

Inter Alia

State Bar of Michigan Young Lawyers Section

State Bar of Michigan

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Spring 2004

Disillusioned With Being An Attorney?

By Roxanne Medina-Solomon

Do you wonder why you went to law school? Are you pondering what else you can do with your law degree? Have you been thinking about a career change?

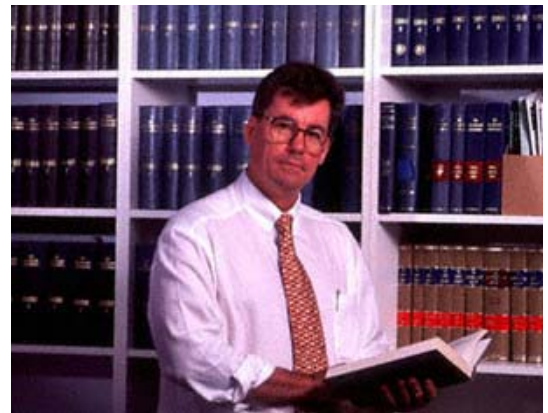
It's no secret that there has been a growing level of dissatisfaction among members of the legal profession and many attorneys today are questioning their career choice. Factors such as long hours, lack of compensation, pressure to produce billable hours, competition for new clients, malpractice threats and lack of respect for the profession all contribute to this discontent. Many believe that the solution is to quit law and find a new career. But sometimes creative adjustments to a dissatisfying work situation may be the solution.

Nationally acclaimed speaker and author Hindi Greenberg is being invited by the Young Lawyers Section to present a seminar in late spring entitled, *Lawyers in Transition_{sm}*. This program is designed to explore the issues of career dissatisfaction among lawyers and offer some innovative solutions. Ms. Greenberg has presented programs and keynote talks across the United States and Canada. She speaks on how to assess your current situation and provides guidance to identify whether minor tweaking or a total career overhaul will help achieve career satisfaction.

At the upcoming seminar Ms. Greenberg will share information to help you answer questions such as:

- Should I stay in law?
- How do I research career options?
- What are my career options in law, related to law and outside of law?
- What are my transferable skills?
- How do I decide what really interests me?

Ms. Greenberg will also explore how to develop a career strategy plan and the tools necessary to land the position you're seeking. A panel discussion will follow highlighting lawyers who have found satisfaction in various



practice settings, non-traditional legal positions and out-of-law careers.

Look for more details coming soon. If you have any questions, please contact Roxanne Medina-Solomon at (248) 874-1621 or roxanne.medina-solomon@uwcs.org.

Open House Starts Official Kickoff to Senior Lawyer – Young Lawyer Mentoring Program

By Jenice Mitchell

On Wednesday, February 25, 2004, The Young Lawyers Section, in conjunction with the Senior Lawyers Section, hosted its first mentoring open house at Howard and Howard in Bloomfield Hills.

The open house offered a rare opportunity for young lawyers and senior lawyers to meet and discuss the practice areas, longevity in the practice and other challenges facing practicing attorneys.

The meeting was hosted by Senior Lawyers Section representative Jon Kingsepp. Both the Senior Lawyers and the Young Lawyers Sections hope to foster young lawyer-senior lawyer mentoring relationships from this open house and in the future.

For more information on the mentoring program, please contact Jenice Mitchell at either jmitchell@foley.com or (313) 442-6408.

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Editor's Note

By Alexandra Matish

Alternative Careers In, Out, and Around the Practice of Law

A law school friend and I used to meet regularly for coffee the first couple of years after we graduated from law school. We would talk about what we were doing at work, as well as what was going on throughout the world. He often would say to me that he should either just go into politics or become a priest. "John", however, loves the practice of law and is an excellent attorney. I could not understand why he would consider a career outside the practice of law.

"John" is not alone. Lawyers, and in particular, young lawyers are increasingly becoming dissatisfied with their profession. There are many theories as to why this is happening. I am not, however, going to give hypotheses on

the cause of this desire to flee, nor can I offer a solution for how to fix the problem. The Young Lawyers Section does, however, want to address the issue. In the late spring the YLS will sponsor an Alternative Careers for Lawyers Seminar (see the article on the front page). The seminar will provide information about alternative careers in, out and around the practice of law. If you are dissatisfied with your practice, we hope you will attend.

Additionally, *Inter Alia* provides useful articles on the practice of law and what we can do to make it more profitable financially and personally. Articles such as Nancy Harbour's tips on legal writing or Tim Battendorf's articles

on marketing and career planning may give insight on a "better" way to practice law. Finally, this issue of *Inter Alia* also offers an article about practicing law for the military. Perhaps all you need is a change of scenery?

So hopefully, if you are becoming restless in your chosen profession, you will find insight and information in these pages. At the very least, we hope these articles get you thinking!

As for my friend "John", I am pleased to say that he has stayed the course and continued in a very successful practice, although I suspect the thoughts of public service or service to the Pope still enter his mind from time to time.

Duty, Honor, Country—JAG Corps

By Eric Jonker, CPT

Legal advisor in Uzbekistan, in support of Operation Enduring Freedom....

Administrative Law and Legal Assistance Attorney at Fort Bragg, North Carolina....

Paratrooper....

These are some of my significant challenges and rewards for serving in the Army Judge Advocate General (JAG) Corps for the past 2 years. As someone who was seeking an adventurous and promising career and lifestyle, the JAG Corps was an opportunity of a lifetime.

The Army JAG Corps is one of the largest and most respected law firms in the country, providing legal services for the Army and its soldiers. I chose the JAG Corps because the Army valued my significant prior military experience. As a benefit, I currently earn roughly what a new associate would make at some of Michigan's larger law firms. Given my prior experience and earning potential, it was an offer I couldn't refuse.

