

The WRIT

June 2011, Vol. 33, No. 6

OFFICIAL PUBLICATION OF THE WASHOE COUNTY BAR ASSOCIATION

Annual Meeting Luncheon, Wednesday, June 8, 2011, 12 noon, Harrah's

Supreme Court's Michael Sommermeyer Speaks on Nevada Foreclosure Mediation Program, Changes to Court Media Rules, Social Media in the Courts and Recalls Life at Clark County Courts

Michael S. Sommermeyer is a public relations strategist and writer. He currently serves as the Quality Assurance Manager for the State of Nevada Foreclosure Mediation Program where he oversees quality service, public education and program processes. Before joining the Supreme Court of Nevada, Mr. Sommermeyer was the public information



Quality Assurance Manager, State of Nevada Foreclosure Mediation Program, Former Public Information Officer, Clark County Courts

officer for the Clark County Courts. His varied career has given him the opportunity to serve as a television news anchor, crime reporter, science writer, a public relations manager and a public information officer for higher education.

He will discuss Nevada's Foreclosure Mediation Program and current legislation affecting the program, including a quick discussion on the Petition for Judicial Review appeals affecting homeowners and lenders. He will cover upcoming changes to the court media rules, which we hope will give him a chance to talk about his life in Clark County Courts (including the media frenzy during O.J. Simpson's Las Vegas trial). He may touch on social media in the courts if time allows.

RSVP by Monday, June 6. \$25 per person, \$200 for table of 8. Register online at wcbar.org or call 786-4494. Special meals by request. We cannot guarantee a seat without a reservation.

WCBA Thanks President Elliott Sattler, Welcomes Clay Brust as New President, Elects Officers

WCBA

says a very warm thank you to outgoing WCBA President Elliott Sattler at its June 8 luncheon. The executive board, acting as



the nominating committee under the bylaws, proposes the following slate of officers for 2011-12. The Bar's bylaws call for election at the June annual meeting:



Vice President Clay Brust automatically succeeds as President.

Nominations: Secretary Michael V. Kattelman for vice president; Treasurer Jasmine Mehta for Secretary; Sergeant-at-Arms Tiffany Barker Pagni for Treasurer;



Cotter Conway as Sergeant-at-Arms /Writ Editor.



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RANDOM THOUGHTS



Elliott Sattler, President

Life is like a roll of toilet paper: the closer you get to the end the faster it seems to go.
Sigrid Sattler (2011)

O.K., I think that Andy Rooney should actually get credit for the quote above; however, I have heard my wife say this line so many times I am sure she thinks it belongs to her. As I sit and write my last “Random Thoughts” I am struck how the past six years has truly been like that roll of toilet paper—gone in a flash. It seems like yesterday that I sat at my first WCBA Board retreat and asked myself two very important questions: (1) what the heck are these people talking about; and (2) what have I gotten myself into? Now it is over. In less than thirty days I will no longer be a board member: I will be relegated to the dustbin of Presidents Past. Time sure flies when you are having fun.

I will be the last board member that served for six years. Two years ago the board eliminated the position of President-Elect, making service on the board more attractive to people because there would be one less year required. This was not the only change in the WCBA that has occurred in my six years: we have added two new dues-paying categories—paralegals and judges; we now offer group health care benefits for our members; we created two very successful legal “guides” for the community—*Now That You Are 18: A Survival Guide* and the *Seniors And The Law: A Guide For Aging Nevadans*; we have added the “Find A Lawyer” practice listing to better assist the public in finding a lawyer in a specialized field; the High School Mock Trial Competition has more teams every year; our annual Santa Fe Dinner is a highly anticipated end to the busy holiday

season; and Gina MacLellan has grown our CLE program exponentially. It truly has been a time of growth. I think the most amazing aspect of my tenure has been the simple fact that we remain a vibrant voluntary bar. At a time when similar bars are losing members by the hundreds, we remain strong and dedicated to our core principle: furthering professionalism, ethics and service in the practice of law.

When Ann Hall called me in 2005 and asked me to join the board I had recently gone through the appointment process to replace Judge Hardesty in Department Nine. I had been in the Washoe County District Attorney’s Office for twelve years at that time and I knew that, barring becoming a judge, I would spend the remainder of my career in this position. The appointment process opened my eyes to something I had not known: public attorneys are not thought of in the same way as private attorneys in our local legal community. I was told (literally, not figuratively) that because I did not practice civil law I simply did not possess the tools to be a general jurisdiction judge. Most attorneys “specialize” in a certain area of practice: mine happened to be criminal jury trials. Why was this being held against me, and presumably all of the other public attorneys who applied for appointment? I wondered to myself if all of the civil lawyers were asked, “How can you be a general jurisdiction judge if you have never practiced criminal law?” I doubted it somehow. There had not been a full time public attorney as

the president of the WCBA in at least twenty years. I decided to join to show that we, the career prosecutors, public defenders, city attorneys and civil government attorneys, had much to offer. It was my hope to lead by example and show the “private world” that there are proportionately as many good public attorneys as private and that the stereotype that seems to be prevalent in our legal community is, at best, short-sighted.

Six years later I don’t know how successful I have been. WCBA has had more CLE directed at criminal and public topics. We have had a few new public attorneys join the WCBA; however, I don’t think that there are enough. There are a few more D.A.’s and P.D.’s at our monthly meetings. It is also not solely the private bar’s fault that public attorneys are given a bad rap: the fact that I have been the first president in at least two decades indicates to me that public attorneys need to be more involved. It is not enough that we sit on the sidelines, bemoaning the fact that we feel slighted. Hopefully something I have done in the past six years has demonstrated that there are numerous people working in government service with much to add. Further, I hope that in the future more attention is paid to what people *have done* rather than what they have not.

Six years goes by in the blink of an eye. Professionally I have had some great success in that time; I have also had my nose bloodied. I wouldn’t trade any of it. I want to thank my fellow board members since 2005: John Desmond, Rob Dotson, Ann Hall, Leslie Hart, Mark Bruce, Clay Brust, Mike Kattelman, Jasmine Mehta, Tiffiny Pagni and Gina MacLellan. You all made this an experience I will always treasure. A special thank you goes out to the only “constant” at the WCBA: Chris Cendagorta. Those who practice in Washoe County are more fortunate than we know that Chris is our Executive Director. She is a wealth of knowledge and inspiration. She is also a great friend. Thank you to the members of the WCBA for allowing me the honor of being your President for the last twelve months. I will see you at those monthly lunch meetings, I promise.



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CONVERSATIONS ON DISCOVERY

By Wesley M. Ayres, Discovery Commissioner

Under our discovery rules, the responding party generally must bear the expense of complying with discovery requests. See, e.g., *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 103 F.R.D. 357, 357-58 (D.D.C. 1984). However, courts are empowered to “make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” including an order “that the discovery may be had only on specified terms and conditions.” See NRC P 26(c)(2). This rule allows district courts to order that a party seeking discovery pay all or a portion of the expenses incurred in obtaining discoverable materials. See, e.g., *Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 468 (9th Cir. 1987).

