



## YLD Perspective

by Glen R. McMurry

# Sending the Elevator Back Down: A Discussion with Raymond J. Dowd on Supporting Younger Attorneys in the FBA

### In September 2010, I had the pleasure of attending

my first Federal Bar Association (FBA) Annual Meeting in New Orleans as the newly elected president of the Dayton Chapter. At 29 years of age, I knew very little about being chapter president and even less about our national organization. My trip to New Orleans was significant for a number of reasons. First, I learned about our national organization and the wealth of resources it offers our chapters. Second, I became involved in the Younger Lawyers Division (YLD), and I met attorneys dedicated to the success of my chapter and the YLD, particularly Ray Dowd, who currently serves as the chair of the Circuit Vice Presidents.

Fast-forward to May 22, 2013. I found myself sitting across the table from Ray in Dayton, Ohio, co-presenting a CLE program on the federal rules of evidence in copyright litigation. The program was part of a series of audio CLE programs that Ray produces for West LegalEdcenter to promote his book *Copyright Litigation Handbook* (Thomson West 2012–13). Admittedly, I was not sure why Ray asked me to participate in his program. Certainly there were more experienced and better-known attorneys in the nation. When I asked Ray why he requested a younger lawyer to present with him in his CLE, his response was simple: “I am sending the elevator back down.” He wanted to open doors for me the way that others had opened doors for him.

That message stuck with me, and as Ray explained in our September 12, 2013, interview, it exemplifies the Federal Bar Association’s goal of helping younger lawyers succeed.

### How did you get involved in the FBA?

I started out writing book reviews for *The Federal Lawyer*. The president of the FBA’s New York Chapter gave me a call and asked me to join the FBA and get involved.

I attended chapter meetings and eventually started attending the FBA midyear meeting in Washington and then the annual convention. Then I started organizing events. The first was an event honoring Judge Robert Carter on the 50th Anniversary of *Brown v. Board of Education*. Since then I have helped organize many

events, including attorney admissions ceremonies at the Second Circuit, an event honoring the U.S. Marshals Service at Federal Hall, and even events at the U.S. Supreme Court honoring Justices Ginsburg, Kagan, and Thomas.

### What positions have you held in the FBA?

I have been a member of the Federal Litigation Section for more than a decade. I also belong to the Intellectual Property Section. When I joined the FBA, I was invited to join the board of the Empire State Chapter. I was then involved in launching the Eastern District of New York Chapter, so we started dividing FBA Chapters to conform to our local judicial districts. Southern District of New York (SDNY) Chief Judge Kimba Wood swore me in as president of the SDNY Chapter.

I eventually ran for circuit vice president and worked my way up as secretary, vice chair, and now chair. Meanwhile I served on the editorial board of *The Federal Lawyer*—Past President Bill Laforge appointed me there—and I was tapped by Past President Ashley Belleau to serve as general counsel of the FBA during her 2010–2011 term. As general counsel, I helped to draft rules for the conduct of FBA national council meetings that have proven very successful in promoting orderly discussion. This fall, I am looking forward to joining the FBA national Board of Directors.

### Why did you stay involved in the FBA?

There are so many bar associations and other potential activities that pull at your attention. In every contact with the FBA, I felt that there were opportunities for leadership and to pursue projects that other bar associations did not present. In other bar associations that I investigated, the predominant culture seemed to be of “shut up and wait your turn.” The FBA, instead, has a national culture that promotes personal initiative and searching open debate. The FBA is thus uniquely open, particularly to younger lawyers pursuing new ideas. If you go to a national meeting with ideas, you are likely to walk away with a committee membership and a task. This contrasts with other organizations that often perceive

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*Glen R. McMurry is a litigation attorney at the law firm of Dungan & LeFevre Co. LPA in Troy, Ohio. His practice includes business and civil litigation. Mr. McMurry is the current president of the FBA’s Dayton, Ohio, Chapter and is the Sixth Circuit liaison on the FBA Younger Lawyers Division’s national board of directors, also serving as the YLD’s publications editor. He may be reached at [gmcmmurry@dunganattorney.com](mailto:gmcmmurry@dunganattorney.com).*

new ideas from younger people as threatening or a challenge to their turf.

**What was your first contact with the Younger Lawyers Division? How have you worked with the YLD over time?**

In attending national meetings, I was struck by two events in particular. Each year at our midyear meeting, there is a moot court competition held at the Court of Appeals for the Armed Services. At each annual convention, there is a luncheon honoring younger lawyers who contribute to the profession. These events were truly extraordinary for the talent and organization that I witnessed, and both were organized by the Younger Lawyers Division of the FBA.

