THE LITIGATION NEWSLETTER

FALL 2009

WHAT'S INSIDE:

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LETTER FROM THE CHAIR

by: ***James C. Partridge***
GMAC LLC

As my term as Chair of the Litigation Section entered its final weeks, I found myself lamenting all of the things I had hoped the Section would accomplish yet, for one reason or another, did not. But while reviewing my notes about the events past year, I realized that the Section had a very productive year, replete with accomplishments big and small. I thought it fitting to catalogue just a few of them here.

The Litigation Section has a proud history of presenting useful and timely legal education, and the 2008-2009 year was no exception. The Section continued to partner with the Institute for Continuing Legal Education to host the acclaimed Masters in Litigation Series. This year's topics included "Winning Before Trial – The 10 Keys to Winning Depositions." Presented by Dominic Gianna, the seminar provided insights and strategies in the art and science of taking and defending depositions. Nationally recognized for his trial skills and as a master of timing and delivery, this successful program was followed by "Trials – Tips, Tactics and Practical Tales." Speaker Michael Cash provided attendees with proven techniques to enhance their performance at trial. The Litigation Section also hosted continuing a legal education course entitled "Winning Civil Cases with Expert Testimony" and again sponsored its very popular Deposition Skills Workshop.

Educating other attorneys is one thing; educating our legislative branch is another. Yet that is exactly what the Section agreed to do when, as part of the State Bar of Michigan's Law School for Legislators held in February 2009, the Litigation Section created a program designed to provide legislators and their aides with information about how the statutes and rules they draft might be reviewed in Michigan courts. Litigation Section Council members presented a session that focused on judicial interpretation of legislation and a review of its constitutionality. The session also featured a component relating to the structure and jurisdiction of the Michigan courts, and addressed emerging issues. By all accounts, the information was well-received and well-presented. Special thanks go to Tom Cavalier and Abe Singer for spearheading this important effort.

Since its inception approximately fifteen years ago, the Litigation Section has developed a tradition of hosting quality summer conferences at various Michigan resorts which are educational, motivational and family-friendly. They also provide a unique opportunity for litigators and Judges throughout the State of Michigan to socialize in a casual setting. Our latest summer conference, held on July 31 – August 1, 2009 at Garland Resort in Lewiston, Michigan continued this fine tradition. This year's conference featured Larry Pozner and Roger Dodd, who are outstanding teachers. Together, they have revolutionized the

practice of cross examination. At the Litigation Section Summer Conference, attendees learned how to harness the power of leading questions, how to establish goal-oriented questioning sequences, and many more techniques that control testimony and persuade jurors. Our council members were proud to partner with ICLE to host such a wonderful program.

Since you are reading this, surely you must know that the Litigation Section puts out seasonal newsletters of consistent quality to our Section members. Our editor, Dari Bargy, does a fabulous job of soliciting and editing the articles and gently nudging me to write this welcoming Chair's Letter. She is a wonderful resource and the Section, and the State Bar of Michigan, is fortunate to have her among us. In this Newsletter, Dari assembled an assortment of helpful articles from Michigan attorneys. According to David Sarnacki, even an experienced litigator can learn a few things from Daniel I. Small's book on "Preparing Witnesses: A Practical Guide for Lawyers and Their Clients." Having prepared and tried cases for nearly 25 years, he ought to know. In their article "The Death Of Boilerplate – Part 2: Practical Considerations For And Legal Ramificatiodns Of Crafting Arbitration Clause" Dickinson Wright attorneys Richard A. Glaser and Daniel D. Quick posit that it would be prudent to reexamine the use of boilerplate arbitration clauses in commercial agreements. Lastly, Gerald Gleeson's article, "So You or Your Client's Child is Seventeen" offers words of wisdom to parents of teenagers inclined to "get up to no good." I believe that every reader will find something of interest in this excellent newsletter.

