mail was actually sent from the purported sender? *Id.* Anyone with the password could have accessed Dr. Siddiqui's e-mail account and sent the messages attributed to him. After all, while an e-mail message can be traced to a particular computer, it cannot be traced to the fingertips of a specific author. *See In re F.P.*, 878 A.2d 91, 95 (Pa. Super. Ct. 2005).

While legitimate, concerns about electronic evidence authenticity do not render its authentication impossible. As noted by the *Siddiqui* court, "[T]he same uncertainties exist with traditional written documents. A signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationary can be copied or stolen." *Id.* The party opposed to admitting an e-mail exhibit is still free to put forth evidence calling its authenticity into question. A prima facie showing of authenticity is not the same as a court finding "that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so." *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006). In addition, an e-mail, like any other type of document, can be deemed authentic if produced by a party during discovery, and subsequently offered by a party-opponent. *See Sklar v. Clough*, 2007 WL 2049698 at *4–5 (N.D. Ga.) (holding that e-mails produced by the defendants during discovery were deemed authentic when offered by the plaintiffs in support of their motion for summary judgment).

What about other forms of electronic communication, such as chat room logs? A chat room is a site on the Internet where a number of users communicate in real time, usually dedicated to one topic, which can range from the benign and possibly helpful to the most vile and repulsive.

In *United States v. Tank*, 200 F.3d 627 (9th Cir. 2000), the defendant. Mr. Tank, was convicted of various child pornography-related offenses. He belonged to an Internet chat room devoted to child pornography. *Id.* at 629. One of the defendant's fellow chat room members, Mr. Riva, saved all online chat room conversations on his computer. *Id.* Before any investigation into this sordid group began, Mr. Riva deleted any nonsexual conversations and the date and time stamps from his text files to decrease the size of the saved files. *Id.* When Mr. Riva was arrested on child molestation charges, law enforcement officials discovered these edited conversation files on his computer. *Id.*

Finding Mr. Riva's conversation files resulted in the arrest and eventual prosecution of Mr. Tank. *Id.* Mr. Tank objected to the admission of the chat room logs because they were incomplete and Mr. Riva might have made undetectable changes to the substance of the conversations or in the names used in the correspondence. *Id.* at 630. In authenticating the chat room logs, the government presented testimony from Mr. Riva describing how he prepared the logs and that the exhibits accurately represented the conversations. *Id.*

In addition, the screen name "Cessna" appeared throughout the conversations. The authenticating evidence presented by the government established that Mr. Tank used the screen name "Cessna" when he participated in the chat room conversations. *Id.* Other chat participants testified that when they arranged to meet "Cessna," it was the defendant who appeared for the meeting. *Id.* at 630–31. Therefore, the court held that the government met its prima facie showing of authentication. Mr. Tank's argument about the potential incompleteness of the conversations was relevant to the weight of the evidence, not its admissibility. The government's responsibility was to present proof that the logs were com-

plete and the substance was unaltered. The defendant was free to counter the government's proof with evidence to establish the logs had been altered.

When authenticating chat room conversations or instant messages, it's critical to establish the author's identity—the identity of the actual person behind the screen name pseudonym. Establishing author identity can be achieved by offering testimony of someone who knows the party and his or her screen name. Just as we saw with Dr. Siddiqui's e-mail, if content is peculiar to a particular person, content of messages can be used to connect the messages to that person and to establish authorship.

The way characteristics of a particular person's e-mails can be used is highlighted in *People v. Pierre*, 838 N.Y.S.2d 546 (App. Div. 1st Dept. 2007), a case in which the defendant was convicted of murdering his girlfriend because she refused to have an abortion. *Id.* at 548. Mr. Pierre's undoing was instant messaging. *Id.* at 548–49. One witness, a friend of the defendant and his accomplice, testified as to his personal knowledge of Mr. Pierre's screen name. *Id.* The deceased's cousin testified she sent an instant message to that particular screen name and received a reply that would have made no sense unless the reply had been sent by Mr. Pierre. *Id.* at 549. The court found the message constituted an admission of the defendant and permitted testimony as to the message's content even though the witness had neither printed the message nor saved it. *Id.* at 548–49.

The failure to present evidence identifying the e-mail's author can be fatal to authentication. For example, in *People v. Von Gunten*, 2002 WL 501612 (Cal. Ct. App.), the defendant was charged with assault with a deadly weapon. *Id.* at *1. The defendant claimed an individual named Beever committed the assault. He attempted to introduce a "cut and pasted" transcript of a series of instant messages between a friend and an individual using the screen name BuckaRoo 20. *Id.* at **4–5. The defendant's friend testified she knew at one time Beever used BuckaRoo 20 as his screen name. The evidence also established that anyone with the correct password could send messages under the screen name BuckaRoo 20. Software that would allow a third party to decode a particular screen name's password was also discussed. The conversations' transcript did not contain the subject header, date, or time at which the instant messages. Therefore, because of the slim evidence connecting the screen name to the individual, Beever, the court refused to admit the transcript as evidence. *Id.* at *5.

Today, it is the exception rather than the norm, to find a business or governmen-

tal agency without a website. Organizations, clubs, and individuals have websites. Often, the information that is posted on a website can prove useful in the litigation of your case. Some courts, however, are very skeptical of the trustworthiness of information found on the Internet. In *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773 (S.D. Tex. 1999), the court was less than impressed with the information from the Internet.

