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# perspectives

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Winter 2013

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## Message from the YLD Chair

Dear Younger Lawyer Division Members:

It is my pleasure to introduce to the first Younger Lawyers Division (YLD) *Perspectives* e-newsletter. This newsletter will be published quarterly delivered to you via email as a benefit of your membership in the YLD.

The YLD is a vibrant, growing section of the FBA. We are a resource to chapters for instituting and fostering positive change in their organizations as well as developing their own younger lawyer divisions. Coextensive with the FBA's Back to Basics campaign, the YLD is focused on "R & R:" recruitment and retention. We welcome all new members and invite our current members to participate in our programming and initiatives.

Part of this initiative includes providing substantive guidance to our members regarding networking, job search skills, and practice pointers. We are also excited to promote an increasing programming and social calendar. Some highlights of 2013 include:

- The Thurgood A. Marshall Memorial Moot Court Competition will be held April 4-5, 2013, in Washington, D.C. The competition will feature teams from law schools across the country, culminating in a final round held at the Court of Appeals for the Armed Forces. We invite all FBA members to participate as judges.
- In May 2013, the YLD will sponsor the annual U.S. Supreme Court Admission Ceremony for all eligible FBA members who are interested in becoming admitted to the Court. The event includes a reception that has traditionally been attended by Supreme Court Justices.
- In Summer 2013, the YLD will hold its annual Summer Law Clerk Program. The program will begin with a kick-off event, generally including roundtable, question and answer events at the Department of Justice, Department of Defense, and Capitol Hill where law clerks can interact with federal lawyers from various federal agencies and departments.

The YLD is looking forward to an active year, and I am honored to serve as its chair. For more information on our division and the opportunities it holds for you, please visit our website at www.fedbar.org/Divisions.aspx and click the Younger Lawyers Division link.

For additional information and updates, please like us on Facebook at www.facebook.com/#!/federalbarYLD?fref=ts and follow us on Twitter at twitter.com/federalbarYLD.

I look forward to working with you to make 2013 and productive and rewarding year for the YLD. ■

*Kelly T. Scalise*
*Chair, Younger Lawyers Division*

## Message from the YLD Editor

On behalf of the Younger Lawyers Division of the Federal Bar Association, I am happy to reintroduce the *Perspectives* e-newsletter. This newsletter is revival of our division's previous newsletter, having been dormant for many years. This publication is also a renewal of our pledge to enrich your YLD membership by providing networking and practice advice, as well as substantive articles addressing the diverse practice areas of our division.

This edition of the newsletter, Winter 2013, contains three great articles from lawyers within our division regarding practice tips for associates, practice tips for solo practitioners, and a substantive evaluation of Sections 861 and 862 of the Internal Revenue Code regarding the "source" of income.

Also included in this month's issue is an introduction to one your YLD

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national board members, Angela Abreu. In addition to Angela's long list of accolades, she is an avid runner, completing not one, but five full marathons!

Additionally, for those interested in becoming published, the YLD Publications Committee is currently accepting submissions for the next issue of *Perspectives*, currently slated for publication in April of this year. Submissions for *Perspectives* and additional YLD publications may be directed to my attention at gmcmurry@dunganattorney.com.

Finally, we hope you are all present for the FBA's Midyear Meeting occurring in Arlington, Va., beginning on April 4, 2013. There is still time to register at www.fedbar.org/Events/.

On behalf of the Younger Lawyers Division and YLD Publications Committee, welcome to the new and improved YLD *Perspectives* e-newsletters. Enjoy! ■

*Glen R. McMurry*
*Publications Editor*

## Tips For Success For All New Associates

by Laura A. Balson

You accepted an offer at a law firm and passed the bar—congratulations, you are now ready to enter the world of private practice! The bad news is that the first year of your career as a practicing attorney will undoubtedly be marked with apprehension and the sinking feeling that you do not know what you are doing. The good news is that there are several golden rules to practicing at a private law firm (regardless of where or how big it is) that you can learn to improve your chances of success as an associate. Here is a list, which is by no means exhaustive, but will give you a good start:

- Always carry a pad of paper and a pen to meetings.
- Keep detailed notes of what attorneys and clients tell you (and add to your notes later if you cannot get it all down during the conversation).
- Always ask when a project is due or the date by which it is needed (ask of attorneys and clients).
- Ask the assigning attorney how much time to spend on a project. Efficiency is very important to clients, especially in an economic recession, so you need to gauge how much time is appropriate.
- Do not pretend to know something you do not know, even if you feel like you should know it.
- It is ok to answer a question with "let me look into it and get right back to you." And if you are having trouble finding an answer, do not be afraid to go to someone more senior than you for help.
- Read carefully and proofread everything you write—three times (at least).
- Excellent work is more important than quick work, especially for new associates.
- Keep track of your time contemporaneously.
- Always bill all of the time you actually spend on a project and leave any reductions to the billing attorney.
- Make the descriptions of your time entries reflective of the cost to the client, and try to reflect the value that you added, not just that it came across your desk.
- Be respectful and professional to everyone, inside and outside the firm. Being kind is not the same as being weak.
- Think carefully about your position on a matter so that you can state it with confidence.
- Remember that clients need you to protect them but not condescend to them.
- Never yell at a staff member or client, no matter what they have done.
- Be meticulous about calendaring dates and deadlines.
- Make all cases your own, and if something comes up, assume you will cover it unless told otherwise.
- If you give a project to a partner for review or comments, you still have the responsibility to make sure the document is finished on time. You may need to remind the partner (repeatedly).
- Ask before you delegate a project to a junior associate, paralegal, or secretary, and only do so for the client's benefit. It is still your responsibility to make sure the project is done timely, accurately, and properly.
- Jump at every opportunity to work with someone new at the firm.
- Seek criticism of your work and do not personalize it. Criticism is the only way to improve your work product. ■

*Laura Balson is a member of the Chicago Chapter of the Federal Bar Association. She is a senior associate, specializing in employment law and commercial litigation at Golan & Christie LLP in Chicago. She is the editor of the firm's quarterly newsletter and the author of the employment alerts, which appear in each issue. Balson is a 2005 graduate of Northwestern University's School of Law.*

# Intangibles: Slipping Through the Tax Cracks

by Stacey Lee Mitchell

*Part I of this article assesses current missteps in the taxation of intangibles. Part II, which discusses plausible solutions to remedy this crack in the U.S. tax system, will be included in the next edition of* Perspectives.

The concept of "source" is the foundation of international taxation. In essence, the source of income determines tax consequences for both foreign and domestic entities. The U. S. Treasury's reach over foreign corporations and individuals depends on the locus of origination.[1] Likewise, the determination of foreign tax credits for domestic bodies revolves around this same key principle.[2]

Sections 861 and 862 of the Internal Revenue Code (code or I.R.C.) provide the statutory framework for determining source. These sections "source"—or assign an origin—to classes of income. Over the years, the items of income enumerated in these two statutes (i.e., dividends, interest, and royalties) have become readily characterized as being derived entirely within or without U.S. borders, or some combination thereof.[3] Generally, characterization is easily traceable.[4]

Upon entering the world of intangibles, however, there exists a land of formless and overlapping boundaries.[5] Intangibles are essentially intellectual property, "created by intellectual effort that has value independent of services to be provided."[6] Intellectual property includes secret processes and formulas, patents, franchises, good will, copyrights, trade brands, and trademarks.[7]

With improved innovation, increased globalization, and enhanced technology, the question of source with respect to intangibles has become increasingly complicated. This is especially problematic for the U.S. tax regime as revenues linked to intellectual property continue to soar.[8] Whether intangibles give rise to portfolio or business income, tax difficulties are consistently rooted in source.[9]

Thus, the U.S. Treasury is faced with two principal challenges. First, due to their ephemeral nature, the international mobility of intangible goods has become increasingly fluid.[10] With greater portability comes greater potential for tax evasion through transferring lucrative intangibles to low-tax jurisdictions.[11] Second, the characterization of income presents ongoing difficulties. Taxpayers simply alter their characterization of intangibles in order to gain favorable tax treatment. For example, and as further discussed below, foreign entities can easily evade U.S. taxation by characterizing a certain use of intellectual property as a sale as opposed to a license.[12]