Occasionally, an issue arises over which party should bear the costs associated with translating requested documents that are written in a language other than English. In the first reported case on this issue, *Stapleton v. Kawasaki Heavy Indus., Inc.*, 69 F.R.D. 489 (N.D. Ga. 1975), plaintiff requested manufacturing specifications of certain products built by defendants. The documents were produced to plaintiff in Japanese, and plaintiff then sought to be reimbursed for the expense incurred in translating those documents into English. The court found that the documents actually produced to plaintiff were “useless,” and it ruled that defendants should have provided plaintiff with English copies, irrespective of whether English copies already existed. See *Stapleton*, 69 F.R.D. at 490. In arriving at this conclusion, the court emphasized that defendants conducted a considerable amount of business in the

United States: “In return for the privilege given defendants to sell their products here and enjoy the protection of this country’s laws, defendants submit themselves to the processes of American courts, and these courts, by and large, conduct their proceedings in English.” See *id.* Essentially, the court concluded that defendants should view translation expenses as a cost of doing business in this country, and they were therefore directed to reimburse plaintiff’s translation costs. See *id.*

The analysis in *Stapleton* has not found acceptance by other courts, and it has been expressly rejected by a federal appellate court. In *In re Puerto Rico Elec. Power Auth.*, 687 F.2d 501 (1st Cir. 1982), the Court of Appeals was asked to review an order requiring defendant to translate (or pay plaintiff the costs of translating) all Spanish-language documents produced by defendant in the course of pretrial discovery. It determined that the rules of civil procedure do not grant district courts the power to order the producing party to pay—at the pretrial stage—the costs of translating documents from one language to another for the benefit of the requesting party. See *In re Puerto Rico Elec. Power Auth.*, 687 F.2d at 506. The court emphasized that parties ordinarily must finance their own lawsuits, subject to the power of a district court under Rule 26(c) to allocate “special attendant costs” that impose an undue burden or expense. See *id.* at 507-08. The district court’s order was premised on the court’s power to require that “data compilations” be produced in a reasonably usable form, see Fed. R. Civ. P. 34(a), but the appellate court determined that this provision was limited to computerized data which could be presented only by use of a machine controlled solely by the

responding party. See *id.* at 508-09.

The court in *Puerto Rico Elec. Power Auth.* also noted that translation expenses may ultimately be recovered by a prevailing party at the end of a case. See *id.* at 506. In that regard, the court relied on the federal statute identifying recoverable costs, which includes “compensation of interpreters.” See 28 U.S.C. § 1920(6) (2006); see also Fed. R. Civ. P. 54(d) (allowing recovery of costs in civil actions); cf. NRS 18.005(6) (2009) (recoverable costs include “[r]easonable fees of necessary interpreters”). Other federal appellate courts have agreed that translation expenses are recoverable under this statute. See *Taniguchi v. Kan Pac. Saipan, Ltd.*, 633 F.3d 1218, 1220-22 (9th Cir. 2011); *BDT Products, Inc. v. Lexmark Int’l, Inc.*, 405 F.3d 415, 419 (6th Cir. 2005); *Quy v. Air Am., Inc.*, 667 F.2d 1059, 1065 (D.C. Cir. 1981); see also *Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 713 F.2d 128, 133 (5th Cir. 1983) (translation costs should be awarded only if necessarily incurred, and court “may choose to assess the cost of translating only titles and subtitles of all discovered documents plus the cost of translations of those documents which, based upon their titles, appear to be relevant to the litigation”). However, one federal appellate court recently determined that the expense of translating documents is not recoverable under 28 U.S.C. § 1920(6), essentially reasoning that translators are not encompassed by the term “interpreters.” See *Extra Equipamentos E Exportação Ltda. v. Case Corp.*, 541 F.3d 719, 727-28 (7th Cir. 2008).

In re Fialuridine (FIAU) Prods. Liab. Litig., 163 F.R.D. 386 (D.D.C. 1995), presented an interesting twist on this issue. In that case, plaintiffs served defendant with a request for documents, and defendants

found that the requested documents existed only in Italian, German, Japanese, and French. But plaintiffs did not request a translation by defendant; rather, defendant filed a motion for protective order requiring plaintiffs to reimburse it for the cost of “formally” translating the responsive documents prior to production. Defendant argued that before requested documents could be produced, they must be reviewed for privileged and proprietary information, and they therefore must be translated. But the court rejected the notion that plaintiffs’ request was actually a veiled attempt to shift the cost of translation onto defendant:

Plaintiffs do not now move to require [defendant] Lilly to produce translated documents, nor can Lilly convincingly argue that the only way to sanitize the documents is to first formally translate them at an excessive cost. Granting Lilly’s motion would allow any party producing foreign documents to shift a potentially enormous economic burden onto the requesting party when it is unclear that any party actually needs to incur that cost. To be sure, before plaintiffs could use any of the documents in this litigation, they must be formally translated. However, not all the documents may be used. Plaintiffs may have access to any number

of people who, for far less cost, could go through the documents and determine which ones contain useful information . . . [P]laintiffs do not request translated documents and Lilly cannot demonstrate that formal translation is a necessary preliminary step before it can produce the documents . . .

FIAU Prods. Liab. Litig., 163 F.R.D. at 388 (footnote omitted). The court observed that defendant, as the party who created the documents in a foreign language, would have better access to people who could review the documents for privileged and proprietary information. *See id.* at 388 n.3. Moreover, since translation was not necessary, defendant could not persuasively argue that plaintiffs’ request imposed an undue burden or expense for purposes of Rule 26(c). *See id.* at 388. In any event, if defendant were to incur translation expenses prior to producing these documents, it presumably could recover those costs at the conclusion of the litigation, assuming that it were the prevailing party. *See id.* at 388-89.

Another interesting variant on this issue is found in *Sungjin Fo-Ma, Inc., v. Chainworks, Inc.*, Civil Action No. 08-CV-12393, 2009 WL 2022308 (E.D. Mich. Jul. 8, 2009). In that case, defendant served plaintiff with interrogatories. In responding to three interrogatories, plaintiff relied on the option to produce business records under Rule 33(d), and defendant argued that plaintiff’s use of this procedure was improper. In the event, the court refused to allow plaintiff to avail itself of that procedure, in part because plaintiff did not specify the documents that were responsive to a particular subsection or other portion of defendant’s interrogatories. *See Sungjin Fo-Ma*, 2009 WL 2022308, at *4. The court also noted that in one part of its response, plaintiff referred defendant to two boxes of invoices that were written in Korean. But the Rule 33(d) procedure is not available unless the burden of deriving the information or ascertaining the answer is substantially the same for both sides. In that regard, the court found that “Plaintiff can readily refer to the documents and extract the information necessary to provide an English language answer to Defendant’s interrogatories,” rejecting plaintiff’s argument that no employee had the language skills necessary to produce complete English translations of the

documents without great burden. *See id.* at *5. On the other hand, “[t]he burden on Defendant would be great if Defendant has to translate each document, assuming that some part of some of the documents is responsive to an as yet unidentified subpart of each of these three interrogatories.” *See id.*; *see also E&J Gallo Winery v. Cantine Rallo, S.p.A.*, No. 1:04cv5153 OWW DLB, 2006 WL 3251830, at *5 (E.D. Cal. Nov. 8, 2006) (under Rule 33(d), defendant had duty “to provide documents from which the response to the interrogatory is clearly ascertainable,” and “[r]eferencing documents written in a foreign language does not completely fulfill this duty”).

An essentially identical analysis applies when a party seeks to recover the expense associated with retaining an interpreter for a deposition. In *East Boston Ecumenical Cmty. Council, Inc. v. Mastrorillo*, 124 F.R.D. 14 (D. Mass. 1989), plaintiffs asserted that they did not speak English, a claim doubted by defendants. The district court ruled that defendants were obligated to bear the initial cost of having their questions translated into plaintiffs’ native language and having plaintiffs’ answers translated into English. *See Mastrorillo*, 124 F.R.D. at 15. If defendants were able to establish that interpreters were not necessary, then the Court could require plaintiffs to reimburse defendants immediately. Otherwise, this expense could be taxed in defendants’ favor, if they prevailed on the merits. *See id.*; *accord Dahn World Co., Ltd. v. Chung*, No. Civil Action No. RWT 06-2170, 2009 WL 277603, at *3 (D. Md. Feb. 5, 2009). With regard to interpreters, practitioners might wish to note that Nevada district courts have both inherent and express authority to appoint interpreters in civil actions in appropriate circumstances, and to direct one or both of the parties to pay the initial cost. *See Caballero v. District Court*, 123 Nev. 316, 321-25, 167 P.3d 415, 418-21 (2007); *see also* NRCPC 43(d). In addition, this expense is a recoverable item of costs. *See* NRS 18.005(6) (2009); NRCPC 43(d).