As chair of the Circuit Vice Presidents, I developed a close working relationship with YLD Chairs Matt Moschella and Kelly Scalise. Initially, the Circuit Vice Presidents helped the YLD reach out to FBA Chapters to assist chapters in launching Younger Lawyers Committees. Since the FBA has more than 85 chapters, each of which has an autonomous local culture, this was no easy task. Some chapters have tremendous resources, some are thinly financed. Some are small, others are large. The Circuit Vice Presidents helped the YLD gain footholds in many chapters that had previously not responded positively to creating a local Younger Lawyers Committee or organizing activities focusing on younger lawyers.

Following this initial cooperation, the Circuit Vice Presidents enlisted the YLD's help in getting FBA chapters to appoint membership chairs and to adopt the membership best practices set forth by the FBA's Board of Directors. The YLD appointed "circuit liaisons" and tasked them with helping circuit vice presidents with membership in that circuit. Thanks to the YLD Circuit Liaisons, we were able to dramatically improve compliance with membership best practices.

The YLD has been helpful to the circuit vice presidents in many other ways. When the Circuit Vice Presidents is launching a new chapter (we are planning launches in Maine, North Dakota, St. Louis, New Hampshire, and Vermont), the YLD has really assisted us in finding charter members in those new territories. Sometimes a chapter will become inoperative (for any number of reasons): the YLD has been a great source of help in staging relaunches. With respect to activities of the Government Relations Committee, the YLD has been a great help, particularly on the issue of sequestration.

**What is the importance of the Younger Lawyers Division and Law Student Division to the overall strength of the Federal Bar Association?**

I am not aware of any other association that gives as much power to younger lawyers as the FBA does. Three seats on the FBA Board of Directors must be elected from the YLD membership. Additionally, the chair of the YLD holds a nonvoting *ex officio* seat on the Board. Those four seats translate in to a tremendous influence on the operations and priorities of the FBA at a national level. The YLD has its own budgetary allotment that is spent by the YLD's

board of directors. Folks who are at the beginning of their careers have priorities and concerns that are completely unlike those who are well-established or nearing retirement. I think that the FBA's empowerment of and its prioritizing the concerns of younger lawyers is paramount in assessing its overall strength.

**Explain the purpose of your role as chair of the Circuit Vice Presidents, when you took on that position, and the length of your term.**

I was elected chair of the Circuit Vice Presidents in September 2011. I was re-elected in 2012. The chair sits *ex officio* on the FBA Board of Directors. The chair is responsible to report to the Board on the activities of the Circuit Vice Presidents and to communicate to the Circuit Vice Presidents the priorities and tasks assigned by the Board.

My main role was to follow and implement the directives of Presidents Fern Bomchill and Bob DeSousa and to work closely with the executive directors, Jack Lockridge and Karen Silberman. Under President Bomchill, the directive was to stimulate additional activities throughout the respective circuits and to define the duties and roles of the Circuit Vice Presidents. Under President DeSousa, the priority has been to focus on building membership and delivering value to FBA members. In my reports to the Board, I try to communicate the challenges and concerns faced by FBA mem-

bers in the various chapters and circuits.

For purposes of being a voice on Capitol Hill, I sit *ex officio* on the Government Relations Committee of the Federal Bar Association. Each year, the Circuit Vice Presidents work with the Government Relations Committee to get FBA leaders in chapters, sections, and divisions to visit Congress and to submit issues to the FBA's legislative issues agenda.

**What role do the Circuit Vice Presidents play in forming Younger Lawyers or Law Student Divisions in our chapters?**

The Circuit Vice Presidents (CVPs) can't force chapters to take on tasks that they are not interested in. However, the CVPs have consistently urged Chapter Presidents to form Younger Lawyer Committees. Additionally, we have fostered the creation of conference calls including Chapter Presidents and Younger Lawyers Committee Chairs. This has sparked additional appointments and increased the activity and visibility of local Younger Lawyers Committees at the chapter level.

**As an ex officio member of the Government Relations Committee, do you incorporate the Younger Lawyers Division in the Government Relations Committee agenda?**

Any member of the FBA can nominate an issue for the FBA's Issues Agenda. In my estimation, this nomination process is a powerful tool that is underutilized. As chair of the Circuit Vice Presidents, I keep my eye out for pending legislation that might affect FBA members. Where there are changes to the Federal



Raymond J. Dowd

supervisor was not pleased and responded: "Since you were well enough to travel on a 4+ hour flight, wait in customs lines, bus transport, etc., we were assuming you would be well enough to come back to work." Lineberry responded that she used wheelchairs at the airports to avoid standing. The supervisor reported her concerns about Lineberry's FMLA misuse to hospital management.