Moreover, the code is based upon a complex system of intangible categories with varying tax rules and consequences.[13] Tax outcomes vary depending on whether income is characterized as compensation for services, royalties for licensing intellectual property, rents for leasing property, or proceeds of sale of goods or intellectual property.[14] In applying source rules, distinctions between a sale, a license, and a service contract—all of which can be applied to similar transactions—may become cluttered. In order to maximize revenue, the Treasury must revise current regulations to better suit the taxation of intangibles.

Increased mobility and a lack of physical form make intellectual property rights difficult to compartmentalize. Although slowly congealing, the methods for taxing these amorphous assets still require further clarification. When confronted with intellectual property, the code must address income distinctions, while still simplifying the overall tax scheme. Part II of this article, which will be included in the next edition of *Perspectives*, proposes that this goal may be accomplished in three ways: (1) the residence rule; (2) the split-the-pie directive; and (3) a combination of the foregoing methods based upon the nature of the income.[15]

Undoubtedly, the question of source is monetarily valuable to all entities, domestic and foreign. The United States taxes its citizens, resident aliens, and domestic corporations on their worldwide income.[16] In contrast, nonresident aliens and foreign corporations are generally taxed only on U.S. source income.[17] But, source is equally important to resident taxpayers because of its relevance to foreign tax credits.[18] To offset domestic tax liability and obtain the most favorable tax treatment, domestic entities will maximize foreign source income, which is taxed at or below U.S. rates, while limiting deductions and expenses related to such income.[19] Overall, strong incentives exist to categorize income as foreign source.

Foreign entities, on the other hand, are exempt from U.S. taxation on foreign source income.[20] However, if U.S. source income is "effectively connected" to a U.S. trade or business, that income is taxed at the same rates applicable to U.S. individuals and corporations.[21] Assuming a tax treaty does not apply, revenues from investments[22] not effectively connected with a U.S. trade or business are subject to a 30 percent tax rate.[23] This 30 percent withholding tax is imposed at the source, creating yet another incentive for foreign entities to classify revenue as foreign source.[24]

The malleability in categorizing intangibles quickly becomes profitable. Characterization must first be determined, followed by application of the proper source provision.[25] Once character and source are identified, ultimate tax liability can then be imputed. This step-by-step process is exemplified by the character distinction between a foreign corporation's sale or license of an intangible asset. A sale entails the transfer of all rights, while a license involves the transfer of less

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than all rights in the asset.[26] Generally, in determining whether payments originate from a license or a sale, fact finders look to the duration and the extent rights in an asset are transferred.[27]

Upon designating an asset as a sale or a license, source rules and tax rates take effect. Based upon our example above, a royalty payment from the license of intellectual property to a foreign corporation will be subject to 30 percent withholding tax (barring any relevant treaty provision), while a payment for the sale of rights in the same property will not entail any U.S. tax liability.[28] As a consequence, entities, desiring the lowest tax liability possible, are incentivized to massage characterization, source provisions, and tax rates to their benefit.

Implementation of this step-by-step process is neither simple nor clean cut. Lacking physical presence and physical entry, it is a challenge for the Treasury to establish defined tax formulas. How should the laws work and interact? Three possibilities are presented in the next edition of *Perspectives*: the residence rule, the arbitrarily split pie directive, and a combination of the foregoing approaches which is dependent on the nature of the income.[29] However, even within these three proposed "solutions," further definitional difficulties await. ■

*Stacey Lee Mitchell is a visiting professor with Temple University Beasley School of Law. Currently teaching with the university's LL.M. program based in Beijing, China, Mitchell practiced antitrust law with Gustafson Gluek PLLC in Minneapolis prior to moving to Asia in 2006. She has also previously worked as a visiting assistant professor for the University of Minnesota Law School's Beijing LL.M. program and as an international rule of law consultant with the United Nations Development Programme. Mitchell holds a J.D. and a B.A. in economics from the University of Minnesota as well as a graduate degree (*LL.M.*) in tax law from New York University School of Law.*

**Endnotes**

[1] *See generally* Lawrence Lokken, *The Sources of Income from International Uses and Dispositions of Intellectual Property*, 36 Tax L. Rev. 235 (1981).