I of course am acutely aware that none of this could have been achieved without the commitment of many individuals. I therefore would be remiss if I did not take these last few moments to thank the members of the Litigation Section Council and particularly the Executive Committee: Bonnie Sawusch, Chair-Elect, Thomas Cavalier Secretary, and David Centner, Treasurer. Their hard work this year was essential to the Section's accomplishments, and it has been a privilege to have served with them.

Sincerely,

James C. Partridge

THE DEATH OF BOILERPLATE – PART 2: PRACTICAL CONSIDERATIONS FOR AND LEGAL RAMIFICATIONS OF CRAFTING ARBITRATION CLAUSE

by: *Richard A. Glaser* and Daniel D. Quick***

Why do we arbitrate? Is the urge to insert alternative dispute resolution procedures into commercial contracts actually driven by the needs and desires of the client and the unique circumstances of the transaction? Is it borne from a fear of courtrooms and juries? Do the parties crave to control the process or do they want to surrender their case to an objective, technical expert? Or, is it a reflexive choice nurtured by the belief that arbitration must be faster and cheaper than the alternatives?

None of these basic considerations, among others, can be weighed if the scriveners of the commercial contract default to a boilerplate arbitration clause. In such circumstances, the parties' expectations about how best to resolve potential disputes are often frustrated by a process with unexpected costs and delays.

The first installment of this article, published in the Spring 2009 edition of this Newsletter, focused on recent decisions from the Second Circuit and the U.S. Supreme Court with direct consequences for contracting parties considering litigation or arbitration. This second installment discusses how this precedent, and other judicial and practical principles, influence the client's dispute resolution choices. We begin with the most fundamental decision–whether to litigate or arbitration–and then explore more specific considerations.

Choosing Between Your Client's Day in Court or in the Conference Room

The nuances of a dispute resolution clause will never get the same level of attention in the negotiation of a commercial transaction as price, payment and warranty terms, but it surely deserves more careful evaluation than it normally receives. As a starting point, attorneys need to take advantage of available resources to better understand the technical aspects of the transaction. By identifying where and when disputes or communication breakdowns are most likely to occur among the people in the field, the attorney can explore what type of dispute resolution process will best keep the project on track. Are there potential political impacts or points of media interest such that your client will best be served by privacy in the resolution of a dispute? For example, an out-of-state supplier of public safety or judicial docketing software systems may not feel confident before a local judge or jury, whose livelihood or sense of well-being may be affected by a defective implementation, and would be more comfortable in a discrete arbitration stipulating at least one arbitrator with software implementation experience.

It is critical to evaluate before signing the contract which party will more likely have control over evidence and

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** *Daniel D. Quick is a commercial litigation trial lawyer with Dickinson Wright PLLC in Bloomfield Hills. He specializes in trade secrets disputes, business divorce litigation and non-competition agreements, as well as a broad array of business torts and intellectual property issues. His publications include Michigan Business Torts (2nd ed. ICLE).*

The authors would like to thank Bojan Lazic, a law student at the University of Iowa School of Law, for his research and contribution to this article.

proofs in the event of a dispute. Will your client need discovery and is it likely to be resisted? For example, if your client is selling her business and turning over the files and assets lock-stock-and-barrel, she needs to appreciate that the more compulsory and liberal access to discovery in the courts may be essential to her success if a dispute arises. Although many practitioners and parties complain that arbitration has become too much like litigation with protracted discovery and days of hearings, a party in need of information from third party sources is bound to encounter more frustrations in arbitration than through the discovery procedures available in federal and state courts. As discussed in the preceding article (*Litigation Newsletter, Spring* 2009, p. 3), the federal circuits are split regarding the ability of arbitrators to issue pre-hearing document subpoenas to third parties.[1] This can severely restrict a party's ability to prepare its case regarding numerous claims, such as consequential damages or alleged quality deficiencies where third party vendors, customers, inspectors, or subcontractors have been involved.