An e-mail, like any other type of document, can be deemed authentic if produced by a party during discovery, and subsequently offered by a party-opponent.

In *St. Clair*, the plaintiff filed suit for injuries he received while working aboard a boat he claimed was owned by the defendant. *Id.* at 774. The defendant filed a motion to dismiss, contending it did not own the boat. *Id.* The plaintiff responded with "'evidence'—taken off the Worldwide Web...—revealing that Defendant..." owned the boat. *Id.* The "evidence" was from the United States Coast Guard's on-line vessel database. *Id.* In rejecting the evidence, the court noted that it viewed the Internet "as one large catalyst for rumor, innuendo, and misinformation." *Id.* The court rejected the ownership evidence because the plaintiff had failed to "overcome the presumption that the information discovered on the Internet is inherently untrustworthy." *Id.* The presumption could have been overcome with evidence authenticating the information as having come from the website and having been posted to the site by the Coast Guard. *Id.* at 775. Without such evidence, the court rejected the "voodoo information" from the Internet. *Id.* The *St. Clair* court's colorful comments about Internet information's untrustworthiness recognized, as have other courts, that "information on [the] internet... presents special problems of authentication." *Terbush v. United States*, 2005 WL 3325954 at *5 n. 4 (E.D. Cal.).

Can the presumption of the untrustworthiness of information on the Internet be overcome if a witness testifies that he or she went to a particular website, viewed its information, printed it, and the printout accurately represents what he or she viewed? The answer varies, depending on the court. Some courts require verifying testimony from an employee of the website's owner to overcome concerns that a hacker may have put the information on the website. An example of a case in which a court believed a hacker might have authored and posted particular website information is found in *United States v. Jackson*, 208 F.3d 633 (7th Cir. 2000).

In *Jackson*, the defendant, Ms. Jackson, apparently had packages sent to her address via United Parcel Service. The packages contained artwork depicting African American culture. Evidence established that the packages arrived at her address, and when they did, they were undamaged. The defendant, however, claimed that not all of the packages arrived, and those packages that did arrive were damaged and contained racial epithets. *Id.* at 634–35. She filed a claim with UPS for $572,000, although she only paid $2,000 for the artwork. *Id.* at 635. UPS denied the claim. The defendant alleged that UPS denied the claim because of racist elements within the company. *Id.* In addition, the evidence showed that she also sent letters containing racially charged language to various prominent African Americans via UPS. *Id.* The letters showed return addresses to various white supremacist organizations. *Id.*

During her trial for, among other things, wire fraud, Ms. Jackson sought to introduce web postings from the websites of the white supremacist organizations which purportedly showed these organizations took credit for the racist mailings. *Id.* at 637. The court sustained the government's objection for various reasons, one of which was a lack of authentication. The court concluded that the defendant failed to show that the web postings were posted to the website by the groups, rather than "being slipped onto the groups' websites by [the defendant]..., who was a skilled computer user." *Id.* at 638. In other words, the defendant had not produced evidence to overcome the presumption of the untrustworthiness of information on the Internet.

Some courts allow admission of web postings or printouts without testimony from the owner of the website. These courts tend to view FED. R. EVID. 901(a)'s requirements as more elastic than courts that require verifying testimony about the origins of a website's information. In *United States v. Standring*, 2006 WL 689116 (S.D. Ohio), the court accepted printouts from various websites based upon a witness' declaration that he visited various websites, accessed the information, and printed the information. The printouts contained the dates on which the websites were accessed and the web addresses of the various sites. Perhaps this additional information gave the court a level of comfort it might not otherwise have found in the witness's declaration alone.

On the other hand, some courts have been willing to accept electronic documents as evidence based upon the affidavits of witnesses who retrieved them. For example, in *Kassouf v. White*, 2000 WL 235770 (Ohio App.) the plaintiff filed a defamation action against Cleveland, Ohio's mayor because the mayor, in opposition to the plaintiff's proposed construction of a hotel, referred to the hotel as a "$39.95 flophouse." In support of his motion for summary judgment, the mayor submitted documents from the hotel chain's website showing rooms in the Cleveland area rented for anywhere from $35 per night to $119 per night. The documents, which were accepted by the court, were authenticated by an individual's affidavit that he accessed the chain's website, retrieved the attached documents, and the documents accurately reflected information on the website. *See also, Moose Creek, Inc. v. Abercrombie & Fitch*, 331 F. Supp. 2d 1214, 1225 n.4 (C.D. Cal.), *aff'd*, 114 Fed. Appx. 921 (9th Cir. 2004); *Johnson-Wooldridge v. Wooldridge*, 2001 WL 838986 at *4–5 (Ohio Ct. App.).

Printouts from private websites are not self-authenticating; therefore, testimony from a witness knowledgeable about the website is required. *See In re Homestore.com Securities Litigation*, 347 F. Supp. 2d 769 (C.D. Cal. 2004). Printouts from government websites, however, can be self-authenticating. Rule 902(5) provides that "[b]ooks, pamphlets, or other publications purporting to be issued by public

authority[ ]" are self-authenticating. FED. R. EVID. 902(5). In determining whether Rule 902(5) applies to documents from government websites, courts have applied the plain meaning to the terms "books, pamphlets, or other publications" and concluded the rule does cover such documents. *See United States v. Premera Blue Cross*, 2006 WL 2841998 at *3–4 (W.D. Wash.).