[2] *Id.*

[3] *See* I.R.C. §§ 861(a)(1)-(a)(2)(B), 862(a)(1).

[4] For example, if more than 25 percent of a foreign corporation's gross income is "effectively connected" with a U.S. trade or business, then the dividends the foreign corporation pays has a domestic source in the same proportion that its effectively connected income bears to its total income. Interest paid by individuals, partnerships, and trusts takes its source of income from their place of residence, while interest paid by corporations takes its source of income from their states of incorporation. And royalties from property located in the United States has a domestic source of income. *See* I.R.C. §§ 861(a)(1)-(a)(2)(B), 862(a)(1).

[5] Intangible property is defined by the Internal Revenue Code of 1986, as amended, as "patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other like property." I.R.C. §§ 861(a)(4), 862(a)(4).

[6] John P. Steines Jr., International Aspects O of U.S. Income Taxation 191 (2007).

[7] *See id.*

[8] Arthur J. Cockfield, *Designing Tax Policy for the Digital Biosphere: How the Internet is Changing Tax Laws*, 34 Conn. L. Rev. 333, 382 (2002); *see also supra* note 5.

[9] Steines, *supra* note 6, at 191.

[10] Cockfield, *supra* note 8, at 382.

[11] *See* Tom Neubig & Satya Poddar, *Blurred Tax Boundaries: The New Economy's Implications for Tax Policy*, 21 Tax Notes Int'l 1203, 1207 (2000); *see also* James R. Mogle, *The Future of International Transfer Pricing: Practical and Policy Opportunities Unique to Intellectual Property, Economic Substance, and Entrepreneurial Risk in the Allocation of Intangible Income*, 10 Geo. Mason L. Rev. 925, 946 (2002).

[12] *See* David S. Teske & Tia Arzu, *Considerations in International Intellectual Property Licensing*, 20 Computer & Internet L. 10, 13 (2003).

[13] *See* Steines, *supra* note 6, at 193.

[14] *See id.*

[15] *Id.* at 192–93.

[16] *See* I.R.C. § 7701(a).

[17] *See* I.R.C. § 871(a)(1).

[18] *See* I.R.C. § 904(a).

[19] *See generally* Jeffery P. Cowan, Jr., *The Taxation of Space, Ocean, and Communications Income Under the Proposed Treasury Regulations*, 55 Tax L. 133, 140 (2001).

[20] I.R.C. § 871.

[21] I.R.C. §§ 1, 11, 871(b), and 882(a).

[22] Such as royalties, rents, dividends, and interest.

[23] I.R.C. §§ 871(a) and 881(a).

[24] I.R.C. § 1442(a).

[25] *See generally* Rufus Von Thulen Rhoades & Marshall J. Langer, U.S. International Taxation and Tax Treaties § 25.10 (2004).

[26] Lokken, *supra* note 1, at 237.

[27] *Pickren v. U.S.*, 378 F.2d 595, 598 (5th Cir. 1967) (holding that the transaction was a license rather than a sale because the agreement constituted a transfer for less than the remaining legally protected life of the secret formulas). Rev. Rul. 84-78, 1984-1 C.B. 173 (IRS ruled that, because the transfer of the live broadcasting right was a transfer of less than the entire copyright interest, the transaction should be characterized as a license). Erin L. Guruli, *International Taxation: Application of Source Rules to Income from Intangible Property.*, Hous. Business & Tax L.J. 205, 215 (2005).

[28] I.R.C. §§ 861(a)(4), 1441(a), 862(a)(4).

[29] Steines, *supra* note 6, at 192-93.