The jobs in the Army JAG Corps are as varied as one would find in private practice. For instance, judge advocates serve as prosecutors and defense attorneys for criminal trials under

the Uniform Code of Military Justice (UCMJ). In addition, we practice in areas such as international, operational, labor, contract, environmental, tort and administrative law. Just as CEOs and corporate supervisors depend on corporate lawyers for advice in civilian practice, I routinely advise our General, unit commanders, and staff officers of Fort Bragg concerning all aspects of administrative law, regulation, and policy. Judge advocates also provide comprehensive legal services for soldiers, retirees, and their families. In our Legal Assistance Office, I successfully helped over 1,100 clients within a 10 month period. Given our range and depth of practice, judge advocates can earn valuable experience practicing before the military, federal, and state courts.

In addition to immediate responsibility in handling significant legal issues, judge advocates encounter a diversified, challenging, and rewarding law practice whether stationed throughout the continental United States, Alaska, Hawaii, Japan, Korea, Germany, Italy or in other choice locations in

support of our War on Terrorism. My next hopeful assignment is in our Litigation Division, Washington, DC, or perhaps reassignment in Europe.

The opportunities and rewards are limitless. An active duty judge advocate must be a graduate of an American Bar Association (ABA) accredited law school and admitted to practice before the highest court of a state or federal court. Judge advocates enter the Army as first lieutenants and are promoted to captain within 6 to 9 months.

Many attorneys interested in becoming part of the JAG Corps but who still want to practice in the private sector, join the JAG Corps Reserve Component Program. As a Reserve judge advocate, you can practice as an attorney in your civilian life, spending only one weekend per month and two weeks a year in service to the Army JAG Corps. Broadening your legal skills and earning an additional income are only some of the immediate and tangible benefits of service in the JAG Corps. If you are seeking an adventurous and promising career, consider the Judge Advocate General Corps.

YLS Members Participate in YLS Sponsored U.S. Supreme Court Swearing-In

By Wilfred Eric Steiner

On January 20, 2004, Michigan Lawyers made the journey to Washington, DC to be admitted to practice before the United States Supreme Court.

The lawyers began their day by having breakfast in the Law Clerk's dining room. Soon, long-time Supreme Court clerk William K. Suter appeared to explain the swearing-in procedure and escorted us to the Grand Chamber.

We were seated to the left of the Supreme Court Justices, about five feet from their bench. After Mr. Suter called the Court to order, the nine Justices came forward from behind the curtains and took their seats.

At that time, Senator Carl Levin of Michigan moved for our admission by



reading our names individually as we rose in turn. Once the delegation was presented to the Court, Sen. Levin requested that the delegation be admitted. Chief Justice Rehnquist granted the Motion and welcomed us to the Supreme Court. We were administered the Oath of Admission by Mr. Suter and were now members of the bar of the United States Supreme Court.

We were offered the opportunity to remain in our front row seats for the two oral arguments scheduled for that morning. We watched as the Justices of the Supreme Court fired questions at the attorneys and passed notes between each other. We could even see their facial expressions change as they reacted to well-argued points of law. All the Michigan attorneys who participated in the swearing-in ceremony were granted an inside look at the United States Supreme Court.

The Michigan delegation consisted of Milton J. Evans, Jr., Elizabeth A. Ganiere, Jenice C. Mitchell, Heather L. Odgers, Gregory Okwuosah, David J. Portuesi, YLS Council Member and coordinator Wilfred Eric Steiner, Elaine Stypula, and Jack E. Wickens.

For more information about how you can participate in next year's Supreme Court trip, please contact Wil Steiner at wsteiner@bealshubbardplc.com.

Driver's License Concerns

By Daniel J. Larin

Presented at ICLE Seminar, "Fundamentals of Drunk Driving Cases" on September 18, 2003

DRIVER'S LICENSE SUSPENSIONS AND REVOCATIONS

Introduction

A new attorney can get into trouble very quickly by failing to recognize all the different ways that your client can have his or her driver's license restricted, suspended or revoked at the District Court level. The most common license suspension in the District Court is probably the "Failure to Appear in Court" (FAC) and "Failure to Comply With Judgment" (FCJ) suspensions. Suspensions and revocations for drinking and driving are also extremely common; these include "Operating Under the Influence of Alcohol", (OUIL), "Unlawful Blood Alcohol Content" (UBAC, UBAL), "Impaired Driving" (OWI), "Child Endangerment" and "Zero Tolerance." Also, "Operating Under the Influence of Controlled

Substance" (OUID) and "Operating a Commercial Motor Vehicle with a BAC of .04-.07". "Open Intoxicants in a Motor Vehicle" by either the driver or passenger can also result in a suspension, as can "Minor in Possession of Alcohol." "Reckless Driving" rounds out this list, which is by no means complete and does not include any suspensions and revocations for felonies.

The District Court does not actually impose license sanctions for most of the above crimes. These actions are handled by the Secretary of State and the District Court usually has no jurisdiction to modify the license action. The Circuit Courts have also been stripped of jurisdiction to modify or set aside many license actions or grant hardship appeals.

Continued on page 6

YLS Sponsors Outreach Clinic Pro Bono Day at Detroit Legal Services

The YLS is looking for volunteers for an Outreach Clinic Pro Bono Day at the Detroit Legal Services Clinic. Volunteers will staff the office of the Clinic on April 8. The initial meeting will take approximately two hours. Each attorney will be assigned a case to be followed to completion. It is a great opportunity to give back to the community. For more information, contact Faizah Shabazz at (313) 224-7740.

A Judges' Brief for Effective Legal Writing: Good Advice for All Practitioners

By Nancy Caine Harbour

Lawyers are professional writers. As such, we must remember that there is a big difference between “thinking like a lawyer” and writing like one. As Floyd Abrams, New York trial attorney and a law and journalism professor, put it: “The *difficult task, after one learns how to think like a lawyer, is relearning how to write like a human being.*”

Legal writing calls into play the discipline of communication. As advocates, we must convince our audience through clear and concise writing. Our reader is not supposed to have to “translate” our writing attempt and plain English should not be a second language! “Simple,” you say? Not so. According to my informal (and admittedly unscientific) survey of some judges, many lawyers suffer from “a failure to communicate.”