In addition to limitations on compelling discovery, the arbitration process, as a creature of contract, is inherently restrained when a foreseeable dispute may require the joinder or impleader of third parties who are not signatory to the contract.[2] Rule R-7, Consolidation or Joinder, of the AAA Construction Industry Arbitration Rules addresses this contingency by assuming that the network of contracts between and among the owner, architect, general contractor and subcontractors will each require arbitration and expressly reference the AAA Construction Rules. However, in those circumstances where the involvement of third parties is not institutionally ingrained, the lawyer needs to employ imagination and probing questions in an effort to avoid situations where the resolution of foreseeable disputes may require involvement of both the courts and one or more panels of arbitrators. If all the potentially affected parties cannot be persuaded to "sign-off" on a consolidated arbitration process, the courts may provide the more efficient and cost-effective forum in such situations.[3]

Similarly, the impact of the U.S. Supreme Court's decision in *Hall Street Associates, LLC v Mattel, Inc.*[4] (which was discussed in the previous Spring 2009 article) should prompt parties to decide up front whether the narrow grounds afforded by the Federal Arbitration Act (FAA) for judicial review and vacatur of an arbitrator's award are desirable or problematic. The option of invoking the controlling authority of a state's arbitration act has met with differing results since *Hall Street*, with a Tennessee court finding that the Tennessee arbitration statutes do not permit the parties to expand the scope of judicial review,[5] and a California court allowing parties to agree to expand judicial review.[6]

One of the "hidden" costs of arbitration involves the challenges of scheduling consecutive hearing dates in a complex matter. Working around the calendars of the parties, the litigators, and three arbitrators frequently results in piecemeal and scattered hearing dates, stretching over months, requiring everybody to repeatedly "get back up to speed." By contrast, most trial judges endeavor to avoid interruptions in a jury trial, which often assures a more efficient and continuous presentation of evidence. Thus, before deciding on the forum for dispute resolution, it is useful to review with the client the relative congestion of available court dockets, whether a single arbitrator would be better than three, and whether a dispute resolution clause should drill down to the level of defining timeframes (i.e., "a hearing of no more than five (5) consecutive business days to be completed within 120 days from the Statement of Claim").

The Arbitration Clause – Predicting the Process without Inadvertently Shackling Your Client

If arbitration is the best option, then taking the time to customize a Dispute Resolution provision will provide the added benefit of anticipating the circumstances that may lead to a breach or termination, which could inspire additional terms designed to head off conflict. For example, if the most likely point of breakdown in a software project is at the implementation stage, the supplier may want to build in milestone payments and approval sign-offs to keep the customer invested. It may also be worthwhile to consider a liquidated damages provision to discourage early termination. Of course, the customer will resist becoming trapped into a process which progressively deviates from expectations.

The exercise of anticipating problems should focus the parties on the topic of what issues are arbitrable. To insert language that "any and all disputes between the parties shall be submitted to arbitration" can invite the unintended consequence of arbitrating matters beyond the four corners of the contract at issue, including tort and intellectual property claims. Even if the definition of "arbitrable issues" is restricted to the subject matter of the contract, a party may find itself handcuffed to

arbitration when it needs immediate access to injunctive relief. Well before the time that an arbitrator can be selected (even on an expedited basis), a judge can have issued a temporary restraining order and even conducted a preliminary injunction hearing. An express carve-out for such urgent equitable relief (imposition of costs or sanctions) is highly recommended, with additional incentives to discourage abuse.

Both parties initially are optimistic as they negotiate the contract, and should agree that it is mutually beneficial to implement a procedure to solve problems before arbitration becomes the sole recourse. A popular option is a non-binding mediation process with a pre-selected mediator to avoid the cost and delay of selecting a mediator after the dispute and negative feelings have festered. Internal dispute resolution processes through tiered or escalating steps are often employed. As with arbitration clauses, boilerplate should be shelved here in order to better understand which supervisory positions within the respective organizations are best suited to reach compromise, what time intervals are realistic, which party is obliged to move the process forward, and exactly what consequences will result from not exhausting the process in good faith. Although such pre-arbitration dispute resolution clauses are often characterized as "informal," the parties ultimately will be ill-served not to establish requirements for describing the dispute and defining how to initiate and progressively advance the process. If the intent is that the complaining party cannot file an arbitration claim without completing this internal escalating process, that prerequisite should not be left to assumption. Further, the parties should consider additional or alternative consequences, such as the forfeiture of specific claims, remedies, or defenses, and how this internal preliminary process might affect into the parties' rights to terminate the contract.