# What's Next? The Transition from Law School to Solo or Firm Practice

by Glen McMurry and Adam Krumholz

You are fresh out of law school and just passed the bar. Whether you are destined to hang your own shingle or have plans to join a firm, you are probably asking yourself, "What's next?" Law school does a fantastic job teaching you the substantive nature of the law and may even start to prepare you for the practical side of our profession, but the minute you enter your office or a courtroom for the first time, you will learn that there are thousands of questions left unanswered. By writing this article, we hope to help you find answers to these questions and make your first years of practice enjoyable and productive.

*Networking*

Many of the following practice tips, as you will soon read, revolve around communication. One of the most important steps to having success in your practice is to network. Networking allows you to make contacts both in and outside the profession and affords you access to invaluable information to starting your career. The easiest way to begin networking is to join a local, state or special interest bar association.

For federal practitioners, the Federal Bar Association is one of the best ways to begin networking. The FBA provides access to committees, networking events, and tools for professional growth. Joining a committee provides access to seasoned attorneys from nearly every practice area and allows you to tap into their experience and insight. Many of our local FBA chapters host monthly networking events, which offer a great way to get to know your fellow bar members and learn from their experiences. It is not enough join these associations; you must make an effort to participate in the events and take advantage of the many learning opportunities made available to you. These networking opportunities are also a great place to find an attorney in whom you can confide and who can serve as your mentor.

Many attorneys are happy to answer questions that arise during the course of your day-to-day practice, but it is important to have one or two attorneys whom you can regularly rely upon to mentor you through the beginning of your practice and beyond. However, your search for a mentor need not wait until you pass the bar and start your practice; you can discover a potential mentor while serving as an extern or law clerk during law school. A mentor can help elevate your confidence and level of professionalism, and increase the likelihood of your success. Maintain these connections and feel free to call upon your colleagues' knowledge as needed.

Communication with your clients and fellow attorneys will be the mainstay of your practice. With this in mind, extending respect and consideration to everyone with whom you come in contact and communicate is a necessity. Simply introducing yourself and starting a conversation has the potential to result in a unique learning experience, greater understanding of the practice, or a new client or client referral. Communication with clients, attorneys, staff, and judges is one of the linchpins of our profession. It pays to do it right, because it will be a constant in your practice.

Communication is particularly important for new attorneys starting their own practice. The ability to grow your practice is greatly aided by a robust network. Referrals are one of the primary driving forces of any practice. Initially, your referrals will likely come from those individuals who have the closest relationships with you, your family, and your friends. As you begin to participate in cases, other attorneys who may have conflicts will refer potential clients to you. Do not be afraid to reciprocate, especially when you have a conflict. Know that building your professional network may take time but eventually, your hard work and patience will pay off in the form of a sustainable process for developing a client base and getting referrals.

*Practice Tips for the New Solo Practitioner*

So you have decided to run the show and hang out your shingle. You have probably wondered where your cases are going to come from, what to do once you get cases, and how to manage those cases. The following tips will help you find the answers to these questions and jump-start your solo practice.

*Getting Cases*

Finding clients when a young lawyer starts a solo practice can be a daunting task. Fortunately, there are resources available that can make this task more manageable. First and foremost, sign up for court-appointed representation lists. In most courts, the public defender offices are unable to represent all potential clients or simply have a conflict that precludes representation. In these cases, a private attorney is appointed by the court's appointment program. For those entering the criminal defense bar, the appointment programs created under the Criminal Justice Act consist of more than 80 authorized federal defender organizations that serve 90 of the 94 federal judicial districts. See www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx. Appointments are not just limited to criminal matters; juvenile courts frequently need to appoint attorneys for delinquency, abuse, dependency, neglect and child support. Some family and juvenile courts will also appoint a guardian ad litem to protect the interests of minor children who are involved in a case. Each court has its own rules to be in the appointment programs. In some

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cases, continuing legal education or certification may be required before cases will be assigned. To determine the exact requirements, it is best to simply contact the court administrator.