Unless you know your judge and his or her authenticity standard, it is best to depose the webmaster or another sufficiently knowledgeable employee to establish the website evidence's authenticity. If you are unable to secure this testimony, include the URL address (*i.e.*, the www._____) on the printout, the date on the printout, and any other evidence distinctive to the website to establish its authenticity.

Business records maintained in an electronic format also require authentication. The language in both Rule 902(11) for authentication and Rule 803(6) about an exception to the rule against hearsay, is very similar. Therefore, the authenticity analysis and the business record exception analysis are merged into one inquiry. *See In re Vee Vinhee*, 336 B.R. 437, 444 (9th Cir. BAP 2005). As we have seen, the authentication standards vary by court. With respect to electronic business records, some courts have adopted Professor Imwinkelreid's 11-step process:

1. The business uses a computer.
2. The computer is reliable.
3. The business has developed a procedure for inserting data into the computer.
4. The procedure has built-in safeguards to ensure accuracy and identify errors.
5. The business keeps the computer in a good state of repair.
6. The witness had the computer readout certain data.
7. The witness used the proper procedures to obtain the readout.
8. The computer was in working order at the time the witness obtained the readout.
9. The witness recognizes the exhibit as the readout.
10. The witness explains how he or she recognizes the readout.
11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.

In re Vee Vinhee, 336 B.R. 437, 444 (quoting Imwinkelreid, Evidentiary Foundations §4.03[2] (5th ed. 2005)). As noted in *In re Vee Vinhee*, "The 'built-in safeguards to ensure accuracy and identify errors' in the fourth step subsume details regarding computer policy and system control procedures, including control of access to the database, control of access to the program, recording and logging changes, backup practices, and audit procedures to assure the continuing integrity of the records." *In re Vee Vinhee*, 336 B.R. at 446–47.

In *In re Vee Vinhee*, the court found the testimony of the records custodian was lacking. His testimony failed to establish "his job title or anything about his training or experience...." *Id.* at 448. Furthermore, his testimony revealed that he did not know the type of computer used by American Express, nor did he know the type of software used. The court found the testimony to be too general and conclusory to authenticate the electronic records. *Id.* at 447 n. 9 and n. 10.

Other courts, however, have been more lenient in authenticity rulings. These courts have generally required only the testimony of a witness familiar with the record-keeping system who was able to verify that the retrieved records were produced from the electronic information generated contemporaneously with the transaction at issue. *See Sea-Land Serv., Inc., v. Lozen Int'l.*, 285 F.3d 808 (9th Cir. 2002); *United States v. Meienberg*, 263 F.3d 1177 (10th Cir. 2001). As with everything involving litigation, you must know your audience. If you err, err on the side of providing the court with more information than needed for authentication rather than less.

Sometimes, no matter how prepared you are, things go wrong. A witness changes his or her testimony. Your client suddenly becomes the worst possible witness. A potential juror was not forthcoming during *voir dire*. But authentication is a different kind of a problem. If your exhibit is rejected because it lacks authentication, you probably have only yourself to blame. Thoughtful, advance preparation can avoid such a painful and embarrassing moment.

Preparation should start during discovery. During discovery, ask questions designed to aid authentication later. For example, does the opposing party have an e-mail address, if so what is it, and how long has he or she used it? Ask questions about the opposing party's prior e-mail addresses and who has access to the various e-mail accounts, both active and inactive. Ask about the screen names he or she uses and what the names mean. Has he or she ever had a problem with others accessing his or her accounts and sending messages attributed to him or her? Does he or she have a website, and if so, who is the webmaster, and who controls the content of the website? If he or she can make some website changes, find out what types he or she is authorized to make. Find out what types of website changes his or her employees are authorized to make. Does he or she maintain a blog or have a MySpace account? If so, find out as much information as you can about it. All of the information mentioned above can be very useful later when you are trying to authenticate evidence.

Some courts...
are very skeptical of the trustworthiness of information found on the Internet.

Hearsay

Once the authentication requirement has been satisfied, you have to address the rule against hearsay. If a statement is offered for its truth and the real witness, or declarant, is not in the witness chair, you must either establish that it is nonhearsay, or fits a hearsay exception.

A statement is not hearsay if it is an admission by a party-opponent. The statement must be "offered against a party and is... the party's own statement, in either an individual or representative capacity." FED. R. EVID. 801(d)(2)(A). Remember our friend Dr. Siddiqui? Some of the e-mails at issue in his case were written by him, and as such, could be offered as an admis-

sion by Dr. Siddiqui to establish truth that worked against him.

This rule—that a party's own admission in an e-mail can be offered as a statement—generally holds, unless the party can establish the e-mail was sent as the result of a computer malfunction. In *Ermolaou v. Flipside*, 2004 WL 503758 (S.D.N.Y.), the plaintiff entered an Internet lottery game in which she picked numbers for the one million dollar, ten million dollar, and twenty million dollar games. She received two e-mails from the operator of the lottery. The first e-mail provided her with the winning numbers in each game, and to her surprise, she matched every number in each game. Sadly, the second e-mail notified her that the first e-mail had been sent in error and provided her with the actual winning numbers, none of which she matched. The plaintiff sued the operator of the lottery and argued that the first e-mail constituted an admission of the defendant. The court rejected her argument because the evidence established the first e-mail was sent as the result of a computer error. Therefore, it did not constitute an admission.