Wes Ayres is Discovery Commissioner for the Second Judicial District Court. His columns are online and searchable at wcbarr.org.



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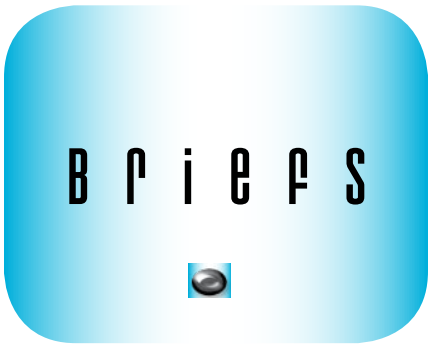
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Community Champions Recognized by Washoe County Public Defender's Office

On June 10th, Washoe County Public Defender Jeremy Bosler will acknowledge three Community Champions who have supported change, systemically and on a personal level which benefit real people who live, work and sometimes struggle in our community. This year the recipients are recognized for their work with the mentally ill: Sheriff Michael Haley, Officer Patrick O'Bryan and Jan Budetti, M.S.W.

A little background on the world that these Community Champions share: Nationally more Americans receive mental health treatment in prisons and jails than hospitals or treatment centers. The one institution that can never refuse anybody is jail. Traditionally law enforcement in our community only had the jail option because officers were not trained on other resources, even though law enforcement has always been the front line in dealing with people in crisis. All of that changed in 2004 when Reno Police Officers Patrick O'Bryan and Steve Johns attended a meeting of judges, prosecutors, law enforcement, defense attorneys and administrators. They described a training program for officers with the goal of implementing more effective ways of responding to citizens in crisis, especially the mentally ill, by collaborating and utilizing community resources which could ultimately stabilize the person and save unnecessary incarcerations. The first Crisis Intervention Training (C.I.T.) training was organized in 2004. Since then nearly 400 sworn officers and paramedics have been trained on effective interventions with persons in crisis.

Officer O'Bryan responds to service calls with a social worker. No call is

routine, some involve trauma, suicidality or a chronically mentally ill individual in distress. Last fall, Officer O'Bryan got a very unusual call to the Wal-Mart shooting scene where he successfully negotiated a peaceful resolution.

Sheriff Michael Haley's leadership in the area of inmate assistance and programs for homeless inmates directly benefits mentally ill individuals while incarcerated and upon their release. Sheriff Haley also supports C.I.T. training for his deputies and hundreds have been trained. Sheriff Haley's commitment to collaboration with agencies and courts who serve mentally ill persons saves thousands of days of incarceration with a direct cost savings to the community.

Jan Budetti is a social worker on the mental health unit at Washoe County

Detention Center, Housing Unit 3 where mentally ill inmates are assigned. Jan does not wear a uniform like the other Champions, she is a civilian employee. Her clients are often intimidated and too ill to make their needs known. She helps them obtain assessments for necessary psychotropic medications, coordinate with Mental Health Court, develop safe discharge plans for return to the community and assists them in organizing applications for basic services. Despite their severe circumstances, Ms. Budetti sees each person on the brink of a new beginning and an opportunity for them to succeed.

Community Champion awards will be presented at the June 10th Washoe County Bar luncheon by Jeremy Bosler, Washoe County Public Defender.

Silverman, Decaria & Kattelman, Chtd.

is pleased to announce that

Alexander C. Morey ('08)

is an Associate with our law firm.

Mr. Morey is a graduate of Gonzaga University and the Northwestern School of Law at Lewis and Clark College.

He externed for the Honorable Valerie Cooke, magistrate judge for the United States District Court for the District of Nevada.

Mr. Morey spent two years as a law clerk to the Honorable Deborah Schumacher in the Second Judicial District Court of Nevada, Washoe County.

We are proud to have Alex as a member of our firm.

Gary R. Silverman • Mary Anne Decaria • Michael V. Kattelman
Dixie R. Grossman • Robert G. Berry, Of Counsel

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Nevada Supreme Court Presents 2011 Legacy of Justice Award to retired Justice Cliff Young

The Nevada Supreme Court presented the 2011 Legacy of Justice Award to Justice Cliff Young on May 3 in Carson City. The award is presented annually to the person or persons within the judicial system whose contributions, innovations, and achievements have resulted in significant improvements in the justice system, and have benefitted the citizens of Nevada. The award presentation helped kick off the Court's Law Day events.



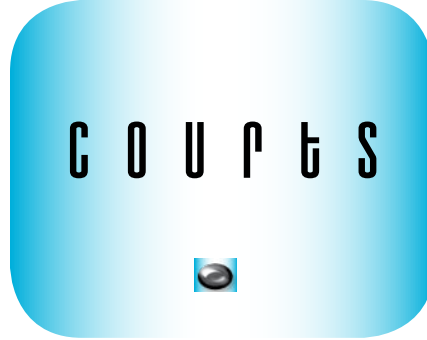
The first Legacy of Justice Award, in 2009, was presented to a pioneer in judicial progress—Justice Robert E. Rose. In 2010, the award went to co-recipients Clark County District Judge Jack Lehman and Washoe County District Judge Peter Breen for their efforts to establish Nevada's first two Drug Courts in the early 1990s.

This year, Justice Young is being honored for his vision and efforts to streamline Nevada's justice system.

Justice Young, a Lovelock, Nevada native, served for 18 years on the Supreme Court before retiring at the end of 2002. He was one of the creators of the criminal appeal "Fast Track" program and was a driving force behind the highly successful Nevada Court Annexed Arbitration Program and Supreme Court Settlement Program.

Before joining the court, Justice Young served two terms as a United States Congressman and 14 years as a Nevada State Senator. The federal courthouse in Reno was named for him. As a state senator, he worked to expand the state park system. Many of today's state parks are a result of his efforts.

Justice Young was a veteran of World War II, serving two years in Europe as an officer in the U.S. Army's 103rd Infantry Division. He is a 1949 graduate of Harvard Law School.



Reno Justice Court Wins Star Award 2011

The Nevada Association of Court Executives presented its initial Star Award to Reno Justice Court. Court Administrator Matt Fisk said that the Star Award is a new award this year.

The Award recognized that the Reno Justice Court has gone through many challenging changes over recent years including a new court administrator, four out of five new judges, a huge case management system implementation, business process reengineering and drastic changes in their operating budget. Remarkably, the court has remained stable and continued to make progress in several areas.

Rather than just be in survival mode, the Reno Justice Court has continued to make positive progress in areas such as:

- Business process streamlining
- Technology
- Collections
- Employee morale

The last bullet point is critical: Throughout all of these changes, court administration has included staff in the decision making process and encouraged them to be part of the solutions. Staff, which constitutes 90% of the court's budget, has been consistently involved in creative and innovative solutions and therefore the Reno Justice Court has not only survived so many dramatic changes, but has thrived in many areas.