Understandably, not all issues to be encountered in a future dispute can be predicted and addressed in the arbitration clause. Accordingly, an arbitration clause should reserve a level of flexibility to allow the arbitrator(s) and parties to deal with discovery issues, access to third party materials, and pre-hearing motions as the needs arise. The number and qualifications of, and the method for selecting the arbitrators, whether to proceed with institutional or ad hoc arbitration, whether to incorporate a recognized and enforceable set of rules (AAA, UNCITRAL, state or federal rules of procedure or evidence, etc.), and the discretionary or mandatory awarding of attorney's fees, costs, and interest can and should be established in the contract.

In view of the federal precedent discussed earlier that has interpreted § 7 of the FAA not to authorize arbitrators to issue pre-hearing document subpoenas to third parties, a suitable provision might be incorporated into a paragraph to deal with anticipated third party discovery issues:

> "The parties will work cooperatively to obtain voluntary production of relevant documents from non-parties and agree that, to the extent necessary to avoid prejudice to a party, the arbitrator may hold a special hearing in order to summon a non-party to appear before him/her to give testimony and produce documents consistent with Rule 7 of the FAA and this Agreement. Otherwise, the arbitrator is authorized upon a showing of special need to issue a subpoena to a non-party for the discovery of documents and testimony consistent with the Federal Rules of Civil Procedure."

Such a clause addresses the Third Circuit's narrow construction of FAA § 7 that arbitrators can subpoena documents only for production at the hearing itself (see Hay Group, supra) and also invokes the holding in *Amgen, Inc. v Kidney Center of Delaware Co.,*[7] which allowed more liberal discovery where the arbitration agreement stipulated that the arbitration would follow the Federal Rules of Civil Procedure. See also I*n re National Financial Partners Corp.,*[8] in which the Court observed that the actual presence of an arbitrator at a hearing reconciled the obstacles imposed by *Hay Group* and *Life Receivables Trust, supra.* While some may criticize the extra steps and expense of such a provision, this procedure may be less disruptive than to summon a non-party for the first time in the middle of the hearing.

There are a multitude of other contingencies to consider in drafting an arbitration clause depending on the industry or business involved, including how to address the prospect of possible class action claims in employment, consumer or investment contracts. Checklists are helpful, but there can be no substitute for the collective experience of the attorney and the client in fitting the dispute resolution vehicle to the circumstances. Boilerplate or the form that your partner or client had used just last year may not be consistent with the dictates of the latest controlling precedent or well suited to the unique features to transaction at hand. Arbitration has its inherent limitations, but it also has distinct advantages if it is properly structured and staged in the negotiation process.

Endnotes

1. See cases holding that the Federal Arbitration Act does not authorize discovery subpoenas to third parties: Life Receivables *Trust v. Syndicate 102 at Lloyd's* of London, 549 F.3d 210 (2nd Cir. 2008); *Hay Group v. E.B.S. Acquisition Corp,* 360 F.3d 404 (3rd Cir. 2004); cases allowing third party document discovery subpoenas: *In re: Arbitration Between Security Life Ins.* Co. 228 F.3d 865 (8th Cir., 2000); *Comsat Corp v. Nat'l Science Foundation,* 190 F.3d 269, 278 (4th Cir. 1999) (upon a showing of special need or hardship); American Federation of Television and Radio Artists, *AFL-CIO v. WJBK-TV,* 164 F.3d 1004, (6th Cir. 1999)(in the context of Labor Management Relations Act).