As we analyze the law, construct our arguments, and employ our legal writing styles, here’s what the judges said we need to do:

- Be brief, concise and to the point. (Lawyers tend to put way too much in their briefs.)
- Avoid repetition.
- Cite accurately to the record and the case law.
- Format a brief with subheads so that it is easy to read.
- In other words, communicate effectively!

Of interest is that, independently, each judge identified these identical issues about the legal writing they see. Many of us may be tempted to assure ourselves that “This is old news. I know these writing concepts.” Yet, the members of the bench are reminding us that problems remain. We need to apply our writing tools more effectively as we simultaneously cope with the daily deadlines of our practice and keep in mind that good legal writing is a “process.” It takes time and effort.

In encouraging clear and concise writing, the Hon. Damon J. Keith, United States Sixth Circuit Judge, notes that the

most problematic legal writing error is the blurring of arguments in a brief. “Too often the muddle is a result of careless drafting or a failure to understand the legal issues. Another common error is improper citation, not just in terms of the Blue Book, but also to the wrong case. The concept of precedent is often misunderstood or altogether ignored; this is a fatal mistake.” Judge Keith suggests that lawyers ***draft an outline*** that follows the logical flow of the arguments ***and stick to it***. “Following an outline will also reduce the likelihood that an argument is overlooked,” the Judge said.

Wayne County Circuit Court Judge Robert J. Colombo, Jr. reminds us that our legal writing has long-term effects. “You are trying to establish your credibility with the judge. You establish a judge’s confidence by citing accurately to the record,” he said.

The judges advise us to *avoid*:

- Attaching an entire transcript to any motion. Attach only the necessary pages of the record ***and highlight*** the pertinent quotations.
- Making the judge look up case law. Make sure the appropriate case law is cited.

“Nothing makes me more upset than to waste time reading an entire transcript. How am I supposed to know what portions you deem important?” said Wayne County Circuit Court Judge Edward M. Thomas. Wayne County Circuit Judge Wendy Baxter agrees. “Don’t make the Court read a ‘bunch of junk,’” she cautions.

On any busy motion day, a judge must prepare for up to 50 motion hearings. That can involve reading as many as 100 briefs!

On the transactional side of legal practice, legal writing (e.g., drafting an opinion letter or contract) brings the identical legal writing rules into play. Good written communication is good written communication. The components of the product, be it a brief or an opinion letter, don’t change between litigation and transactional work.

For example, which of the following better communicates your message to your client?

Dear Client:

I thought you’d like to know about a new court decision that could affect how you record your shareholder minutes.

-OR-

Dear Client:

The United States Sixth Circuit Court of Appeals issued an opinion, on November 1, 2003, that discusses whether it is appropriate to use electronic video recording equipment, despite the fact that video recordings can be erased or doctored, at annual shareholder meetings, to keep the minutes of the meeting instead of more traditional ways like using court reporters or stenographers.

It is our job as advocates to grab our reader’s attention and then *communicate* our message using *plain English*.

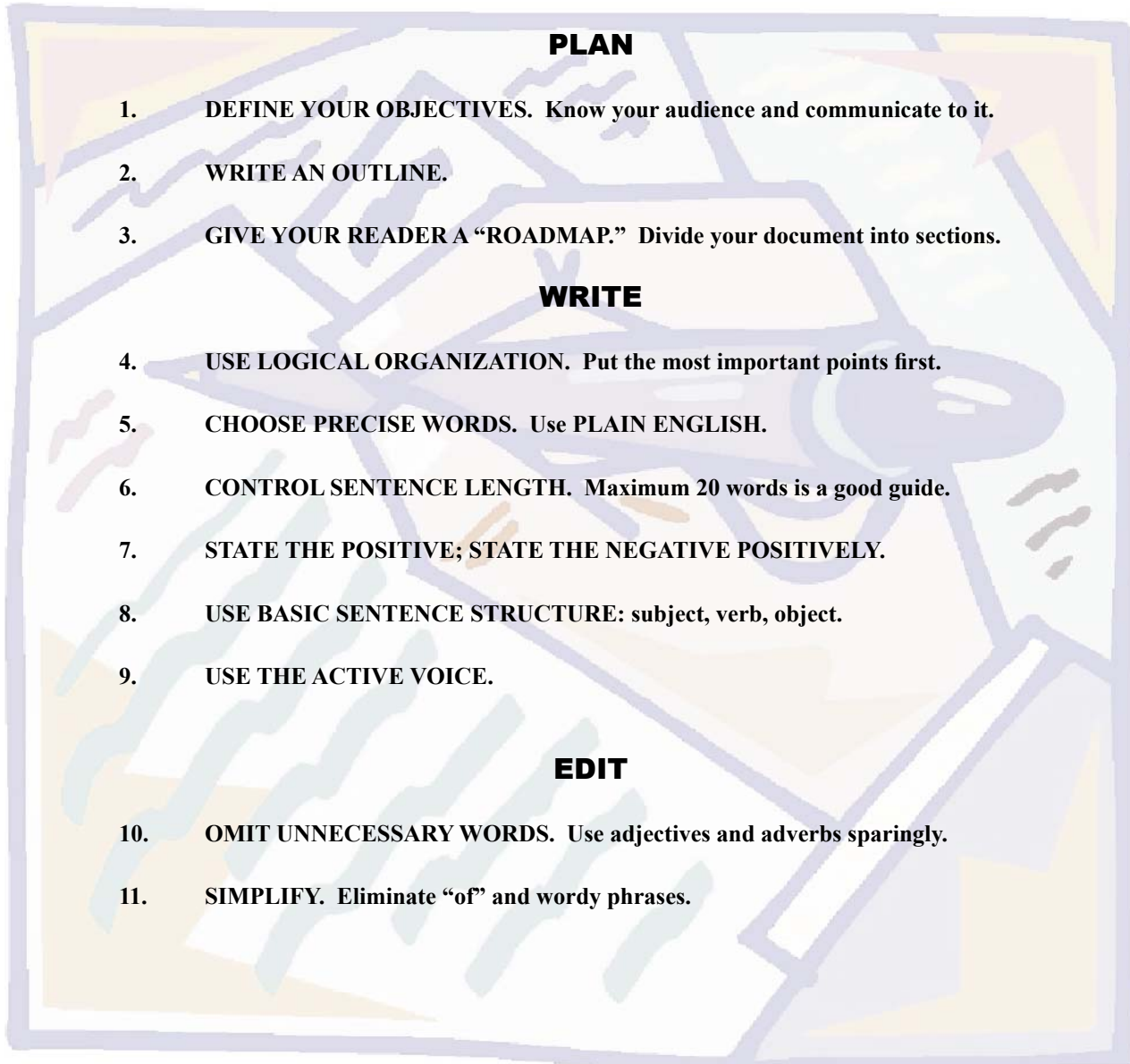
Before starting to write, imagine yourself in a conversation with your intended audience. Assume that your client or the judge has only two minutes to hear and understand your position — from the facts and argument to your stunning conclusion! Hopefully this imagined conversation forces a distillation of every aspect of the written communication and ensures that it is presented logically.