In the world of electronic mail, merely forwarding an e-mail to another recipient may be enough to make a statement contained in it an adoptive admission.

A second rule is that the "statement offered against a party... is... a statement of which the party has manifested an adoption or belief in its truth..." FED. R. EVID. 801(d)(2)(B). In the world of electronic mail, merely forwarding an e-mail to another recipient may be enough to make a statement contained in it an adoptive admission. In *Sea-Land Serv., Inc., v. Lozen Int'l*, one employee sent an e-mail to a second employee and the latter forwarded the e-mail to the defendant and included her own comments, which manifested her own belief in the statements made by the e-mail originator in the original e-mail. The court found the act of forwarding an e-mail with comments indicating agreement with beliefs expressed by the e-mail chain originator, constituted an adoptive admission under FED. R. EVID. 801(d)(2)(B). *Sea-Land Serv., Inc., v. Lozen Int'l*, 285 F.3d at 821. Similarly, if the evidence shows that the e-mail was written by "a person authorized by the party to make a statement concerning the subject, or... a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[ ][,]" then the e-mail qualifies as nonhearsay. FED. R. EVID. 801(d)(2)(C)–(D). In *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1155 (C.D. Cal. 2002), the court addressed whether e-mail messages sent by Cybernet's employees were nonhearsay under Rule 801(d)(2)(D). Because the messages were sent by employees, concerned matters within the scope of their employment, and were prepared during the existence of the employment relationship the court held the messages were nonhearsay.

E-mail, however, can also satisfy one or more of the 23 exceptions to the rule against hearsay. For example, if the HR director for your client sent an e-mail to her superior detailing an interview with an employee making a sexual harassment complaint, the e-mail might be admissible in subsequent litigation. Under Rule 803(1), provided the e-mail was prepared during the conversation, or very shortly thereafter, it could be admitted into evidence as a present sense impression. *See United States v. Ferber*, 966 F. Supp. 90, 98–99 (D. Mass. 1997).

Could the e-mail also be admitted under the business records exception? Perhaps, but not every document made in a business setting falls within the business records exception. The critical questions to be answered are whether the business routinely required the HR director to report to her supervisor and hence whether she had a business duty to report these matters. Without affirmative answers to these questions, the e-mail would not be admissible under 803(6).

The various exceptions should be examined in detail, in light of the facts of your case and the circumstances of the e-mail, to determine if they apply. For example, a text message sent from a witness to an accident might fit the excited utterance exception.

Often when e-mail is received it has been forwarded by various recipients, each of whom may add his or her own comments to the original. Each message in this e-mail chain must be analyzed and found to fit within an exception. In *Rambus Inc. v. Infineon Tech. AG*, 348 F. Supp. 2d 698 (E.D. Va. 2004), the court held that for an e-mail chain to be admissible under the business records exception, the proponent of the e-mail must show that each declarant was acting in the course of regularly conducted business. Of course, it might be possible to fit each part of the chain within other exceptions.

The rules against hearsay and its exceptions apply to websites as well. If a website belongs to a party-opponent, the information taken from the website can be considered an admission. If the information is hearsay, it can fit one or more of the exceptions. A printout from a website, such as Kelley Blue Book, is admissible under FED. R. EVID. 803(17) to establish the value of a car. In *Neloms v. Empire Fire & Marine Ins. Co.*, 859 So. 2d 225, 232 (La. Ct. App. 2003), the plaintiff submitted a printout from the website to establish the value of her car. The court held that the printout was admissible because these types of publications are widely relied upon to determine the values of cars.

Original Writing Rule

If you must "prove the content of a writing, recording, or photograph, the original... is required, except as otherwise provided..." in the rules of evidence. FED. R. EVID. 1002. In other words, if you are not proving the veracity of the content of the writing, recording, or photograph, this rule does not apply. For example, if you called a witness to testify in a car wreck case as to what the plaintiff's car looked like following the wreck, and you used a photograph as part of the testimony, the rule would not apply. *See* FED. R. EVID. 1002 (1972 advisory committee's notes). The rule would apply in a medical malpractice case to X-rays or MRI images. *Id.*

The rules provide that a printout of data stored in a computer or similar device is an "original" provided it accurately reflects the data. FED. R. EVID. 1001(3). For this reason, in *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002), the court permitted a police officer to present a "cut and pasted" version of his text messages

with the defendant. The officer "cut and pasted" the text of the conversations from the chat room into a word processing program and printed the document from the word processing program. The court concluded that based upon 1001(3) the printout was an original.

When the rule applies, however, you need not produce the original if a duplicate is available. FED. R. EVID. 1003. If, however, the authenticity of the original is genuinely questionable, or doubts exist about the reliability of the method used to make the duplicate, the duplicate cannot be used.