FEDERAL CJA PANEL APPLICATIONS

The Clerk of the Court will accept applications for appointments of new Federal Criminal Justice Act (CJA) Panel attorneys (appointment of counsel for indigent defendants) for the Las Vegas Office. A panel selection committee, chaired by Magistrate Judge Peggy Leen in Las Vegas will be making recommendations to the Court for the Fiscal Year 2012 panel. All persons interested must submit an application to Lance S. Wilson, Clerk of Court, by **July 15, 2011**. Attorneys applying for the Appeal panel **must** also submit a writing sample. Appointments for the new panel will be effective October 1, 2011. Those interested in being a Panel Attorney may pick up blank applications at the U.S. District Court Clerk's office or may request one via E-mail at or Applicants must be members in good standing of the bar of the Federal Court and have demonstrated experience in, and knowledge of, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the Federal Sentencing Guidelines. Attorneys on the CJA Panel also must have demonstrated an interest in providing criminal defense services and a reputation for competent and vigorous representation. Members of the panel are required to participate in 6 hours of training in federal criminal practice, with at least 3 of the 6 hours on the Federal Sentencing Guidelines, per year which shall be provided through the Federal Public Defender's Office or other court approved provider of Continuing Legal Education.

Counsel who do not have Federal Criminal Court experience may wish to apply for the Mentor Program. Counsel may apply for the Mentor Program by completing the CJA Panel Application and noting on the top right corner "Mentor Program."

Please see late-breaking court announcements page 19

Just as The Writ went to press, WCBA received announcements from First Judicial District Court, Second Judicial District Court, Reno Municipal Court and Sparks Justice Court. Announcements are noted on page 19

Judge Edward C. Reed, Jr. Awarded Distinguished Nevadan Award

The University of Nevada, Reno awarded Judge Edward C. Reed, Jr. the Distinguished Nevadan Award at its Advanced Degree Commencement and reception on Friday, May 13. The nomination noted Judge Reed's impressive career in Nevada. President Jimmy Carter appointed Judge Reed to the United States District Court for the District of Nevada on September 26, 1979. He has served on the federal bench with distinction since 1979. He was Chief Judge of the District of Nevada for many years (1986-1992) and served as acting Chief Judge for the District (1983 to 1986). One of a handful of federal judges who, in their 80's still maintain a full caseload, Judge Reed at age 86 continues to sit both in Reno and Las Vegas. Judge Reed is recognized by his peers as being one of the brightest and hardest working judges in the state.

Prior to being appointed to the District Court and while in private practice, he was elected four times to the Washoe County School Board, serving as a trustee of the school district for 16 years. He was elected President of the School Board during much of his tenure on the Board. In 1973, the Washoe County School District named its new high school in his honor, the Edward C. Reed, Jr., High School in Sparks, Nevada.

Judge Reed served in WW II as a staff sergeant in both the Southwest Pacific and Europe (Judge Reed was a German prisoner of war in 1945).

While at the University of Nevada, Judge Reed—who was born in Mason, Nevada, but was reared in Reno—was president of the Alpha Tau Omega fraternity and was inducted into Phi Kappa Phi scholastic organization. He played on Nevada's famous basketball team, which in 1948 beat St. John's University at Madison Square Garden. Judge Reed also played on the University's tennis team and later was the periodic Reno Singles, Doubles and Mixed Doubles tennis champion (1951 through 1965).

Judge Reed has served on various community and professional boards, including the 1977-78 Citizens Advisory

Committee for the Washoe County School Bond issue among many others. While in private practice Judge Reed served as attorney for numerous charitable organizations, including the Girl Scouts of America; University of Nevada Agricultural Foundation; Nevada School Administrators Association; Nevada Congress of Parents and Teachers. He also served as Chairman of the Governor's School Survey Committee (1958-1961).

Responding to Judge Reed's award, Judge Brent Adams said: "Dollar for dollar Judge Reed is the best public service bargain in the United States. His distinguished career as a United States District Judge was followed by over 17 years as a senior judge. Even today he is traveling regularly to Las Vegas and serving full time with a substantial caseload. Judge Reed is the gold standard for integrity, fairness and competence in all he does. That's why he's revered by every lawyer and judge I know."

WCBA Past President Gayle Kern described her clerkship with Judge Reed this way: "I had the privilege of being Judge Reed's first female law clerk and treasure my two years with him as being the most intellectually stimulating and rewarding of my career. He started each day by chatting with me and ended with the words 'We are here to do justice.' Truly, our day's work began with the reminder that we must always embody the concept of moral

rightness based on ethics, rationality, law, fairness, and equity. He is a great man."

U.S. District Court Judge Larry Hicks considers Judge Reed to be one of the finest judges and persons he has ever known. "After thirty-two years on the Bench, he remains one of our brightest and most hardworking judges. Moreover, what this man has given to our community, our state and our government in the way of selfless and effective public service has to be a source of unlimited inspiration and pride for every Nevadan."

Judge Patrick Flanagan, wrote: "Judge Reed was appointed by President Carter upon the recommendation of a Merit Selection Committee. It was the first (and only) Merit Selection process for a U.S. District Judge in Nevada's history. Shortly after he took the bench he was thrust into the middle of the government's negotiations with Joe Conforte who was trying to bargain away a prison sentence in exchange for testimony against then-U.S. District Judge Harry Claiborne. Despite the government's strenuous arguments in support of Conforte's request to reduce his prison sentence, Judge Reed ruled the motion was untimely and rejected Conforte's deal with the government. Judicial integrity, untiring patience, fairness and a faithful allegiance to the Rule of Law are the hallmarks of Judge Reed's career. Nevada should be justly proud of its native-born son."

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J U D I C I A L E T H I C S

Hon. David Hardy, Second Judicial District Court, Department 15

“A judge’s conduct may be judicially imprudent, even if it is legally defensible.”¹

I have become my father. I do not understand my children’s music, I can no longer sleep past 6:00 a.m., and I know nothing about Facebook. I am not bothered by the first two but I sometimes wonder if I should join the Facebook phenomenon. Facebook announced in July, 2010 that it had 500 million users, which was double the number of its users in 2009. At this rate of growth I may soon be the last person on earth without a Facebook account.

An in-house Facebook attorney was the featured speaker at the monthly bar luncheon in May. While he talked about social media as a constantly shifting and increasing influence in our lives, I just wondered if Facebook was an ethical minefield for judges. I knew social media provided a constant supply of evidence in family-centered disputes. A quick survey of other states revealed that judges should be careful about their journeys into the virtual world. A few examples are instructive.

Alex Kozinski is the Chief Judge of the Ninth Circuit Court of Appeals. He was appointed to the Circuit Court when he was 35 years of age. A conservative who emigrated from Romania at age 12, a Reagan Administration protégé, he was introduced to my law school in 1992 as a sure bet for the U.S. Supreme Court.

In 2008, the *Los Angeles Times* published an article entitled “9th Circuit’s Chief Judge Posted Sexually Explicit Matter on His Website.”² The material was graphic and disgusting. Even Judge Kozinski described the material as “highly offensive,” “gross,” “demeaning” and with “no redeeming value.”³ Coincidentally, the *Times* ran the story when Judge Kozinski was sitting by designation as a district

judge in an obscenity trial. He declared a mistrial and reported himself for a discipline investigation.⁴ A three-judge discipline committee admonished Judge Kozinski, noting among other things, that “[p]ictures and commentary on sites which might be of questionable taste, but otherwise acceptable for public, may be inappropriate for judges.”⁵

A newspaper blogger in Ohio using the pseudonym “lawmiss” posted more than 80 opinionated, online comments about a particular judge’s high-profile cases (one was a serial murder prosecution).⁶ The newspaper investigated the identity of “lawmiss” because the comments revealed a high probability of insider information.⁷ The newspaper discovered the online comments came from the presiding judge’s own computer and personal email account.⁸

The judge is African-American and some of the comments were racially insensitive.⁹ One entry reads: “If a black guy had massacred five people then he would’ve received the death penalty. A white guy does it and he gets a pat on the hand. The jury didn’t care about the victims. They were set to cut him loose from day one. All of them ought to be ashamed.” Another comment reads: “[A named attorney] did a disservice to his client. If only he could shut his Amos and Andy style mouth. What makes him think that is [sic] he insults and acts like a buffon [sic] that it will cause the judge to think and see it his way. There are so many lawyers that could’ve done a much better job. This was not a tough case, folks. She should’ve hired a lawyer with the experience to truly handle her needs. Amos and Andy, shuffling around did not do it.”¹⁰