2. See *United Steelworkers of America v. Warrior Gulf Navigational Co,* 363 U.S. 574 (1960), a party cannot be required to submit to arbitration unless a party has agreed to arbitration. Note that courts have considered that non-signatory parties may be bound to arbitration if so dictated by common law principles of contract, agency, or corporate law, but such arguments are rigorously scrutinized and rarely applied. See, *Thomas-CSF, S.A. v. American Arbitration Association,* 64 F.3d 773 (2nd Cir. 1995), corporate veil piercing, estoppel, and corporate successor theories cannot bind non-signatory party to arbitration; *Interocean Shipping Company v. National Shipping and Trading Corp.,* 523 F.2d 527 (2nd Cir. 1975), guarantor who did not sign arbitration agreement cannot be bound to it.

3. For a comprehensive discussion of multiple, nonparty issues, see Stipanowich, "Arbitration and the Multiparty Dispute: The Search for Workable Solutions," 72 Iowa L. Rev. 473 (1987).

4. 128 S.Ct. 1396 (2008).

5. *Pugh's Lawn Landscape Co. v. Jaycon Development Corp.,* 2009 WL 1099270 (Tenn. Ct. App.).

6. *Cable Connection, Inc. v. Direct TV, Inc.,* 44 Cal 4th 1334 (2008).

7. 879 F.Supp. 878 (N.D. Ill. 1995).

8. 2009 WL 1097338 (E.D. Pa., Apr. 21, 2009).

THIS IS NOT A CONVERSATION: DANIEL SMALL'S PREPARING WITNESSES, 3RD EDITION

by: ***David C. Sarnacki****

Col. Jessep: *You want answers?*

Kaffee: *I think I'm entitled.*

Col. Jessep: *You want answers?*

Kaffee: *I want the truth!*

Col. Jessep: *You can't handle the truth!*

–A Few Good Men (1992)

To be clear, Daniel Small's *Preparing Witnesses* honors the fundamental principle that a witness always tell the truth. Still, he would have ruined the movie had Col. Jessep taken his advice.

Small's premise is that "the truth" is sacrificed by inattention and ineffective preparation. In everyday conversations, people are not accompanied by a court reporter or questioned by a highly skilled inquisitor. Instead, people speak casually, with a mixture of factual reporting, storytelling and exaggeration. When people become witnesses and leave their ordinary world of conversation, they enter a strange new world with an unnatural communication environment. They face heightened risk, unusual pacing and narrow precision. Simply put by Small, "this is not a conversation."

Small demonstrates that witnesses can take back control of testimony only by following a strict discipline of listening to the question, pausing to think, answering the question and stopping. Every question. Every time.

Through 26 chapters, Small shows us how to serve as mentor and ally to our clients who must journey into the special world of litigation. The first seven chapters set the stage. They orient the lawyer and the witness to the strange world of giving testimony, the importance of preparation, seven steps for effective preparation, and the basic principles of being a witness.

At this point, Small, a best-selling ABA author and partner with Holland & Knight, LLP, presents and carefully explains his 10 Rules for effective and helpful communication by a witness:

1. Take your time.
2. Always remember you are making a record.
3. Tell the truth.
4. Be relentlessly polite.
5. Don't answer a question you don't understand.
6. If you don't remember, say so.
7. Don't guess.
8. Do not volunteer.
9. Be careful with documents and prior statements.
10. Use your counsel.

While I found myself challenging certain statements and strategies presented in the 26 chapters, I have to confess: I learned something from Small's book. I've been preparing witnesses for 25 years. I've taught trial advocacy. I've prepared CLE materials and presented on topics that included witness preparation. And I found that Small had considered the topic more thoroughly and explained concepts in more detail than I imagined possible.

**David C. Sarnacki practices family law, mediation and collaborative divorce in Grand Rapids, Michigan. He is a past Chairperson of three State Bar Sections: Family Law, Litigation and Law Practice Management Section. He is listed in Best Lawyers in America.*

You will learn something from this book. You will enhance your general knowledge and better appreciate what the witness faces in the special world. You will find a structure for your witness preparation efforts. You will find language you can use to help the witness. And you will be able to consult a handy reference when that particular client faces an issue or communication habit that requires correction and control.