Can evidence other than an original or duplicate be used to prove the veracity of the content of the writing, recording, or photograph? Yes, provided the original or duplicate is lost or destroyed, not obtainable, or is in the possession of the opponent. FED. R. EVID. 1004. An example of a case in which a duplicate sufficed to prove content accuracy, can be seen in *King v. Kirkland's Stores, Inc.*, 2006 WL 2239203 (M.D. Ala.). In *King*, the plaintiffs sued the defendant alleging they were fired because of their race. One of the plaintiffs was permitted to testify as to the contents of an e-mail from a customer complaining the defendant employed too many African Americans at the store where the plaintiffs worked. The plaintiff claims she saw the e-mail when it was forwarded to the store. According to the plaintiffs, they were terminated shortly after the e-mail was forwarded to the store's management. The court held that because the e-mail was allegedly in the possession of the defendant, the plaintiff could testify as to its contents.

Conclusion

The role that electronic evidence plays will vary from case to case. But with camera phones, PDAs, laptops, traffic cameras, websites, and chat rooms, our chance of having to deal with electronic evidence continues to increase. Not only must we learn what to look for and what questions to ask during discovery, but we must learn how to use the evidence to our advantage.

The applicable standards regarding the authenticity and admissibility of evidence can vary from court to court. This is particularly true with electronic evidence, given the doubts some courts hold regarding its reliability in certain forms. Therefore, "[u]nless [you] know what level of scrutiny will be required, it would be prudent to analyze electronic [evidence] that [is] essential to [your] case by the most demanding standard." *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534, 574 (D. Md. 2007). Failure to prepare for the most demanding standard may cost you the benefit of the electronic evidence you diligently collected during the pretrial phase of your case. FD

EXHIBIT F

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Chapter 25

Effective Opening Statements

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Effective Opening Statements

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Effective Opening Statements

Introduction

The opening statement provides you, the young defense lawyer, with a rare opportunity—the opportunity to talk directly *with* the jury. Although it may appear to an outsider looking in that you are talking *to* the jury, you must deliver your opening in such a manner that the jurors sense that you are having a conversation with them.

The opening statement is your first real opportunity to talk directly with the jury and to make your first impression. This first impression is critical because it will be the impression the jury has of you throughout the trial, whether right or wrong, fair or unfair. This opportunity must not be wasted. It is your time to tell the jury about your case and your client, and to begin the process of persuading twelve jurors to decide the case in your favor. In order to do this, you must first get the attention of the jury by setting forth the theme of your case. Once you have its attention, then you *must* talk directly to the jury in plain English. Forget using big words or legalese: that exercise will come across as an insincere effort to inappropriately impress. Your job during opening statement is to begin the process of persuasion. You can do this only if the jury believes you have something to say that it wants to hear.

The purpose of this chapter is to give the young defense lawyer an introduction to preparing and delivering an opening statement. There is, however, no substitute for experience. The only way to learn and to improve is to try cases, including the delivery of the opening statement. From the beginning of your career, you must seek out cases to try, regardless of how unimportant they may appear. Through this experience you will find your voice and the style of delivery that is best for you. Remember, in the courtroom imitate no one, be yourself. Lloyd Paul Stryker, *The Art of Advocacy*, at 41 (1954).

The Theory of Your Case

To deliver an effective opening statement, you must immerse yourself in the facts of your case and understand the governing law. This is true whether the lawsuit involves simple negligence or more complex matters such as medical malpractice or products liability. This immersion in the facts and law is a prerequisite to developing the all important theory of your case. The theory is, after all, a melding together of the facts and the law. Once you have gathered the facts and assembled the applicable law, you are ready to begin developing your theory.

The theory of your case should be about one paragraph in length and set forth for the jury your client's story within the framework of the legal issues involved. This requires that you develop a story, a story that must be plausible to the jury, and it must be compelling. To accomplish this, the theory must contain certain elements.

First, the theory must be logical. In other words, the jury must be able to see where you are going and willing to go there with you. The factual basis of your theory must be strong; it will be so only if each of the individual facts from which you create this framework are consistent with each other. Furthermore, these factual pieces must be selected with the intention that they show the jury the way to the desired result.

Second, your theory must be simple. Always start with the assumption that your case is complicated. Not only is it complicated because of the law, which is foreign to the jury, but the facts are also foreign to the jury. You, unlike the jury, have lived with the facts for weeks, months, or even years. For this reason, you must guard against being lured into believing yours is a "simple" case.

Another complicating factor is your opponent. She will be presenting facts that she believes support her argument. These competing factual scenarios can very easily lead to confusion. To counter this, select facts that you will be able to prove, facts your opponent will not be able to contest, facts that will be admissible, and facts that are believable. By doing so, you will gain an advantage because the jury will recall that the facts you set forth in your opening statement are true. Never present factual claims in opening

statement that you will not be able to prove with the evidence. Although the jury may not remember your exact words or your inability to prove, your opponent will not forget and she will eagerly remind the jury.

Third, can the jury believe your theory? The factual basis must be believable. In other words, it cannot stretch the bounds of what the average person on the jury would find to be plausible. Regardless of how attractive your theory is to you as a lawyer, it must be disregarded if any of its elements are not plausible. Leave to your opponent the task of trying to persuade the jury to believe the unbelievable.

Finally, your theory must lead the jury to the desired legal conclusion. In order to develop a theory that will satisfy this element, you must not only have a mastery of the facts, but also a mastery of the governing legal principles. This includes not only the elements of the defenses you will rely upon at trial, but also the elements of your opponent's legal case. Therefore, to develop a logical and believable theory that simplifies your case, and leads the jury to the desired conclusion, you must understand these legal principles before constructing the factual basis of your theory. The starting point for understanding these legal principles should be the jury instructions. After all, this is the law that will be given to the jury at the conclusion of the case. These instructions will provide the legal framework for deciding which facts to include in your opening statement.