Another way to building your client base is to sign up for the FBA's Need an Attorney online directory. For a mere $75 per year, you will receive an on-line listing through www.fedbar.org/Menu/Need-an-Attorney.aspx. This listing makes it easier for potential clients to find you because it organizes listings by the attorney's geographic location and up to three practice areas. Taking advantage of appointed counsel programs and listing services is a great way to help generate cases for a budding practice.

***Courtroom Procedure***

After getting your first case, opening a case file, and placing pertinent dates on your calendar, you will eventually go to court for your first time. Initially, courtroom procedure can be very confusing, because each judge, magistrate, and bailiff has different methods for handling cases. It is important to understand the nuances of each court and courtroom. The quickest way to gain familiarity with a court's procedures is to review that court's local rules. These rules are generally found on a court's website and are a valuable source of information that you should not ignore.

In addition to reviewing the local rules, one of the primary sources for discovering and becoming familiar with local courtroom procedures is the bailiff or case management specialist of the specific courtroom. Another excellent way to gain information is to speak to seasoned attorneys about their experiences in the specific courtroom. You may also consider attending a docket call, observing a trial, or serving as co-chair for a trial. As you begin to uncover the nuances of each courtroom, it is advisable that you keep notes of each courtroom's procedure, because you never know when you will be back.

***Case Management***

Once the cases start coming in, keeping them organized is critical. The two primary facets of a successful case management plan are filing and calendaring. Filing can simply consist of having folders in a filing cabinet, fully digitizing your case files, or a combination of the two. The primary considerations when implementing a filing system should be ease of use and access. To satisfy the first consideration, pick a method that you are comfortable using, whether that is using folders or scanning all case documents and using an iPad in your practice. Regardless of which method you choose, your case management system should allow easy access to pertinent information, including detailed contact information, case numbers, relevant court filings, court dates, and deadlines.

A calendaring system that keeps track of client interviews, court dates, and deadlines is just as important for a case management plan as the filing system. There are a variety of options that can help manage your calendar. Some of the most commonly used calendaring programs are Microsoft Outlook and Google Calendar. There are instances in which both could be utilized. For example, if you are using an Android mobile device, you are required to create a Gmail account, and any dates placed on your phone will be reflected on the Google calendar. If you want to use Outlook for your calendaring and have that information reflected on your Android mobile device, there are synching programs available, such as Google Calendar Sync, which will automatically keep your calendars in sync. Having a case management system in place from the start of your practice will help you manage your cases successfully and will give you a competitive edge for years to come.

***Practice Tips for the Law Firm Associate***

After a long summer of conducting research, following partners to court and trying your best to not appear as scared as you truly were, you receive the good news! The law firm for which you clerked has offered you your first job as an attorney. You will soon come to find, as many of us do, that you know very little about what it means to be a practicing attorney, much less what it will take to survive in a law firm. Many of the practice tips applicable to solo practitioners apply to law firm associates as well. In addition to those practice tips, the following will aid you in your advancement in a law firm environment.

***Ask Questions***

Do not shy away from asking questions. With law firm clerkships dwindling, your first job with a law firm may be your first experience actually working in a law firm setting. All the partners in your firm have experienced exactly what you are going through and can offer advice on how they approached the issues you are experiencing and how they succeeded. With this in mind, you should endeavor to strike a balance between deference to your partners' experience and your independence. This is a hard line to walk and admittedly an issue many of us struggle with. Every firm is different and has different expectations on how the firm's associates should conduct themselves. It is advisable to err on the side of caution at first and a get a feel for what your partners are looking for. Also, trust your instincts. If you are facing an issue you feel does not warrant tremendous oversight, you are probably correct.

***Time Management***

Your timing and punctuality are directly linked to your partnership's perception of your credibility and reliability. Write things down, place them on your calendar and do not overcommit. Ask your partners when they would like assignments completed and keep the attorneys updated on your progress. If a deadline becomes unworkable (which happens to us all), alert the assigning partner immediately.