When the newspaper confronted the

judge about the comments coming from her personal computer and email account the judge denied her involvement. The judge’s 23-year-old daughter later came forward and suggested she had posted “quite a few, more than five” of the 80 comments. The judge remains under a dark cloud of suspicion.¹¹

“MySpace, Twitter and Facebook present ample opportunities for defendants, jurors, adjudicated offenders and even attorneys to blab, brag and leave hints about their activities, legal and otherwise.”¹² Facebook also creates its own unique risks to judges. A New York judge was transferred to a misdemeanor docket for undisclosed reasons.¹³ Some suggested he was transferred because he constantly posted details of his personal and professional life on Facebook.¹⁴ He updated his Facebook account while on the bench and even took a picture of his crowded courtroom and posted it on Facebook. One anonymous source said: “It’s all childish. I don’t think it was meant to harm anybody. The man was on Facebook 24 hours a day. If you were on Facebook, you saw what he was doing all the time.”¹⁵

A North Carolina judge was publically reprimanded for Facebook-related activities and independently investigating a matter before him. During trial he added one of the attorneys as a friend and then posted comments about the trial on the lawyer’s Facebook page.¹⁶ He read what others were posting about the trial. He also used the internet to independently research the wife’s photography business. He enjoyed the wife’s on-line poetic postings and even modified and recited one poem during his oral pronouncement.¹⁷

A judge in Michigan uses social networkingsites to keep track of adjudicated

offenders under his jurisdiction.¹⁸ The judge takes action when he discovers probation violations. “In one case . . . the probationer had a Facebook page and we found out that she posted a picture of her smoking a blunt—a cigar hollowed out and filled with marijuana.” This judge (and others) should be careful about this off-bench activity. In a similar manner, the Oregon Supreme Court censured a judge who witnessed an alleged probation violation and ordered the offender into court the following week.¹⁹

Neither the Nevada Judicial Discipline Commission nor the Nevada Standing Committee on Judicial Ethics & Unfair Election Practices has considered a judge’s Facebook behavior. Other states have considered the issue but reached inconsistent results.

In Florida, a judge may post comments and other material on the judge’s own social networking site if the posted material does not otherwise violate the Code of Conduct. But a judge may not add lawyers who appear before the judge as “friends,” nor may a judge permit a lawyer to add the judge as a friend.²⁰ The Florida Supreme Court Judicial Ethics Advisory Committee noted a purpose of social networking is to identify friends and be identified as a friend. A judge may lend the prestige of judicial office to advance the private interests of others by “friending” lawyers with whom the judge has a professional relationship. “By proclaiming a virtual relationship a judge may also convey or permit others to convey the impression that they are in a special position to influence the judge.”²¹

The Florida Advisory Committee acknowledged that judges cannot entirely isolate themselves from their communities and friendships. But the commentary to the Code provides that, “[i]rresponsible or improper conduct by judges erodes public confidence in the judiciary. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge’s conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.”²²

California adopted a similar approach when it concluded a judge could be a member of an online social networking site and be friends with lawyers who may

appear before the judge.²³ Even though there is no per se prohibition against a judge’s Facebook participation, “it is important to stress that a judge’s interaction with attorneys who may appear before the judge will very often create appearances that would violate the Canons.”²⁴ If a judge chooses to have a social media presence, the judge may not be friends with any lawyer who has a case actually pending before the judge. When this occurs, all activity must stop and the judge must “unfriend” the lawyer.²⁵

In Kentucky a judge can be “friends” on social networking sites with lawyers, social workers, and law enforcement who may appear in court. While a judge should be mindful of actual and apparent improprieties, and avoid all behavior that casts doubt upon the integrity of the judiciary, a “complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.”²⁶

The Ethics Committee of the Kentucky Judiciary concluded the words “friend,” “fan,” and “follower” are terms of art used in the virtual world and not used in the ordinary sense of the words.²⁷ They do not reasonably convey to others an impression that such persons are in a special position to influence the judge. Judges enjoy many varied relationships in the real world. “Certainly, judges have many extra-judicial relationships, connections and interactions with any number of persons, lawyers or otherwise, who may have business before the judge and the court over which he or she presides. These relationship may range from mere familiarity, to acquaintance, to close, intimate friendship, to marriage. Not every one of these relationships necessitates a judge’s recusal from a case.”²⁸

Even though judges may be virtual friends with lawyers, the Kentucky Committee felt compelled to note social networking is a dangerous activity for judges that should be undertaken with “extreme caution.”²⁹ Judges should not participate in the same manner as members of the general public.

While a New York judge may participate in social media, the New York Advisory Committee on Judicial Ethics concluded:

The judge also should be mindful of the appearance created when he/she establishes a connection with an attorney

or anyone else while appearing in the judge’s court through a social network. In some ways, this is no different from adding the person’s contact information into the judge’s Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge’s friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a “close social relationship” requiring disclosure and/or recusal.³⁰

I keep a note on my desk that reads “no friends-no enemies.” The note is intended to remind me of a judge’s personal detachment from others within the legal community. I do not know if I will ever join Facebook. If I do, however, I will be mindful of what others have cautioned: Facebook should not 1) be an instrument to cast reasonable doubt on the judge’s impartiality, 2) undermine the judge’s independence, integrity, or impartiality, 3) demean the judicial office, 4) interfere with the proper performance of judicial duties, or 5) lead to frequent disqualification.

NOTES

¹ In re: Complaint of Judicial Misconduct, 575 F.3d 279 (3rd Cir. 2009).

² Scott Glover, *9th Circuit’s Chief Judge Posted Sexually Explicit Matter on his Website*, L.A. Times, June 11, 2008.

³ In re: *Complaint of Judicial Misconduct*, supra note 1, at 33.

⁴ Glover, supra note 2.

⁵ In re: *Complaint of Judicial Misconduct*, supra note 1 at 27.

⁶ James F. McCarty, *Anonymous Online Comments Are Linked to the Personal E-mail Account of Cuyahoga County Common Pleas Judge Shirley Strickland Saffold*, Cleveland Plain Dealer, March 16, 2010.

⁷ Henry J. Gomez, *Plain Dealer Sparks Ethical Debate by Unmasking Anonymous Cleveland.com Poster*, Cleveland Plain Dealer, March 26, 2010.

⁸ *Id.*

Fotnotes cont. p. 18.

This is number 45 in a series of essays on judicial ethics authored by Judge David Hardy, Second Judicial District Court, Dept. 15.



APPELLATE BRIEFS

Carla, B. Higginbotham

The housing crisis and recession have severely impacted Nevada. Consequently, our state has seen an explosion in bankruptcy filings, home foreclosures, and civil lawsuits alleging various forms of mortgage fraud. In May, the Nevada Supreme Court published two opinions in cases emanating from these very types of issues—bankruptcy and alleged mortgage fraud.

First, in *In re Sandoval*, 126 Nev. Adv. Op. 15 (May 13, 2010), the Nevada Supreme Court resolved a certified question from the United States Bankruptcy Court related to the application of issue preclusion under Nevada law. In the bankruptcy proceeding, the debtor sought to discharge a debt arising from a default judgment entered against him in Nevada state court. The default judgment was entered after service was made by publication and the debtor failed to answer. The judgment creditor objected claiming that the underlying

default judgment provided issue preclusion on the question of dischargeability of the judgment.

Under Nevada law, “issue preclusion only applies to issues that were actually and necessarily litigated and on which there is a final decision on the merits.” *Id.* at p. 4 (emphasis in original). Thus, the Nevada Supreme Court was required to resolve whether a default judgment entered after the defendant failed to answer would be considered “actually and necessarily litigated” for purposes of issue preclusion.