The core of Small's book focuses on preparing witnesses for depositions. He includes separate chapters toward the end for interviews, trial testimony, parties, experts, physicians and criminal defendants.

The latest edition includes three new chapters explaining why giving testimony is so different from our conversations in everyday life, how to approach testimony as a means for reaching the finder of fact, and what the witness's "bill of rights" are. Another 10 chapters were significantly revised and reformatted from the second edition. Small's book includes a CD-ROM of the appendix materials.

You want answers? You want the truth? You are entitled, and you can handle it. Small's Preparing Witnesses gives you the answers for how to prepare your clients and honors your role in getting to the truth and bringing it out effectively.

Daniel I. Small, *PREPARING WITNESSES:* A Practical Guide for Lawyers and Their Clients (3rd ed., 2009, American Bar Association), $89.95.

SO YOU OR YOUR CLIENT'S CHILD IS SEVENTEEN…

by: *Gerald J. Gleeson II**

For those of you who have yet to receive a client call in the middle of the night announcing the arrest of a son or daughter, it is perhaps only a matter of time. Having lectured high school students and parent groups, it has become apparent to me that many children (and indeed, some parents) have very little sense of the consequences that accompany the moments that, when confronted with a choice, teenagers decide to "get up to some no good."[1] Especially those who have reached their 17th birthday and are adults in the eyes of the law.

The areas in which most young men and women typically run afoul of law enforcement and the criminal justice system involve alcohol or controlled substances, such as marijuana. The use of these substances is also often involved in cases of criminal sexual conduct. It is not the purpose of this article to discuss the social mores involved, but rather to point out the current state of the law and provide impetus for family discussion of what young men and women should know before they make adult choices that have lasting consequences.

ALCOHOL

It is illegal for anyone under the age of 21 to possess or consume an alcoholic beverage. There is no minimum concentration of alcohol in the system to support a conviction for "MIP." A first offense is considered a "non-jailable" offense as the Legislature has proscribed the maximum punishment to be a fine, community service and alcohol counseling.[2] Thereafter, the law creates a series of graduated sanctions based on the number of prior MIP convictions. A second offense is a 30-day misdemeanor and a third or subsequent offense is a 60-day misdemeanor. The convictions can be abstracted to their Secretary of State driving record and may also result in license sanctions.

Most often, a MIP ticket is the result of police attention being drawn to a group of individuals. Whether it is a loud party in a college town, a gathering at a house in suburbia when the parents are out of town or just a group in a park after hours, the police respond and are usually quick to realize when they are in the midst of underage drinking. From there the police seek to acquire evidence that will support the charge.

The police prefer to rely on the results of a preliminary breath test (pbt) to show that the minor has consumed alcohol. Initially, a minor's refusal to take a pbt was punishable as a civil infraction. However, the Eastern District of Michigan has ruled that this portion of the statute is unconstitutional. Therefore, minors are free to refuse the pbt, although police may attempt to prove consumption by other signs of intoxication.

Some young people like to take advantage of Canada's lower age limit for alcohol consumption. It is legal to consume alcohol in Canada when a person turns 19. Many don't realize that once they return to Michigan, it does not matter where the alcohol was consumed. They can be charged with MIP if a pbt or other evidence indicates the presence of alcohol in the body. Contrary to popular opinion, they cannot claim immunity based on Canadian consumption.

There is also a separate crime for drunk driving when under the age of 21. Known as a "zero tolerance" violation, it is against the law for anyone under the age of 21 to drive a motor vehicle with a blood alcohol level between .02 and .08. This is much lower than the .08 standard for the crime of operating while intoxicated. While it is technically a non-jailable offense, it is a four point offense and the conviction can be used to enhance the penalty of future drunk

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driving charges. The zero tolerance conviction (as are all drunk driving convictions) is abstracted to the individual's Secretary of State driving record and can result in licensing sanctions, as well as drastic action by the insurer of the vehicle.