Another technique is to think of facing the jury for your opening statement. You don’t just stand there and blither, verbalizing your thoughts off the top of your head!

You organize your thoughts into a logical, understandable, and compelling presentation with a beginning, a middle, and an end. You do not want to bore the jury, so you use plain language to explain what you believe your evidence will show and to persuade the jury of your position. A written communication should be no

Legal Writing Check List

11 TIPS FOR CLEAR, CONCISE, COHERENT WRITING



different than an opening statement. Why would you want to smother our client or judge with verbiage presented unclearly or illogically? Instead, don't lawyers want to grab their audience's attention and then convince our reader, step by step, to follow our advice or position?

Clients have short attention spans *and* they are paying you for your analysis. A judge has limited time *and* is deciding your case. What more motivation do we need to be concise and effective?

Nancy Caine Harbour, a former journalist, has been a Michigan trial attorney for over 23 years. She serves as a resource to help law firms design in-house professional development programs such as advocacy skills training. She also conducts legal writing seminars and does individual legal writing coaching. She can be reached at the AndersonBoyer Group in Ann Arbor, MI. 734.971.5678 nch@andersonboyer.com

Her complete bio is at: www.andersonboyer.com

Plea Bargaining

Attorneys must be very careful when advising clients whether to plead or enter into a plea bargain. Oftentimes the District Court will not advise a defendant of potential licensing actions. The District Court Judges, prosecutors and city attorneys often are unaware of the implications on a defendant's license for certain convictions. Many are still operating on assumptions that were true before the last major overhaul of the Motor Vehicle Code in 1999.

Every attorney practicing any criminal law in the District Court should know at the very least the license implications of convictions for certain crimes, especially those involving alcohol and drugs. For a first offense drinking and driving offense that is not a felony, a restricted, suspended or combination license is issued by the Secretary of State. However, a conviction for any of the following: OUIL, UBAC, OUID, OWI, Child Endangerment or Zero Tolerance followed by another conviction for any of the above in seven years will result in a **LIFETIME REVOCATION OF DRIVING PRIVILEGES**. It is true that depending on the driver's record they are eligible to appear before the Driver License Appeal Division of the Secretary of State (DLAD) to petition for a license after one or five years. However, the process of restoring driving privileges is time consuming and costly. Often one will overhear a defense attorney asking the prosecutor for a plea bargain to a first offense in the mistaken belief that this will prevent license revocation.

If a prosecutor's case is particularly weak, they may be talked into a plea of "Reckless Driving". The defendant will lose his driving privileges for 90 days with no restricted license available. Attorneys should be aware that two reckless driving convictions in seven years will result in the revocation and denial of a person's driver's license.

Prior to advising any defendant to go to trial or to enter a plea to any traffic or alcohol offense, an attorney should carefully review MCL 257.919 and 257.303.

Additional Revocations and Suspensions

If a defendant is convicted of a misdemeanor traffic offense or found responsible for a civil infraction, and at the time of the driving their driver's license is suspended or revoked, upon receipt of an "abstract of conviction" from the District Court, the Secretary of State will impose a like suspension. This means that if a person's license is suspended for 90 days and he/she is found responsible for a traffic offense during that time, even if the license is currently valid, the Secretary of State will impose a 90 day suspension as soon as they find about the driving. This scenario should be forefront in your mind when negotiating with a prosecutor or city attorney to attempt to prevent additional loss of your clients' driving privileges.

Out of State Drivers

If your client is from another state or country, contact the Department of Motor Vehicles in his/her home state or province to determine how a conviction will affect their out of state driving privileges. Quite often a sister state may have tougher penalties for a drinking and driving conviction but may have programs that will lessen the impact of the driving privileges. If your client has recently relocated to Michigan, it is often preferable to have them obtain a Michigan driver's license prior to conviction.

Conclusion

Be well informed of the driver's license sanctions that may be imposed for convictions of certain crimes. There are crimes that are not even related to driving, which may cause license suspensions especially in dealing with minors and in many felonies. Make sure your client is aware of the license sanctions prior to going to trial or entering a plea. The driver's license is so important to some people that they would risk incarceration to preserve their driving privileges.