After conducting an extensive review of the law from other jurisdictions, the Nevada Supreme Court followed the majority rule and held that issues resolved by a default judgment entered after a defendant failed to answer the complaint were not actually and necessarily litigated and did not have issue preclusive effect in subsequent litigation. *Id.* at 7. It is critical to note, however, that the Nevada Supreme Court expressly left open the question of whether other types of default judgments, i.e., defaults entered after a defendant answered and participated in the litigation, would be treated in the same way. Therefore, it is unclear if issue preclusion applies to other types of default judgments.

Next, in *Betsinger v. D.R. Horton, Inc.*, 126 Nev. Adv. Op. 17 (May 27, 2010), plaintiff filed a civil action claiming that various defendants committed fraud and violated Chapter 598 of Nevada’s Revised Statutes, also known as Nevada’s Deceptive Practices Act, after “baiting” and “switching” the terms of a mortgage loan. Following a jury trial, a verdict was entered against the defendants for fraud and deceptive trade practices. The jury awarded plaintiff actual damages, emotional distress damages, and punitive damages.

The defendants appealed. Primarily, defendants argued that the statutory deceptive trade practices claims were based upon allegations of fraud and were required

to be proven by “clear and convincing evidence” – not by a preponderance of the evidence as partially instructed by the district court. The Nevada Supreme Court rejected this argument concluding that claims for deceptive trade practices made pursuant to Chapter 598 “must *only* be proven by a preponderance of the evidence.” *Id.* at p. 7 (emphasis added).

Second, defendants “tangentially” argued that Nevada’s Deceptive Trade Practices Act does not apply to deceptive sales related to real property. *Id.* at p. 7, n.4. The Nevada Supreme Court, however, squarely rejected this narrow interpretation of Chapter 598 and made clear that these statutory provisions do apply to deceptive practices related to the sale of real property.

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What Great Writers Can Teach Lawyers and Judges: Wisdom from Plato to Mark Twain to Stephen King (Part I)

by Douglas E. Abrams *

“Writing,” said lawyer Abraham Lincoln in 1859, is “the great invention of the world.”¹ From ancient times, the writer’s craft has captivated leading figures in literature, non-lawyers who are remembered most often for what they wrote, and not for what they said about how to write. Their commentary about the writing process, however, seems unsurprising because facility with the written language brought recognition in their day and later in history.

Like most other close analogies, analogies between literature and legal writing may be imperfect at their edges. “Literature is not the goal of lawyers,” wrote Justice Felix Frankfurter nearly eighty years ago, “though they occasionally attain it.”² “The law,” said Justice Oliver Wendell Holmes even earlier, “is not the place for the artist or the poet.”³

Despite some imperfections across disciplines, advice from well-known fiction and non-fiction writers can serve lawyers and judges well because law, in its essence, is a literary profession heavily dependent on the written word. There are only two types of writing – good writing and bad writing. As poet (and Massachusetts Bar member) Archibald MacLeish recognized, good legal writing is simply good writing about a legal subject.⁴ “[L]awyers would be better off,” said MacLeish, “if they stopped thinking of the language of the law as a different language and realized that the art of writing for legal purposes is in no way distinguishable from the art of writing for any other purpose.”⁵

As Justices Frankfurter and Holmes intimated, the tone and cadence of non-lawyer writers might vary from those of professionals who write in the law. Variance aside, however, the core aim of

any writer, lawyers and judges included, remains constant – to convey ideas through precise, concise, simple, and clear expression.⁶

This two-part article presents instruction from master non-lawyer writers about precision and conciseness. In the next issue of *Precedent*, Part II will present their instruction about simplicity and clarity.

PRECISION

1. “The difference between the almost right word and right word is . . . the difference between the lightning and the lightning bug” – Mark Twain.⁷

When we read personal messages from acquaintances or newspaper columns by writers friendly to our point of view, tolerance may lead us to recast inartful words or sentences in our minds, tacit collaboration that may help cure imprecision. “I know what they really meant to say,” we think silently to ourselves, extending a helping hand even if the words on the page did not quite say it.

Readers, however, normally do not throw lawyers and judges such lifelines. Quite the contrary. Legal writing typically faces a “hostile audience,” a readership that “will do its best to find the weaknesses in the prose, even perhaps to find ways of turning the words against their intended meaning.”⁸ Judges and law clerks dissect briefs to test arguments, but only after opponents have tried to make the arguments mean something the writers did not intend. Advocates strain to distinguish language that complicates an appeal or creates a troublesome precedent later on. Parties seeking to evade contractual obligations seek loopholes left by a paragraph, a clause, or even a single

word.⁹

The adversary system of civil and criminal justice induces lawyers and judges to strive for the right words and phrases the first time, even when extra care means reviewing drafts line-by-line. Legal writers beset later by a hostile reader’s parsing cannot always rely on a second chance to achieve precision.

2. “The words in prose ought to express the intended meaning, and nothing more” -- Samuel Taylor Coleridge.¹⁰

Experienced litigators seek to avoid the predicament of having to ask the court to excuse their missteps by doing them a favor. Lawyers weaken the client’s cause when, for example, they miss a deadline, file the wrong paper, or overlook an argument and must summon the court’s discretion for an extension of time or permission to amend. Lawyers similarly weaken the cause when they must summon the generosity of judges or adversaries to do them a favor by acknowledging what the brief, agreement or other filing “really meant to say.”

France’s greatest short-story writer Guy de Maupassant was no lawyer, but his advice can remind lawyers that imprecise or otherwise inapt words can affect legal rights and obligations. “Whatever you want to say,” he asserted, “there is only one word to express it, only one verb to give it movement, only one adjective to qualify it. You must search for that word, that verb, that adjective, and never be content with an approximation, never resort to tricks, even clever ones, and never have recourse to verbal sleight-of-hand to avoid a difficulty.”¹¹

Maupassant’s directive sets the bar high, perhaps a bit too high because some imprecision is inescapable in language.

Justice Frankfurter, a prolific writer as a Harvard law professor before joining the Supreme Court, was right that “[a]nything that is written may present a problem of meaning” because words “seldom attain[] more than approximate precision.”¹²

Imprecise tools though words may be, they remain tools nonetheless, sometimes the only tools that lawyers or judges have for stating their position or explaining a decision. Achieving the greatest possible precision remains the reason for meticulous writing and careful editing. Lawyering and judging, like politics, often depend on the “art of the possible,”¹³ even as perfection remains unattainable.¹⁴

CONCISENESS

1. “Brevity is the soul of wit,” and “Men of few words are the best men” – William Shakespeare.¹⁵

Perhaps more than any other foundation for precision, preeminent writers often stress conciseness. “Less is more,” said British Victorian poet and playwright Robert Browning, wasting no words.¹⁶ “Brevity is in writing what charity is to all the other virtues,” said British writer and cleric Sydney Smith (1771-1845). “Righteousness is worth nothing without the one, nor authorship without the other.”¹⁷

Journalist and satirist Ambrose Bierce acidly defined “novel” as “[a] short story padded,” and wrote what is probably history’s shortest book review, only nine words: “The covers of this book are too far apart.”¹⁸ One of the world’s greatest short-story writers, Russian Anton Chekhov, understood that “[c]onciseness is the sister of talent.”¹⁹

2. “This report by its very length, defends itself against the risk of being read” – Sir Winston Churchill.²⁰

Conciseness increases the odds that the legal writer will hold the readers’ attention to the finish line. “I want the reader to turn the page and keep on turning to the end,” said Pulitzer Prize winning historian Barbara W. Tuchman. “This is accomplished only when the narrative moves steadily ahead, not when it comes to a weary standstill, overloaded with every item uncovered in the research.”²¹

“There is but one art – to omit!,” said Scottish writer Robert Louis Stevenson, who lamented that, “O if I only knew

how to omit, I would ask no other knowledge.”²²

Churchill, Tuchman and Stevenson accent the point that where the writer can convey the message efficiently in five pages, the writer risks losing the audience by consuming ten. Readers with a choice may not even start a lengthy document, and weary readers may throw in the towel well before the end.