CONTROLLED SUBSTANCES

Marijuana is the controlled substance that is most prevalent in younger circles. The charge of possession is a one year misdemeanor under Michigan law.[3] If charged with delivery or possession with the intent to deliver, the penalty increases to a four-year felony. Based on an informal poll conducted by the author, marijuana use is far more prevalent than most parents realize. While many parents might think "my son/daughter would never…," the fact of the matter is that it is quite likely that son or daughter already has.

Often, young people fail to understand that possession has several legal definitions. Possession is not merely what is in one's hand or in one's pocket. Possession may be actual or constructive, and it may be joint or individual. People may conspire to possess marijuana without ever having smoked or even seen it. And kids also fail to realize that they enjoy only a limited expectation of privacy in an automobile. A positive dog sniff in the school parking lot can have drastic consequences.

One of the dangers inherent in controlled substance use is that (absent growing it themselves or investigating their parents' medicine drawer), kids must procure it from a source. Bargain conscious sons and daughters often prefer to shop where they can get a discount to make their allowance go further. In the realm of controlled substances, a discount is generally based on volume. A group of budget-minded youngsters who might only use a small amount often pool their money in order to pay less, thinking nothing of it. Little do they realize that buying marijuana is not like shopping at Costco.

The purchasers generally send the least intelligent among them with the cash to go and make "the buy." Sometimes this service results in a larger cut. However, when a police officer questions the youth about the half-pound of marijuana in the car, the usual reply of "I'm just bringing it back to share with friends" amounts to a confession to a four year felony: possession with intent to deliver marijuana. "Delivery" is not synonymous with "drug dealing" (i.e., the sale for profit). It can include a bargain hunting driver or someone whose intent is to give a gift.

CRIMINAL SEXUAL CONDUCT

When young people attain adulthood at 17, they are subject to the criminal sexual conduct (CSC) laws. Most CSC cases with teenagers involve either consensual activity between parties (one of whom is under 16) or allegations of date rape. Many 17-year-olds don't realize that sexual intercourse with a 15-year-old friend constitutes criminal sexual conduct in the third degree, a crime subject to the state's Indeterminant Sentence Act (which, absent a special advisory status, requires a prison sentence, rather than probation or jail). Kids also rarely consider the requirement to register as a Sex Offender under the Sex Offender Registry Act (SORA) for the next 25 years.

Likewise, a young person may not realize that a night of shots and drinking games like "Beer Pong" may result in their either becoming a criminal sexual conduct victim or defendant. The author suspects that most experienced prosecutors and defense counsel would agree that the majority of date rape cases in some way involve the abuse of alcohol or controlled substances (which can also provide a mechanism for the administration of date-rape drugs) by some or all parties involved.

Due to the prevalent use of alcohol and controlled substances, young persons also need to realize that it is not necessarily objective consent that makes the activity permissive, but rather the other party's capacity to consent to the activity. Michigan law makes clear that criminal sexual conduct exits when the "…other person is mentally incapable, mentally disabled, mentally incapacitated or physically helpless." As the cases are often "he said/she said," such determinations are fraught with danger.

CONSTITUTIONAL PROTECTIONS

Children, like their parents, enjoy the privileges and protections of the Fourth and Fifth Amendments. When they head to college or otherwise leave the nest, it is important that parents teach their children that they have the right to counsel and to refuse to consent to a search. While police officers may cajole them to the contrary, there is nothing wrong with young people asserting these rights (and such an assertion can often make the difference in a criminal matter). Oftentimes there may be some questions as to the subject of the

police officer's interest. Perhaps the easiest explanation is that "if the police are knocking on your door, then you are either a suspect or a witness. And if you weren't at the bank when it was robbed that morning, assume you're a suspect."