From Theory to Theme

Once you have developed the theory of your case, you must distill from the theory a very simple one or two sentence theme. This theme, unlike the theory of the case, does not set forth the factual and legal bases, but rather gives the jury the moral reason it needs for deciding in your favor. The goal is to present the theme so that the jury concludes, without being told directly, that this is a battle between right and wrong. The theme will allow you to capture the attention of the jury from the beginning; it will start you on the road to persuading the jury. You will return to your theme throughout the trial. The witnesses and exhibits you present to the jury, and your closing argument, must reflect this theme.

For example, if your case involves a breach of contract, you could begin with the theme of "a deal is a deal." Everyone knows from childhood that we keep our word; if we promise to do something, then we must honor that commitment. This theme, if properly developed, provides the jury with the moral force to decide the case for your client. It will empower the jury to take action in the face of an obvious wrong. It will transform the jury from a passive audience into a group that can protect your client. This assumes of course that the facts will show that your client honored his commitment, or at least was justified in not doing so.

The first moments of your opening statement are critical: that is when you connect with the jury. For this reason, you should state clearly at the outset just what the theme of the case will be. You do not want to waste the critical first moments with the jury by going through a litany of "thank yous" or lecturing the jury on the importance of their service to our system of justice. Rather, you need to go directly to the theme and begin the process of persuasion. A good example of this comes from Michael Tigar's opening statement in his defense of Terry Nichols. Right from the start, Mr. Tigar went to the heart of his defense: Terry Nichols was not present with Timothy McVeigh in Oklahoma City, but rather he was at home with his wife and children. He was, according to Mr. Tigar, "building a life, not a bomb."[1] Mr. Tigar immediately went to the theme of his case and began building the framework for his defense. Despite the fact his client was guilty and Tigar ultimately lost, he made the most of his opening moments with the jury.

Organizing the Opening Statement

You have spent days, weeks, or months reviewing and learning the facts of your case and the applicable law. You have conducted the usual written discovery and deposed everyone who knows anything relevant. You have decided which witnesses will best support you,

[1] Michael E. Tigar, Classics of the Courtroom Vol. XXV, Opening Statement and Closing Argument, *United States v. Terry Nichols* (The Professional Education Group, Inc. 1998).

developed a theory of the case, and you have your theme. The time of trial is fast approaching and you are ready to prepare your opening statement.

First, you must face the task of organizing your opening statement. There are just too many facts to include all of them, a futile process that will only confuse the jurors and/or turn them off completely. Another risk in trying to include too much information is that you will hide the theory and theme that you have developed. Not only must you decide which facts to include, but you must also decide the order in which they will be presented. The facts and the order in which they are presented must support the theory and theme of your case.

In organizing the opening statement, remember that no matter how simple the facts may appear to you, they will be complicated to the jury. These are ordinary citizens with little if any knowledge about the lawsuit about to be tried. Until they were summoned to the courthouse, questioned about things they otherwise would consider none of anyone else's business, and selected by you and your opponent to serve on the jury, these individuals were living their day-to-day lives happily ignorant of the lawsuit. Therefore, in organizing, the young lawyer must view the matter from the perspective of someone who knows nothing about the case. Also, take into consideration the applicable law when deciding which facts to include. Certain facts that could be damaging to your client should not be emphasized, or even mentioned, in the opening.

The attorney may be so close to the lawsuit that it is difficult for him or her to see it from the vantage point of a juror. Moreover, you may believe that some facts are important while the jury regards them as unimportant. There is, however, a remedy to this problem. Unless you are one of those poor unfortunate souls who have no acquaintances beyond the local bar association, then you know someone with a mind unsullied by three years of law school. Take advantage of this relationship by sitting down with this "mock juror" and discussing the facts of your case. Make notes of the questions asked and the comments made by your mock juror; this may give you great insight into the facts that should be included in your opening statement. (I never prepare or deliver an opening statement until I have discussed the case with my wife and presented my opening statement for her review and constructive critique.) Armed with this additional perspective you can now return to your office and begin preparing the opening statement.

As with every aspect of trial advocacy, there is no substitute for personal preparation and involvement. The advocate who will present and argue the case is the only one who can prepare the opening statement. Preparation by proxy will not suffice.

Delivering with Confidence

When you deliver your opening statement remember you are telling the jury a story. It is a true story; it is the story of your client and his case. In order to tell the story in a compelling and persuasive way, you must speak with confidence and authority. This confidence and authority will come from the fact that you have immersed yourself in the facts and the law—and you are prepared. When you stand before the jury, not only must you speak with the confidence and authority that comes from knowing your case, but you must also convey an air of friendliness. Remember, you are speaking for your client—and the jury will associate your behavior with your client.

Delivering With or Without Notes?

When it is your time to deliver the opening statement, you must make a couple of tough decisions—where to stand and whether to use notes. In some courts, the judge may have made the first decision for you. But if you are fortunate enough to be in a courtroom where you are not confined to the lectern, then take full advantage of it and move closer to the jury. You must of course maintain a respectful distance; you do not want the jurors to believe that you are "invading their space" and making them uncomfortable.