IMPLIED CONSENT

Implied Consent Hearings

Introduction

Every attorney who practices criminal law and handles drinking and driving

cases will eventually have a client who purportedly refused to take the Datamaster test or the police officer's request for a blood or urine test. This is called an "Implied Consent Refusal." An implied consent refusal can result in the suspension of your client's driving privileges for one year (six months for refusals prior to 9/1/2003) or if he/she had a refusal within the past seven years, the suspension is two years (one year prior to 9/1/2003) and a hardship license (discussed below) is not available. Usually your client arrives in your office with a temporary driving permit, which consists of two pages. One page is a "Request for Hearing". The request must be returned to the Secretary of State and it must be postmarked within 14 days of the arrest to preserve the petitioner's right to a hearing. If the client refused the breath, blood or urine test but for some reason they did not receive the correct paperwork, you can still preserve their rights by requesting a hearing on his/her behalf. Do not take clients' paperwork unless you are retained and mail the request for hearing immediately. Do not put it in the file. There is no worse feeling and no quicker route to a grievance than forgetting to send the request. **BE VERY CAREFUL.**

The implied consent hearing is a civil matter and may or may not have any bearing on the criminal case pending against your client. In other words, you can get the charges against your client dismissed but if he or she did not prevail at the implied consent hearing, their license will still be suspended.

Should An Implied Consent Hearing Be Held?

The question is whether or not to fight the implied consent suspension or just proceed to Circuit Court for a hardship license. Many attorneys see the implied consent hearing as a losing proposition and a waste of time. They could not be more wrong. As an attorney, it would be irresponsible not to fight the implied consent suspension. There is only one reason not to hold the hearing, that is to prevent the preservation of testimony. The hearing, in addition to the possibility of winning, is a good chance to see how the officers will testify against your client and how strong the case is.

The most important reason to hold the hearing is that the administrative rules that govern the implied consent hearing state that if a party does not appear within the allotted time period the case is dismissed or they are deemed to have withdrawn the request for hearing. The allotted time period is 20 minutes from the time scheduled. This means that if the police officer does not show within 20 minutes of the scheduled time and the hearing officer does not grant the police an adjournment, the implied consent violation will be dismissed against the petitioner. If the petitioner does not appear, they are deemed to have withdrawn their request for hearing. If the attorney is present, the appearance of the petitioner can often be waived and the hearing is held without them.

Also, a second implied consent suspension in seven years will result in a two year loss of driving privileges. This means that it is very important to try to win the first one so if your client is unfortunate enough to be arrested again in the next seven years and refuses the chemical test, the stakes will be considerably higher.

There is usually nothing to lose by holding the hearing and the information gathered at an implied consent hearing can be invaluable in the defense of your client against the criminal charges. So even if your client does not have a valid license and may never again qualify for a driver's license, the implied consent hearing should be held.

Preparing for the Hearing

Prior to appearing for the hearing, every effort should be made to get a copy of the police report. If you are unable to get a copy of the report prior to the hearing, ask the officer to see the report before you go into the hearing room. Most officers will allow you to see their report. If they do not allow you to see the report, object to them refreshing their memory from the report until you have had an opportunity to review it. Review Michael Morgan's chapter on Implied Consent in ICLE's book *Michigan Drunk Driving Law and Practice*. Review your case in light of the cases and issues contained in the chapter, get any applicable case law and be prepared to cross examine the police officer and argue case law. In most cases, your client will have no defenses to the refusal; do not fret, you can still prevail.

Check with other attorneys to see if they have had any experience with the arresting officer. Many officers have reputations for embellishing facts or trying to get in evidence outside the scope of the hearing. Be prepared to use any information that you uncover for the benefit of your client. However, do not operate on rumor or innuendo; be very careful when attacking someone's credibility. It can be a very dangerous road to travel.

Nuts and Bolts of the Implied Consent Hearing

There are only four issues that will be covered in an implied consent hearing. It is the police officer's (or the prosecuting attorney's) burden to prove the four issues by a "Preponderance of the Evidence" not the "Reasonable Doubt" standard for a conviction in court. The four issues are: 1.) Whether the peace officer had reasonable grounds to believe that the person had committed a crime described in section 625c(1). (625c(1) covers all the drinking and driving crimes under state law and local ordinances); 2.) Whether the person was placed under arrest for a crime described in section 625c(1); 3.) If the person refused to submit to the test upon request of the officer, whether the refusal was reasonable; and 4.) Whether the person was advised of the rights under section 625a(6) (Implied Consent Rights, usually read from the back of the temporary driver's license). If an attorney tries to bargain with the DLAD based on hardship or good driving record, the argument will fall on deaf ears; stick to the four issues.

The person who presides over the hearing is the Hearing Officer, basically an Administrative Law Judge; they rule on admissibility of evidence and ultimately rule as to whether the refusal of the chemical test was reasonable. They are well versed on the law as it pertains to Implied Consent. If the police officer is not represented by a prosecuting attorney, the Hearing Officer will often help the police present their case by asking specific questions relating to the four issues. When making an argument to the Hearing Officer, be concise. Do not waste the Hearing Officer's time with frivolous arguments. They will appreciate your brevity. A good reputation with the DLAD Hearing Officers is invaluable to your clients.

If there is more than one police officer present for the hearing, make a sequestration motion to prevent the officers from hearing the testimony of the other and possibly changing their perception of the events the night of the arrest.

The police officer will testify first. A well prepared attorney will have mental checklist of the four issues. If the officer does not address all four issues, DO NOT CROSS EXAMINE as to the missing issue. It is not your job to help the officer present their case. Often a person will be arrested for another crime such as leaving the scene of a property damage accident and it is not until later that the police decide to investigate the possibility of the person having been under the influence. If this is the case, the person must be placed under arrest for driving under the influence or the implied consent statute is not violated.

Try to prevent the officer from reading his report into the record at the hearing. Object to the reading and request the officer testify from memory and use the police report only to refresh his memory. This often flusters and officer and they miss issues.

An officer may forget to mention that the person was arrested for driving under the influence or forgets to say that the chemical test rights were read. It is best if the officer forgets to mention an issue; do not ask any questions, and at the end of the hearing in your closing statement ask the Hearing Officer to review the evidence in light of the missing issue. Be prepared for the officer to try to interject the missing testimony, object to any additional evidence.