Talented writers succeed best when professional modesty leads them to recognize, as historian David McCullough puts it, “how many distractions the reader has in life today, how many good reasons there are to put the book down.”²³ Distractions in the information age can be personal or professional. Like other Americans, lawyers and judges can choose from thousands of new books each year, plus Internet sources, digital and electronic resources, blogs, and the world’s newspapers and magazines available a mouse-click away. Federal and state judicial dockets have increased faster than population growth for most of the past generation or so, limiting judges’ patience for overwritten submissions.²⁴ Judges may sense when they have read enough of a brief, just as counsel researching precedents may grow bored with an overwritten judicial opinion. Counsel may have no choice but to plod through an opponent’s unwieldy brief or motion papers, or through unnecessarily verbose legislation or administrative regulations or private agreements, though the writer still risks obscuring important points amid the baggage.

Judges, in particular, can appreciate this short verse by Theodor Geisel (“Dr. Seuss”), who wrote for children, but often with an eye toward the adults: “[T]he writer who breeds/ more words than he needs/ is making a chore/ for the reader who reads./ That’s why my belief is/ the briefer the brief is,/ the greater the sigh/ of the reader’s relief is.”²⁵

3. “I have made this [letter] longer, because I have not had the time to make it shorter” – French writer and mathematician Blaise Pascal.²⁶

As any brief writer knows who has ever tried to present an argument within page limits imposed by court rules, achieving brevity without diminished meaning is no easy chore. Without rules or other formal restraints, verbosity can seem the path of

least resistance. British poet, essayist and biographer Samuel Johnson, however, aptly likened “[a] man who uses a great many words to express his meaning” to “a bad marksman who, instead of aiming a single stone at an object, takes up a handful and throws at it in hopes he may hit.”²⁷

Conciseness demands self-discipline and clear thinking, usually through multiple drafts. Achieving brevity can be particularly hard work nowadays because computers may grease the skids for verbosity, but Johnson was right that “[w]hat is written without effort is in general read without pleasure.”²⁸

“Not that the story need be long,” said transcendentalist writer Henry David Thoreau, “but it will take a long time to make it short.”²⁹ Editing by the writer and others remains central, even though lawyers and judges typically write under time pressures (and, in the lawyer’s case, also financial pressures) that might not constrain other writers. “It is not the writing but the rewriting that counts,” said Pulitzer Prize winning novelist Willa Cather.³⁰

Environmentalist Rachel Carson observed that writing is “largely a matter of application and hard work, of writing and rewriting endlessly until you are satisfied that you have said what you want to say as clearly and simply as possible,” a process that meant “many, many revisions” for her.³¹ Novelist Ernest Hemingway believed that “easy writing makes hard reading,”³² and he made no secret that he rewrote the last page of *A Farewell to Arms* 39 times before the words satisfied him.³³

Carson and Hemingway were not the only eminent writers candid enough to acknowledge publicly the inadequacy of their early drafts. “To be a writer,” said Pulitzer Prize winner John Hersey, “is to throw away a great deal, not to be satisfied, to type again, and then again and once more, and over and over.”³⁴

“Half my life is an act of revision; more than half the act is performed with small changes,” wrote novelist and Academy Award winning screenwriter John Irving, who recognizes that writing requires “strict toiling with the language.”³⁵ “I’m not a very good writer, but I’m an excellent rewriter,” reported James A. Michener,³⁶

cont. next page

who could not “recall anything of mine that’s ever been printed in less than three drafts.”³⁷

Dr. Seuss, who wrote for a particularly demanding audience, estimated that “[f]or a 60-page book, I’ll probably write 500 pages. . . . I winnow out.”³⁸ The rewards of winnowing may become apparent only with the finished document. “To get the right word in the right place is a rare achievement,” said Mark Twain, whom novelist William Dean Howells once called “sole, incomparable, the Lincoln of our literature.”³⁹ “To condense the diffused light of a page of thought into the luminous flash of a single sentence, is worthy to rank as a prize composition just by itself,” Twain explained. “Anybody can have ideas—the difficulty is to express them without squandering a quire of paper on an idea that ought to be reduced to one glittering paragraph.”⁴⁰

4. “It is words as with sunbeams—the more condensed, the deeper they burn”—British Romantic poet Robert Southey.⁴¹

Concise, precise writing can be the most direct, and thus the most forceful. “When you wish to instruct, be brief; that men’s minds take in quickly what you say, learn its lesson, and retain it faithfully,” said Roman author, orator and politician Marcus Tullius Cicero. “Every word that is unnecessary only pours over the side of a brimming mind.”⁴²

Eighteenth century British poet Alexander Pope said that “[w]ords are like leaves; and where they most abound, much fruit of sense beneath is rarely found.”⁴³ Pope found “a certain majesty in simplicity”⁴⁴ because wordiness breeds imprecision when underbrush shrouds expression.

Does “less” really mean “less”? Not to writer and Nobel Prize winner Elie Wiesel, who says that “even when you cut, you don’t.”⁴⁵ “Writing is not like painting where you add. . . . Writing is more like a sculpture where you remove.” “Even those pages you remove somehow remain,” says Wiesel, “There is a difference between a book of two hundred pages from the very beginning, and a book of two hundred pages which is the result of an original eight hundred pages. The six hundred pages are there. Only you don’t see them.”⁴⁶

The quest for conciseness nonetheless

may raise a judgment call for lawyers and judges. Justice Joseph Story, one of the most prolific legal writers in the nation’s history, warned that sometimes “[b]revity becomes of itself a source of obscurity.”⁴⁷ Where full exposition of a legal doctrine, argument or agreement requires extended discussion, conciseness for its own sake may actually breed imprecision and compromise the sound administration of justice or the rights of clients.

5. “It wasn’t by accident that the Gettysburg Address was so short. The laws of prose writing are as immutable as those of flight, of mathematics, of physics” – Ernest Hemingway.⁴⁸

“History at its best is vicarious experience,” said leading twentieth century historian Edmund S. Morgan.⁴⁹ Sometimes an historical example can help dispel a writer’s concern that readers might mistake conciseness for weakness. The “less is more” school profits from recounting President Abraham Lincoln’s Gettysburg Address, which he delivered on November 19, 1863 to help dedicate a national cemetery to fallen Civil War soldiers.

Preceding the President to the podium that day was Edward Everett, widely regarded as the greatest American orator of the era, a luminary whose resume included service as U.S. Representative, U.S. Senator, Massachusetts Governor, Minister to Great Britain, Secretary of State, and Harvard University professor and president. After Everett held the podium for more than two hours, Lincoln rose with a masterpiece that took less than two minutes.