Professor Irving Younger, in his opening statement in *Tavoulareas v. The Washington Post Co.*, (see 817 F.2d 762 (D.C.Cir. 1987)) provides an illustration of how to move from the lectern to the jury with ease. At the beginning, he stood and said to the jury:

> The Judge introduced me to you earlier this morning but it was from across the length of the courtroom. So let me give you a chance to get a look at me [moving from behind the lectern] again and let me remind you that my name is Irving Younger and in this case I speak for The Washington Post,

for Ben Bradlee, for Bob Woodward,for Pat Tyler and for Sandy Golden.[2]

In a way that was not distracting, Professor Younger moved himself from the lectern to the jury and introduced his clients in a way that humanized even an impersonal newspaper company.

As for the second decision: you should always present your opening statement without notes. Relying on written notes creates a few problems. First, if you have notes, then you must have a place to put them. The lectern is the obvious depository—but this means you will have to stay at the lectern and thereby create a physical separation between you and the jury. Second, looking at notes, even for a second or two, gives the impression you are reading to the jury, rather than talking to them. This creates another form of separation from the jury. Another problem that results from looking at notes while you are talking is that it interrupts eye contact with the jury. Steady eye contact is important because it sends the message that you are being truthful. When you have a conversation with a friend, you look her in the eyes; you should do the same with the jury. This will communicate to the jury that you are confident in your knowledge of the facts and law.

How do you get to the point of being able to deliver your opening statement without notes? Preparation and practice are the keys. No one knows your case as well as you. You have spent countless hours studying the facts of your case—you know your case. It is this knowledge that will give you the strength to stand and deliver your opening statement without notes. Do not forget that you talk about your case without notes all the time—when you talk informally to colleagues and personal friends. Talking with the jury in opening statement should be no different. It is a conversation in which you are the storyteller.

Practice is the other key. Once you have prepared your opening statement, practice delivering it to your spouse or a friend. Just as with deciding which facts to include, these non-lawyer sources can prove invaluable when you are fine-tuning your opening statement. Practice is the key to confidence, and confidence is the key to success.

Look Them in the Eye

During your opening statement you should make eye contact with each individual juror. This should be very natural behavior—look at each person as if you are having a conversation with them. Maintaining eye contact with an individual juror for too long, however, will make him or her uncomfortable and should be avoided. Again, apply the lessons you have learned from a lifetime of having conversations involving multiple parties. In such conversations you move your eye contact from person to person; it should be the same in your opening statement. Failure to look someone in the eye when talking to her leaves the impression you are not being truthful. Maintaining eye contact with the jury makes them feel as if you a talking to them and this will make the jury want to listen to what you have to say.

The Value of Plain Talk

Never "circumambulate a structure." In law school we learned all kinds of big words and Latin phrases. According to Irving Younger, we learned to distort the English language and learned "to use complicated words instead of simple words." Perhaps you have been tempted to use such words and phrases to impress clients or others. But when you are talking to a jury, never use big words that serve no purpose other than to try to impress the listener. The same goes for Latin phrases when you can accomplish the same result without them.

The reason for using plain talk is not because the jurors are not intelligent enough to understand the words or the Latin phrases, but because it simply is not a natural part of conversation. By using words that would not normally be used in conversation, you distract the jury. The juror tends to focus on the word, rather than listening to you. Getting and keeping the attention of individual jurors can be difficult enough without creating your own distractions. Remember your goal is to simplify the case. Using complicated words is self-defeating. If your client walked around the building, then tell the jury he walked around the

[2] Irving Younger, Classics of the Courtroom Vol. IV, Opening Statement in *Tavoulareas v. The Washington Post Co.*, 1 (The Professional Education Group 1987).

building rather than telling them, as I once heard a lawyer say, he "circumambulated the structure." In another case I heard a lawyer say that his client was "transported emergently to a medical facility." What he meant, of course, was that his client was brought to the hospital by ambulance. Why not just say that?

How Long a Statement?

Before beginning your trial it is a good practice to talk to lawyers who have tried cases in your judge's court to find out as much as possible about how the judge conducts his trials. One of the things you need to know is how much time the judge will allow for opening statements. But remember, just because the court allows you 45 minutes does not mean you have to talk that long. Again, your goal is to get and maintain the attention of the jury and not to out-talk your opponent. The jurors will appreciate you more if they feel you have not wasted their time, but have given them useful information. You have worked too hard to get the jury to listen to your opening statement and to develop credibility. Do not lose what you have gained by talking longer than you should. Of course the type of case and its complexity will govern the length of the opening statement to some degree, but you should try to get the job done in thirty minutes or less.

Visit the Scene

When a young lawyer gets a new case in the office, he or she knows how important it is to go to "the scene." Whether it was a car wreck, negligent construction, or a civil rights action, the lawyer must see where it happened. Visiting the scene allows the lawyer to more fully understand what occurred and how it happened. Juries, however, are rarely allowed this opportunity. Therefore, a critical part of your job in delivering the opening statement and telling the story is to transport the jury to the scene through the magic of words.

You must not only take the jury to the scene, but you must allow it to put itself in the role of your client. The jury must be able, through your story, to see what your client saw, to feel what she felt; this will help the jury understand why your client made the decisions she made.