The petitioner has an absolute right to testify at the hearing. If they do not want to testify, they are protected by their Fifth Amendment right against self incrimination if the hearing is being held before they have been convicted. Often your client will want to testify so that they can tell the hearing officer about the hardship of the potential suspension or to vent that they are being treated unfairly by the system. They should only testify if there is a substantial reason. There is usually nothing good that will come out of the petitioner testifying, except it will allow them to have their "day in court" and say

Continued on the next page

the things they feel the need to say. Caution your client that attacks on the police officer in their testimony can interfere with the plea bargain process at District Court.

If the petitioner's refusal is a "technical refusal" or "operator refusal" the petitioner should probably testify. An operator refusal is when the operator decides the person is not making a sincere effort to provide a sample. If the operator decides that there is sufficient reason to believe that the person is not making an honest attempt to provide a sample, the Datamaster machine will ask them if it is a refusal and they will press the "YES" key. They are not required to give the test again. "Operator Refusal" must be written on the evidence ticket. Careful cross examination can often uncover an operator's unreasonable finding of refusal especially with a petitioner who has asthma or other breathing difficulties.

A technical refusal is where the Datamaster machine decides that the person is not making a reasonable effort to provide a breath sample. This occurs when the person blows insufficiently five times before two minutes has elapsed. The machine will print the evidence ticket with "Refused". The operator must not remove the mouthpiece but should instead place his finger over the mouthpiece during the purge cycle to determine if the mouthpiece is blocked. Failure to check the mouthpiece invalidates the technical refusal and makes the implied consent refusal "reasonable". "Technical Refusal" must be written on the evidence ticket.

Many Datamaster operators confuse the two types of refusals and a technical refusal, which is treated like an operator refusal will often result in a win. Exploring these refusals at the implied consent hearing can often lead to valid defenses and due process claims once the case proceeds to District Court because the operator, by failing to follow the administrative rules, has denied your client an opportunity to gather exculpatory evidence that may have exonerated them or at least raised reasonable doubt.

A copy of the Michigan Breath Test Operator Training Manual is available from the Michigan State Police. It should be on the bookshelf of anyone who is representing drinking drivers.

Defenses Uncovered at an Implied Consent Hearing

If after an implied consent hearing your client decides that a trial is warranted, you should move quickly to secure a transcript of the hearing. (It may take upwards of 50 days to get a transcript.) Transcripts can be useful for cross examinations of the officers since the testimony is under oath and you can use it to show inconsistencies in their testimony. Exploiting prior inconsistent statements under oath can be a very powerful weapon before a jury.

On the rare occasion the hearing officer finds that the stop of the petitioner was without reasonable suspicion and therefore a violation of the 4th Amendment of the Constitution. You can possibly use this finding in District Court for a motion to dismiss based on the principle of *Res Judicata*.

As mentioned above, a finding by the hearing officer that the refusal of the chemical test was *not unreasonable*, should always be used to file a motion for dismissal in District Court for due process violations.

Circuit Court Introduction

If you did not prevail and your client has not received an implied consent suspension in the prior seven years, you can petition the Circuit Court for a restricted license. This type of license is based on hardship. This means that you must show that the suspension of your client's license will be a great hardship; e.g., Unable to work, nobody in the petitioner's home is available to drive the petitioner around, etc.

You can also appeal the decision of the hearing officer. The court will set aside the hearing officer's determination "only if the petitioner's substantial rights have been prejudiced because the determination is any of the following: (a) in violation of the Constitution of the United States, the Michigan State Constitution of 1963, or a statute; (b) In excess of the Secretary of State's statutory authority or jurisdiction; (c) Made upon unlawful procedure resulting in material prejudice to the petitioner; (d) Not supported by competent, material and substantial evidence on the whole record; or (e) Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion. MCL 257.323(4)

Jurisdiction

The petition to seek a hardship license or review of the hearing officer's decision must be filed within 63 days (183 with good cause shown) in the jurisdiction where the implied consent refusal took place.

Documentation

The petition must contain the following information: petitioner's full name, current address, date of birth and driver's license number.

The hardship petition should also detail how the suspension of the license will be a great hardship to the petitioner. The petition and supporting documentation shall be served on the Secretary of State's Lansing office no later than 20 days prior to date set for the hearing. The county prosecutor usually represents the Secretary of State before the Circuit Court; in some jurisdictions the Attorney General represents the Secretary of State. Contact the Secretary of State to see which entity should also be served in the county of action.

If filing a petition for hardship license, it is imperative to present a substance abuse evaluation from a licensed substance abuse counselor. This will allow the Judge to see that the petitioner is not a risk and that by granting a restricted license he is not endangering the public.

If a petition for review of the decision is being filed, the court may enter an *ex parte* stay of suspension pursuant to MCL 257.323a. This stay cannot be based on hardship. The court may set terms and conditions on the petitioner. (A standardized Order can be found in the Driver License Appeals Practice Manual put out by the Secretary of State.)

The petition to review the hearing officer's decision must be filed no later than 50 days prior to the hearing date. The court may by statute only review the record and no additional testimony will be taken and no additional evidence can be presented. You should order the transcript as soon as possible and upon receipt of the transcript file it with the court and the Secretary of State's representative. Transcripts take a long time to be furnished. When requesting the transcript make sure that

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The Partnership Matrix

Do you want the red pill or the blue pill? The red pill answers the question, “what is the partnership matrix?” The blue pill allows for life to continue as it is. If you choose the red pill, keep reading. If you choose the blue pill, stop here.

The partnership matrix is the false belief that life becomes easier, better or more secure after becoming a partner in a law firm.¹ Too many young lawyers fall into the partnership matrix with no real idea what they are pursuing or how to get there.