When Lineberry returned to work in April, the hospital followed its progressive discipline policy and held several meetings. Lineberry admitted to lying about using a wheelchair at the airports, and the hospital eventually terminated her for a violation of the hospital's dishonesty policy, which prohibited "dishonesty, falsifying, or omitting information, either verbally, or in written format (including electronically) on [hospital] records including, but not limited to payroll records, human resources records, etc." Lineberry then sued the hospital for violating her FMLA rights by interfering with her right to be reinstated and for retaliating against her for taking FMLA leave.

### *Holding*

At summary judgment, the Eastern District of Michigan ruled in favor of the hospital for two reasons. One, FMLA gives an employee on leave the same workplace benefits and discipline as a continuously employed employee. An employer has a right to discipline or terminate an employee for reasons unrelated to an exercise of FMLA rights. Lineberry openly admitted to violating the hospital's dishonesty policy, and based on this admission, the hospital had a right to terminate her regardless of her leave status. Two, because the social media evidence provided the hospital with particularized facts sufficient to develop an honest belief of FMLA misuse by an employee, the court also found the hospital would prevail based on the Sixth Circuit's honest belief doctrine.

### *Lessons Learned*

Social media's influence in the workplace continues to grow. This case underscores the potential importance of social media as

evidence in both internal investigations and in litigation. Employees should consider how much information they disclose on Facebook and whether they should give their co-workers (and supervisors) access to their social media pages. Employers usually don't have the time, resources, or desire to monitor their employee's social media accounts. Here, however, the hospital didn't single out Lineberry to make sure she was complying with her FMLA restrictions. Instead, the hospital only acted when other employees with whom Lineberry shared her Facebook page brought the misconduct to its attention. The hospital, understandably feeling duped by Lineberry, then used the information to establish a basis for termination under their policies that was unrelated to her FMLA leave. This case also underscores that the employer need not always be 100 percent correct. The hospital didn't have to launch an independent investigation into Lineberry's vacation. Instead, the employer may be absolved of liability when it honestly believes that an employee lied and misused his or her FMLA leave and discharges an employee based on that belief.

There's never a dull moment in the employment law world. These three cases are just a few from this year that make us go hmmm. ... ☺

### **Endnotes**

<sup>1</sup>*Benes v. A.B. Data, Ltd.*, \_\_ F.3d \_\_, 2013 WL 3838112 (7th Cir. 2013).

<sup>2</sup>*Crockett v. Mission Hospital, Inc.*, 2013 WL 2350454 (4th Cir. 2013).

<sup>3</sup>See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-87 (1998).

<sup>4</sup>*Lineberry v. Richards*, 2013 WL 438689 (E.D. Mich. 2013).

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Rules of Civil Procedure, for example, I might discuss that with the Federal Litigation Section. With issues surrounding law school loans, for example, I might reach out to a YLD member to make sure that the issue is on the radar. But these are just informal actions, my role is simply to support the workings of the Government Relations Committee and its advocacy programs.

### **What advice do you have for Younger Lawyers Division and Law Student Division members who wish to become more active?**

Great question. People who are active in an organization get a disproportionate share of the benefits of membership. Show up at meetings. Talk to leaders face to face. Volunteer. Join a section or division. When your e-mails are ignored, make phone calls. When your phone calls are ignored, talk to leaders face-to-face AGAIN! In any busy volunteer organization, there will be a certain amount of nonresponsiveness or delays in getting back to you. Busy practitioners are bombarded by e-mails from all sides, handling heavy

dockets, family issues, health issues, whatever. The person who persists and makes a clear case will likely break through. Be aware that opportunities often come to those who volunteer to do tasks that others consider unpleasant or tedious.

### **What is "sending the elevator back down"?**

The French have an expression "*renvoyer l'ascenseur*." It refers to those who get to the top of a profession and "send the elevator back down" to bring up others to share in good luck. In this context, it means opening a door for a younger lawyer to give him or her a chance to shine or, put another way, really using my position and vantage point to assist well-meaning people in overcoming hurdles. I am thankful to the many local and national FBA leaders who sent the elevator my way and who were patient and supportive as I developed skills and experience. ☺