***Be Assertive***

One of the most difficult lessons to learn is that you are just as capable of handling legal matters entrusted to your care as those attorneys who are 10 years your senior. The only difference between you and more experienced attorneys is exactly that—experience. Every attorney has his or her first deposition, first trial, and difficult client or opposing counsel. The only way you can move past being nervous and garner these experiences is to assert yourself in a case or issue. As you do, your partners and clients will come to rely on you and look to you for guidance. With this in mind, mentorship is important (as discussed below). Eventually, everyone needs to fly out of the nest, but you do not necessarily have to do so without a parachute. Your partners have a vested interest in your success. One of the most beneficial advantages firms offer is their institutional memory. Tap this resource. Your clients (and your nerves) will thank you.

***Try Everything Once (and Sometimes Twice)***

Coming out of law school, very few of us know with certainty exactly what subject matter of the law we wish to specialize in. Make your decision carefully, because even general practitioners find themselves gravitating to only a few practice areas (criminal defense, general civil litigation, and so forth).

Another advantage law firms have to offer is the diversity of their practice areas. Over your first few years of practice, team up with as many partners in as many areas of practice as you can. Domestic relations law may entice you while unemployment compensation law bores you to tears. Find the practice area (or areas) that excite you and stimulate your creativity and imagination. This cannot be accomplished unless you make an effort to try new things.

***Find Mentors (Including One Who is not in Your Firm)***

The practice of law (particularly among FBA Members) is a collegial one. Our successes and failures are intertwined, and the reputation of one attorney will inevitably (for good or bad) influence the reputation of another. It is this reality that requires us to nurture our younger attorneys in their development. In law firms, every partner and senior associate will arguably serve as your mentor, providing an example of how you should practice and how you can succeed in your firm. Yet, younger attorneys also need an outlet where they can let their hair down and detach from the formal partner/associate relationship. If you find yourself in a firm, ask if you have an assigned mentor. A majority of the time this will be the person with whom you can go to lunch, in whom you can confide, and to whom you can express your concerns. This person is also an excellent gauge for your reputation in the firm and a person who can honestly evaluate your progress.

Many firms offer fantastic environments for young attorneys, but the attorneys and partners in these firms can have a tendency (naturally) to think alike. Another way to set yourself apart and succeed in your practice is to demonstrate your resourcefulness and ability to think outside of the box. Interact with other attorneys at different firms as well as solo practitioners. Membership in the FBA is a priceless tool to achieve this end. Make these people your mentors outside the firm. Exchange ideas and get a different perspective of the issues you are facing. These people will also be an invaluable source of referrals and guidance when you begin the transition from associate to partner.

**Conclusion**

We hope that these tips provide you some guidance in your path as a solo practitioner or new law firm associate. We also hope that these tips emphasize networking as an ever-present aspect of the legal practice. To those attorneys joining a firm or starting their own practice, we hope these suggestions will help you get started on the right foot. On behalf of the Federal Bar Association and Younger Lawyers Division, good luck! ■

*Glen McMurry is an associate attorney at the law firm of Dungan & LeFevre Co. LPA in Troy, Ohio and is a 2007 graduate of the University of Dayton School of Law. His primary areas of practice are business and civil litigation. McMurry is the current president of the FBA's Dayton Chapter and is a member of the FBA Younger Lawyers Division's National Board of Directors. Adam Krumholz graduated from the University of Dayton School of Law and was admitted to practice law in 2008. Upon being admitted, he hung his own shingle in Dayton, Ohio, as the Law Office of Adam H. Krumholz LLC. Krumholz is a member of the FBA's Dayton Chapter and practices primarily in the areas of juvenile, domestic relations, criminal, and consumer protection law.*

## Meet a Board Member

Angela Sheffler Abreu

Angela Sheffler Abreu currently serves as a member-at-large on the National Board of Directors for the Federal Bar Association's Younger Lawyers Division. Abreu is an associate with Forman Holt Eliades Ravin & Youngman LLC in Paramus, N. J. She represents creditors, debtors, and trustees in bankruptcy and the representation of creditors in loan workouts, assists clients with all aspects of claim prosecution and protection in Chapter 7, 12, 11, and 13 proceedings, and has litigated a variety of actions in state and federal courts to enforce liens, foreclose on mortgages, and collect debt.