But many young lawyers realize that life is actually more difficult after partnership - with more stress, added responsibility and greater time commitment. Pursuing partnership has been described as a pie eating contest where the first prize is all the pie you can eat.²

Let's look at a few of the illusions young attorneys have about being a partner:

“Being a partner provides security”

Certainly, being a partner offers some security. However, if a partner does not generate clients or bill the requisite number of hours or meet some other firm requirement, the partner can be expelled from the firm or demoted within the firm, the same as an associate. Once you become a partner, you still have to meet firm standards. Just as with an associate, a partner's security lies in the work the partner does, not on status within the firm. In fact, if you think about it, partners have less security than associates in at least one respect. Partners are not only liable for their own acts but also for the acts of anyone under their direct supervision or control.³

“Partners make more money”

Partners make more money than associates in law firms.⁴ However, if you are a financially successful partner in a law firm, you may make more money on your own in solo practice. The reason: if you work with several other partners, you could be subsidizing some of them. You may also be paying for office overhead and expenses that you don't need or want.

“Partners have more freedom and control”

If you are THE partner in a firm or in the “control group” of partners, you will definitely have more freedom within the firm and control over the firm. If not, you

may answer to someone else even if you are a partner. Bear in mind that many firms are creating two-tiered partnerships with equity partners and income partners. In other words, you may make “partner” (i.e., income partner) and have absolutely no equity ownership (or control) of the firm. Even if you eventually become an equity partner, you may find that you own such a small percentage that you have little, if any, real voice in firm matters.

Despite all of the above, there *are* benefits to becoming a partner in a law firm. Partnership sounds appealing if there is an offer of true equity ownership, if all the partners have relatively equal say in the operations of the firm, if the purchase price for partnership is not too great, if there is sharing of agreed-upon expenses, if there is financial protection in the event of retirement, death and disability, if there is good legal support and if there is a reasonable work environment within the firm.

As young lawyers, we work in law firms that demand long hours from us, for years of our lives. In exchange, we receive legal training, salaries and the hope that someday we will become a partner. Unfortunately, few of us actually know what that means. We zealously represent our clients, yet we fail to represent ourselves.

Here are some tough questions to ask yourself and to consider asking your supervising attorney:

- How long does it take to become a partner?
- What exactly are the requirements for becoming a partner?
- How many associates are slotted for one partner's position?
- How much turnover is at the partnership level?
- How many levels of partnership exist in the firm and what are they?
- How much does it cost to become a partner?
- How is the firm owned?
- How much of the firm will I own if I become a partner?
- If I become a partner, what happens if I become disabled or die or if I decide to leave?
- What new expectations will arise if I become a partner?
- How will becoming a partner affect the balance in my life?

Be conscious of what career path you *truly* want to follow. Be conscious of what career path you are currently on. I imagine it would be helpful to know if those paths diverge. Wouldn't you agree?

Tim Batdorf is a lawyer coach/consultant who inspires young lawyers to play a bigger game. Tim will be conducting a free teleconference discussion regarding the partnership matrix. If you are interested in participating in the teleconference, contact Tim by e-mail at timbatdorf@comcast.net.

Endnotes

¹ In this article, I use the term “partner” loosely. It includes a member in a professional limited liability company or a shareholder in a professional corporation.

² NALP Foundation for Research and Education: *Keeping the Keepers: Strategies for Associate Retention in Times of Attrition* 106 (Jan 1998) [Keeping the Keepers Report].

³ See, for example, Section 6 of the Professional Service Corporation Act or Section 905 of the Michigan Limited Liability Company Act.

⁴ While this statement is generally true, some partners actually make less money when they initially become partner because they become liable for self-employment tax.

you inform the Secretary of State of the hearing date. A memorandum of law must be filed; make sure to leave the possibility of amendment open so that upon receipt of the transcript you can use quotes from the actual hearing to supplement your arguments.

The Hearing

Prior to arrival at the hearing, obtain the SCOA Approved Forms pertinent to your particular appeal. (Forms can be found in the Driver License Appeal Manual.) The orders are not valid until a true copy is filed in with the Secretary of State in Lansing.

For hardship appeals make sure that your client is prepared to demonstrate with a letter from the employer employment hours and the necessity for driving during work hours if applicable. Any other evidence should be presented to show other driving that may be necessary; e.g., school, AA, regular doctor's appointments. It may also be necessary to show that public transportation is inadequate for the petitioner's particular circumstances. The Judge will usually allow the petitioner to drive with restrictions, often just to and from and in the course of work and other necessary driving. The restricted privileges cannot exceed the license granted by the Secretary of State for the driving offense. This means that if a petitioner was convicted of OUIL first offense; the Secretary of State will issue a restricted/suspended license, the Circuit Court Judge's restricted license cannot be less restrictive than that license. However, the license can be more restrictive. This also means that if the petitioner's license is revoked/denied by Michigan or any other state, the Circuit Court cannot order a restricted license for an implied consent violation hardship license. Even if the Judge grants the license, the Secretary of State will ignore the order.

For a hearing on a review of the decision, be prepared with copies of all pertinent case law especially if you are arguing unpublished cases, out of state cases or federal law.

Other Appeals to Circuit Court

The Circuit Court has jurisdiction to set aside additional revocations/suspensions imposed pursuant to MCL 257.904 if the additional revocation is based on a traffic stop or arrest that occurred before October 1, 1999. These types of appeals are usu-

ally used to make a petitioner eligible for an appearance before the Driver License Appeal Division for a license restoration. Any 904 revocations or suspensions imposed after October 1, 1999 cannot be set aside unless the imposition was in violation of law and then the appeal must be filed within 63 days (183 days with good cause).

The Circuit Court also has concurrent jurisdiction with the DLAD to hear license restorations for revocations denials imposed for crimes committed before January 1, 1992. Circuit Courts lack the jurisdiction to grant relief for revocations/denials imposed pursuant to MCL 257.303 for crimes committed after to this date. However, if after an unsuccessful license restoration appeal to the DLAD, the petitioner wishes to appeal, the Circuit Court is the proper venue. The appeal is limited to the record and is limited to the same criteria as stated above for a review of a hearing officer's decision.

Finally, suspensions for bad driving records can also be appealed to the Circuit Court; usually only a restricted license, if any, is granted. Be prepared to show at the very least that your client has completed a refresher driving course.