CONCLUSION

Oftentimes, parents overlook the fact that even the most well-behaved son or daughter has the capacity to make a bad decision. As these children reach their 17th birthday, it is important for parents to sit down with their children and discuss the consequences of alcohol and drug use. An ounce of prevention might just avoid the pound of cure.

ENDNOTES

1. This article is an abbreviated summary of the issues discussed during these presentations.
2. Certain District Courts have sentenced minors to jail for violating a probationary sentence for a first offense. Generally, these courts treat the violation of probation as contempt of court in order to impose a sentence of incarceration.
3. Possession of other controlled substances, such as cocaine, heroin, methylenedioxymethamphetamine (commonly known as ecstasy) and prescription medications, are substantially higher. The legal principles discussed herein are equally applicable.

2009 SUMMER CONFERENCE

by: ***Thomas F. Cavalier****

Highway 489 cuts through rural Oscoda County in northeastern Michigan, between M72 and Lewiston. The landscape is unremarkable: woodlands and fields of corn, their growth slowed by the cool summer weather. But a few miles south of Lewiston that all changes when you turn off the road and enter the beautiful grounds of Garland Resort, site of the 2009 Litigation Section Summer Conference.

Garland greeted Conference attendees with a wide variety of recreational opportunities. The resort is a golfer's paradise, boasting four championship courses. For those who preferred other types of recreation, Garland offered swimming, basketball, tennis, and biking. Or visitors could simply stroll the well-manicured lawns set among stands of fragrant pine trees.

The Conference began on Friday, July 31st with an evening reception featuring an open bar and delectable horsd'oeuvres. The next morning, Conference participants gathered in a spacious light-filled room to enjoy a continental breakfast followed by a seminar, "Advanced Cross-Examination Techniques."

For six hours, seasoned trial attorneys Larry Pozner and Roger Dodd educated the group in their pioneering approach to cross-examination, while at the same time entertaining the crowd with self-deprecating humor, colorful war stories and good-natured barbs tossed at one another (and occasionally at audience members). This short article cannot do justice to the many useful principles and tips presented and explained by Pozner and Dodd. Here, though, are the highlights of what we learned.

- Build your case through cross-examination. Your questions should draw out facts from the witness that help to establish your case. Facts admitted by an adverse witness are more believable and memorable.

- Develop facts in "chapters", a story that ends with the main point you want to establish. The questions in each chapter should create a "picture" that will be retained by the jury.

- Three rules of cross-examination:

    1. Use leading questions: to control the witness and show the jury you have mastered the facts.

    2. Each question should ask about one new fact.

    3. Organize questions in a logical progression to create the desired picture.

- Tips on leading questions:

    1. Use short declarative sentences.

    2. Avoid starting a question with who, what, where, why, explain. These allow the witness too much latitude and permit her to become the focal point.

    3. Use vivid words to paint the desired picture.

- Tips on one fact per question

    1. Break a compound factual scenario into constituent facts; the smaller the fact, the more likely the witness will admit it.

    2. Asking one fact per question avoids objections.

**Tom Cavalier is a member of Barris, Sott, Denn & Driker, P.L.L.C., Detroit, where he specializes in business litigation. Mr. Cavalier is Secretary of the Litigation Section.*

3. One fact at a time, presented logically, allows the jury to reach the desired conclusion on its own.

- Tips on logical organization:

1. Each chapter must have a specific well-defined goal.

2. Each goal must either help the cross-examiner's case or undermine her opponent's case.

3. Move from general questions to increasingly specific questions until the goal is established. Establishing the goal does not mean that the witness admits the ultimate conclusion; rather, the goal is to have the witness admit enough facts so that it is inevitable that the jury will draw that conclusion.

The techniques offered by Pozner and Dodd should enhance the cross-examiner's effectiveness and self-confidence. Expectations, however, should be kept modest. Your case is unlikely to be won on cross-examination. Your questioning may not neutralize all "bad" facts presented by the witness on direct. As Larry Pozner advised, towards the end of an enlightening seminar, "Do what you can. Suffer what you must."

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