One of the best examples of this can be found in Irving Younger's opening statement in the libel trial of *Tavoulareas v. Washington Post*, mentioned above. When Professor Younger started his opening he took the jury right to where the action was and laid the groundwork for understanding what his clients did and why. Read on and see how Younger set the stage:

> Ladies and gentlemen, if you had been in the city room of The Washington Post on some day in the middle of 1976 you would have seen a messenger hand a letter to Bob Woodward, who was then a reporter on the staff of The Post. ... He opened the letter; it was on the stationery of a French hotel. It was typed but it wasn't signed.
>
> What the letter said... was this: Bob Woodward and Carl Bernstein—you ought to know that there's something worth looking into involving the president of Mobil Oil and his son.
>
> What did Woodward do? Did he publish a newspaper article? Did he run to the printing press with an anonymous note? Of course not. That's not the kind of reporter he is, it's not the kind of paper that Ben Bradlee runs.
>
> What Bob Woodward did was to set out to find out what the truth was. And the first telephone call he made was to Mobil Oil.[3]

In his opening statement Mr. Younger goes on to outline what some of his other clients did and did not do, but in those opening moments he took the jury to the scene. Once there he explained what his client, Mr. Woodward, did and what he did not do. He set the stage for the jury to understand the events confronting his clients and how they reacted to these events. No doubt Mr. Younger had visited the city room of the newspaper and he knew the importance of taking the jury there and telling them what they saw. Younger became the jury's tour guide through not only the city room, but through the entire case. Even in a libel case, there is a "scene."

Find your scene and visit it. When it is your turn to deliver your opening statement, take the jury to the

[3] Irving Younger, Classics of the Courtroom Vol. IV, Opening Statement in *Tavoulareas v. The Washington Post Co.*, Vol. IV (The Professional Education Group 1987).

scene and put it in your client's shoes. This will motivate it to act for your client, to ensure that justice will be done.

Pace Yourself

When delivering your opening statement it is important that you pace yourself and not talk too fast. Although you will be nervous, you must resist the urge to speak too rapidly. The jury will not be able to follow even the best opening statement, if it is delivered in a machine gun style. One way to train yourself to slow down is through the strategic use of the pause. When you have made a significant point, pause briefly to give the jury time to digest what you have just said.

You have freed yourself from your notes and the lectern and have moved to the jury. Once there, however, you should not stand as if your feet are in concrete. You are not a statue; walk around a bit, but always stay close to the jury box. You should not race back and forth in front of the jury. Rather you should use your movement to engage the jury and to control the pace of your delivery. You can step closer to the jury for effect and you can use movement to signify you are changing to a different point when you move from one position to another. As with everything else you do, you do not want the opening statement to be about you. So avoid behaviors that will draw attention to yourself and away from your story.

Never Downplay the Importance of Your Statement

What would be your reaction if, once seated in an auditorium, you heard the speaker say: "What I am about to tell you is not that important." You would probably leave, or at the very least quit listening. It is no different when you stand in front of the jury and tell them, "What I am about to say is not evidence. The evidence will come from the testimony and the exhibits that are presented to you during the trial." The jury knows the evidence is what is important in a trial and when you tell them that what you have to say is not evidence, they will conclude it is not important. And we know that your client's story is the most important part of the trial. The judge will tell the jury that what the lawyers say is not evidence, or words to that effect, but you should never invite the jury to disregard what you have to say.

Jury Instructions

In most trials, the jury is going to have a lot of respect for the judge. You should use this respect to your advantage. One way of doing this is to weave some of the jury instructions into your opening statement. For example, if the opposing party has serious credibility problems, then you should use to your client's advantage the jury instruction regarding how to determine who is telling the truth when there is conflicting testimony on a critical issue. One such jury instruction concludes as follows:

> What you must try to do in deciding credibility is to size a witness up in light of his or her demeanor, the explanations given, and all of the other evidence in the case. Always remember that you should use your common sense, your good judgment, and your own life experience. [4]

Use this instruction to invite the jury to use their common sense and their own experience in deciding who is telling the truth. This can be done by foreshadowing the credibility battle that is about to present itself.

This is one example of how you can use the jury instructions to your client's advantage during the opening statement.

Opening Statement in a Non-Jury Trial

This chapter has focused on the opening statement in the context of a jury trial. When you are faced with a bench trial, the process of preparing and delivering your opening statement is guided by the same underlying principle, *i.e.*, persuasion. You cannot take anything for granted. From a factual standpoint, your case is as foreign to the judge as it is to the jury. You must still prepare and deliver an opening statement designed to persuade. A bench trial provides you the advantage of an audience of one. Another advantage

[4] http://www.tnwd.uscourts.gov/judgetodd/instructions/Todd_Civil_Standard.html Instruction 76-1.

is the fact that other lawyers have almost certainly delivered opening statements to a particular judge. Seek out these lawyers and learn what they have to offer about the judge's demeanor and what he or she is looking for in an opening.

Conclusion

This has been merely an introduction into preparing, organizing, and delivering an opening statement. As noted earlier, the best tool for learning is by trying cases and gaining experience talking with the jury. You will be amazed at the change in your performance after delivering four, five, or six opening statements. In addition to actual trials, I would recommend going to a trial school to polish your craft. These are usually week-long intensive sessions where you perform daily and are critiqued by experienced trial lawyers. Finally, you should remember to imitate no one. In order to be effective, you must feel comfortable with your delivery. Find what works for you when you try cases, and stick to it.