Conclusion

Being well prepared for the implied consent hearing can mean the difference between a win and a loss. Often it is simply paying close attention to the testimony and bringing any discrepancies in the evidence or a lack of evidence of one of the four issues to the attention of the Hearing Officer. Be well versed in the administrative rules as they pertain to the implied consent hearings. Also, know the Datamaster procedures as well as or better than the police officers. A well prepared attorney is a hero to his client and even if you lose, your client will know that there was nothing more that could have been done and that he has received excellent legal services.

Daniel J. Larin of Larin & Leonard PC, Bloomfield Hills, Michigan, practices in the areas of criminal law and driver's license restoration. Mr. Larin was admitted to the State Bar of Michigan in 1998 and the Kansas Bar in 1999. While attending law school, Mr. Larin was employed as an intern prosecutor in Sedgwick County, Kansas, and was an editor for the Washburn Law Journal.

**Don't forget that you can find back issues of this newsletter
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Nominations Open for Five Major State Bar Awards

The State Bar of Michigan is seeking a few outstanding lawyers and judges to be the recipients of five major awards to be presented during the September 2004 Annual Meeting in Lansing. Nominations are now open and any member of the State Bar can propose a candidate for the following awards:

The **Roberts P. Hudson Award** goes to a person whose career has exemplified the highest ideals of the profession. This award is presented periodically to commend one or more lawyers for their unselfish rendering of outstanding and unique service on behalf of the State Bar given generously, ungrudgingly, and in a spirit of self-sacrifice. It is awarded to that member of the State Bar of Michigan who best exemplifies that which brings honor, esteem and respect to the legal profession.

The **Champion of Justice Award** is given for extraordinary individual accomplishments or for devotion to a cause. Not more than five awards are given each year to practicing lawyers and judges who have made a significant contribution to their community, state and/or the nation.

The **Frank J. Kelley Distinguished Public Servant Award** recognizes extraordinary governmental service by a Michigan attorney holding elected or appointive office. Created by the Board of Commissioners in 1998, it was first awarded to Frank J. Kelley for his record-setting tenure as Michigan's chief lawyer.

The **John W. Cummiskey Pro Bono Award**, named after a Grand Rapids attorney, recognizes a member of the State Bar who excels in commitment to pro bono issues. This award carries with it a cash stipend to be donated to the charity of the recipient's choice.

The **Liberty Bell Award** recipient is selected from nominations made by local and special-purpose bar associations. The

award is presented to a non-lawyer who has made a significant contribution to the justice system. The deadline for this award is Monday, May 3, 2004. All other award nominations are due on **Wednesday, April 7, 2004** at 5:00 p.m.

An Awards Committee, co-chaired by State Bar President-elect Nancy Diehl and attorney James Steward, reviews nominations for the Roberts P. Hudson, Champion of Justice, Frank J. Kelley Distinguished Public Servant, and Liberty Bell awards. The Bar's *Pro Bono* Involvement Committee reviews nominations for the Cummiskey *Pro Bono* award. The committee's recommendations are then voted on by the full Board of Commissioners at its June meeting.

Nominations should include sufficient detail about the accomplishments of the nominee to allow the committees to make a judgment. Information should include the nominee's biography and may also include narratives relating specific accomplishments, news clips, and letters of support. Materials will not be returned.

Nominations should be sent to:

Awards Committee
Attention: Ms. Naseem Stecker
State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing MI 48933-2083
FAX: 517 316-7218

For further information, call 1-800-968-1442 ext. 6428, or (517) 367-6428. Awards information will also be posted on the State Bar website at <http://www.michbar.org/awards/content.html>

SBM Partners With ICLE To Launch Michigan Law Online

Michigan Law Online - a new and free research service will soon be available to all active State Bar members. To be launched in March 2004, Michigan Law Online is the result of a collaborative endeavor between the State Bar of Michigan and the Institute of Continuing Legal Education. The new service will feature convenient round the clock daily access from any desktop to the following:

- Michigan Supreme Court opinions from 1942 to the present
- Michigan Court of Appeals published opinions from 1965 to the present
- Michigan Court of Appeals unpublished opinions from 2003
- Michigan Supreme Court orders from 1966 to the present
- Current Michigan Court Rules, and amending orders from 1995 to the present

Cases will be searchable by key word, date, docket number, case citation, party name and opinion author. Other features include links to the most recent cases as well as official citations.

"I'm very pleased that we can offer this new service to our members. This should be a cost effective research tool for many lawyers, especially small firm and solo practitioners, in their day-to-day practices," said Scott S. Brinkmeyer, president of the State Bar of Michigan.

John T. Berry, the executive director of the State Bar, said the collaboration with ICLE significantly enhances the range of services that the Bar provides to its members. "Michigan Law

Online is a timely, cost-effective and valuable tool that will help lawyers at their desks. It's a service that reflects the central theme of the Bar's strategic plan, which is to support and help our members in their practices," Berry said.

The Institute of Continuing Legal Education is a not-for-profit organization based in Ann Arbor that has served the educational needs of the Michigan bench and bar for well over 40 years. The institute's director Lynn P. Chard said the organization was "excited to collaborate with the Bar to bring members Michigan Law Online, a significant expansion of our existing electronic practice resources. Collaboration allows us to offer this rich database free to Bar members — something only possible with the Bar's support. We look forward to continued collaboration on behalf of Michigan Bar members."

The University of Michigan Law School, Wayne State University Law School, and the State Bar of Michigan founded ICLE in 1959. It is also sponsored by Thomas M. Cooley Law School, Michigan State University Detroit College of Law, University of Detroit Mercy School of Law and Ave Maria School of Law.

More details about Michigan Law Online, including information on how to register will be available soon. To review a sample page please visit www.icle.org/mlo. For further information please contact the State Bar Member Services Representative, Amy Pierce, toll-free at (800) 968-1442 or (517) 346-6322 or apierce@mail.michbar.org.

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