Mindful that the nation’s newspaper and magazine readers needed a concise, stirring and readily embraceable rationale for wartime perseverance, Lincoln knew that his audience extended beyond the shadows of the cemetery. Indeed, the greatest praise for the Gettysburg Address came not from the President’s listeners that November day, but from his readers almost immediately. Ralph Waldo Emerson anticipated the verdict of history when he predicted that the President’s “brief speech at Gettysburg will not easily be surpassed by words on any recorded occasion.”⁵⁰ “Perhaps [in] no language, ancient or modern, are any number of words found more touching or eloquent,” echoed abolitionist writer

Harriet Beecher Stowe.⁵¹

Everett knew immediately that his interminable oration had bequeathed nothing memorable. “I should be glad,” he wrote the President the day after the Gettysburg dedication, “if . . . I came as near the central idea of the occasion in two hours, as you did in two minutes.”⁵² “My speech will soon be forgotten, yours never will be,” the prescient Everett told the President, adding “How gladly would I exchange my hundred pages for your twenty lines.”⁵³

6. “Great is the art of beginning, but greater the art is of ending;/ Many a poem is marred by a superfluous verse” – Henry Wadsworth Longfellow.⁵⁴

7. “Many a poem is marred by a superfluous word” – Henry Wadsworth Longfellow.⁵⁵

Conciseness begins with a document’s broad design and overall structure, but extends to choice of individual words. “The most valuable of all talents is that of never using two words when one will do,” said lawyer Thomas Jefferson, who found “[n]o stile of writing . . . so delightful as that which is all pith, which never omits a necessary word, nor uses an unnecessary one.”⁵⁶

British writer H.G. Wells concisely stated the case for conciseness: “I write as straight as I can, just as I walk as straight as I can, because that is the best way to get there.”⁵⁷ British historian and educator Thomas Arnold (1795-1842) introduces Part II of this article, which will begin by discussing Simplicity in the Winter issue of Precedent. “Brevity and simplicity,” Arnold wrote, “are two of the greatest merits which style can have.”⁵⁸

See Endnotes page 16.

Our thanks to the Missouri Bar Association for the right to publish this two-part article which previously appeared in the Missouri Bar’s magazine The Precedent. Part 2 will appear in the July/August edition of the Writ.

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ENDNOTES

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Lawyer in the Library Awards 2010-11

Law Library Board and Staff Thanks Volunteers

Chief Judge and Law Library Board Chair Connie Steinheimer thanked the many volunteers and presented awards to those with over ten years of volunteer service at a luncheon at the Law Library on April 14.

Volunteered five or more times

Muriel Skelly – 14
Dixie Grossman – 11
Victoria Mendoza – 10
Graeme Reid – 10
Tamara Jankovic – 8
Patricia Phair – 9
Kenneth Ching – 6
Richard Williams – 5

Filled-in at the last minute

David O'Mara
Madelyn Shipman
Patricia Phair

Over 10 years continuous volunteering

Bill O'Mara
Leah Wigren
Patricia Phair
Craig Etem
Ian Silverberg
Rick Cornell

Washoe County Law Library recognizes the following volunteers, who gave generously of their time during the past year:

Hon. Harold G. Albright
Hon. Kevin G. Higgins
Hon. Wesley Ayres
Alison Colvin
Barbara Gruenwald
Bruce Lindsay
Bryce Alstead
Craig Etem
David O'Mara
Dixie Grossman
Donald Pope
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Ian Silverberg
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Muriel Skelly
Patricia Phair
Richard Cornell
Richard Williamson
Robert Howey
Ryan Campbell
Ryan Earl
Sara Barry
Sarah Carrasco
Tamara Jankovic
Tim Riley
Victoria Mendoza
William O'Mara

Pictured here are volunteers with ten-plus years of continuous volunteering: l-r, Leah Wigren, Rick Cornell, Patricia Phair, Judge Connie Steinheimer and Bill O'Mara.

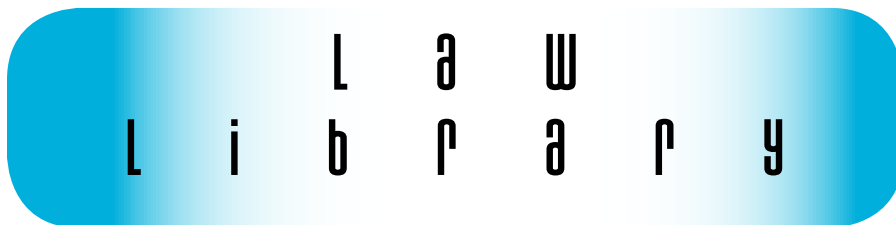


P E O P L E

In Memory – Blain Andrus

R. Blain Andrus, a partner at Woodburn and Wedge, passed away in San Francisco CPMC hospital after a monumental struggle with heart complications. Andrus practiced mining law for 37 years in the western states. Gordon DePaoli, a senior partner at Woodburn and Wedge notes that Blain Andrus graduated from BYU in 1974 and received his J.D. from California Western School of Law in 1977. He was admitted to practice in Utah in 1977 and in Nevada in 1985. Blain joined Woodburn and Wedge in 1995 and became a shareholder in 1997.

He was an avid reader and a prolific writer, having written numerous articles for law reviews and other legal publications. He inspired all of us by his insatiable thirst for knowledge as evidenced by his search to identify the world's first lawyer. That endeavor culminated in the American Bar Association's publication in 2009 of Blain's book entitled *Lawyer: A Brief 5,000 Year History* which begins with an analysis for whether Adam and Eve would have fared better had they been represented by a lawyer, or lawyers. Blain was one of a kind and will be greatly missed by everyone at Woodburn and Wedge.



LIBRARY HOURS

Mon.	8 a.m. - 5 p.m.
Tues- Thurs.	8 a.m. - 7 p.m.
Fri.	8 a.m. - 5 p.m.
Sat.	10 a.m.-5 p.m.
Sun.	Closed

We would like to thank the following attorneys who participated in Lawyer in the Library programs during the month of April: Jeremiah Barlow, Richard Williamson, Mark Liapis, Gary Pakele who volunteered for our Wednesday night

program. We would also like to thank Muriel Skelly, Alison Colvin, William O'Mara, and Alex Morey for volunteering for our Tuesday night program, which is reserved for family law matters.

A special thanks to Patricia Phair, Esq., for presenting the legal seminar *Bankruptcy Law* in April.

Please call Nikki Britt at 328-3250 if you would like to volunteer for our weekly Lawyer in the Library programs, or if you are available to give a seminar. Our seminars are held the 4th Thursday of every month.

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JUNE

8 WCBA Luncheon, 12 noon, Harrah's. WCBA Annual Meeting. Speaker is Michael Sommermeyer, Lead Program Analyst, Nevada Supreme Court AOC and former administrator Clark County Courts. Register online at wcbar.org or call 786-4494. \$25 per person. RSVP by Monday, June 5.

3 0 Young Lawyers Section night at the Reno Aces—Aces v. Salt Lake City Bees, 7:05 p.m. YLS will host a pre-game happy hour (6:00 p.m.) at 250 Lounge in the Freight House District. YLS members can RSVP to Jenny at jsparks@lionelsawyer.com to reserve a FREE ticket. If YLS member would like to bring a non-member guest, send a check for \$5, made payable to the "Young Lawyers Section - Nevada State Bar", to Lionel Sawyer & Collins, Attn: Jenny Sparks, 50 W. Liberty St., Ste., 1100, Reno, NV 89501.

Court Announcements

Second Judicial District Court • Effective July 1, 2011; the subscription fee for electronic filing will be increased to \$300.00 per attorney, per year. To participate in a bench bar committee to provide feedback regarding our eFlex electronic filing system please send an email indicating your willingness to participate to our Court Administration team at: CourtAdmin@washoecourts.us

First Judicial District Court • Civil and family lawyers are asked to provide a self-addressed stamped envelope when requesting conformed copies to be returned to their offices. This action will speed up your request. Questions? Max Cortest, Court Administrator, (775) 887-2121 ext. 30249.

Sparks Justice Court • In order to allow all of our staff to eat lunch every day and to give them time to attend to all of their duties, the Sparks Justice Court will make the following scheduling changes beginning Friday July 1, 2011. See details online at www.washoecounty.us/sjc

Reno Municipal Court • Please be advised that, effective immediately, due to budget cuts, childcare services at the Reno Municipal Court (Camp Laughing Bear) have been suspended indefinitely.

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