Prior to working at Forman Holt, Abreu received her B.S. from Saint Vincent College in 2000 and her J.D. from Duquesne University School of Law in 2003. During law school, Abreu worked as a law clerk with the Office of the Chapter 13 Trustee in Pittsburgh, Pa. After graduation, she worked in the Insolvency and Creditor's Rights practice group at Tucker Arensberg P.C. in Pittsburgh, Pa., until her relocation to New Jersey in May 2007, where she worked in the Bankruptcy and Restructuring practice group at McCarter & English LLP before moving to Forman Holt in 2011.

Abreu is actively involved not only in the Federal Bar Association (where she is the FBA Bankruptcy Section at-large board member, but also the New Jersey Bar Association, the International Women's Insolvency & Restructuring Confederation (IWIRC), and the American Bar Association (where she served as the ABA Young Lawyers Division bankruptcy vice chair from 2009-2011 and the ABA Young Lawyers Division Lawyer Assistance Programs Commission Liaison from 2010-2012).

Abreu is an avid long-distance runner and a member of the New York Road Runners Association. She has completed five marathons, including the ING New York City Marathon, and numerous half marathons. Abreu is a strong supporter of animal rights and welfare. She has been a member of the ASPCA and was a board member of the Beaver County Humane Society in Beaver, Pa. Abreu resides in Cranford, N.J., with her husband Nicholas, their nearly two-year-old daughter, Chalina, rescue dog Oscar, and cat Sundance.

## Save the Date!

1. Feb. 1, 2013
   Federal Career Service Division
   Public Service Career Fair
   Fairfax, VA

2. March 15, 2013
   Article Submission
   Deadline for the next
   issue of *Perspectives*

3. April 4-6, 2013
   Midyear Meeting
   Arlington, VA

4. Arpil 4-5, 2013
   Thurgood A. Marshall Memorial Moot
   Court Competiton
   Washington, D.C.

5. May 28, 2013
   Younger Lawyers Division Supreme
   Court Admissions Ceremony
   Washington, D.C.

For more information on these and other FBA and Younger Lawyers Division events, please visit www.fedbar.org/Calendar.

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# Exhibit 2

## Glen McMurry

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# perspectives

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## June 26, 2013

**Message from the Chair** *by Kelly Scalise*
Welcome back! You are reading the second edition of the Younger Lawyer Division (YLD) *Perspectives* e-newsletter. You have no doubt noticed **something different**. Our new HTML format brings *Perspectives* directly to your inbox, facilitating your access to useful content and news about our division.

---

**Message from the Editor** *by Glen R. McMurry*
Greetings and welcome to the Spring/Summer issue of *Perspectives*. Our publication is now **100% digital**!

---

**The Business Records Exception to the Hearsay Rule: Do Financial Institutions Get a Free Pass?** *by Scott Konopka and Paige Gillman*
Compare and contrast the **business records exception** to the hearsay rule under the Florida and Federal Evidence Rules.

---

**Meet a Board Member: Adine Momoh**
She's not only an accomplished associate trial attorney, but a budding artist as well. Read more about Adine **here**.

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San Juan, Puerto Rico
Sept. 26-28, 2013

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Every lawyer should have a personal legal antilibrary. And here's **why**.

**A Young Lawyer's Guide to Multidistrict Litigation** *by Maria Janoski*
Peek into the staggering complexity of **multidistrict litigation**, and the break-neck speed at which many of these cases proceed.

You can view our newsletter **here**.

## Calendar of Events

Annual Meeting and Convention
September 26-28, 2013
San Juan, Puerto Rico

Federal Career Service Division Public Service Career Fair
February 1, 2013
Fairfax, VA

Midyear Meeting & Convention
April 4-6, 2013
Arlington, VA

Younger Lawyers Division Supreme Court Admissions Ceremony
May 28, 2013
Washington, D.C.)

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# YLD Perspectives



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Acquiring a Personal Legal Antilibrary
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Dear Younger Lawyer Division Members:

Welcome back! You are reading the second edition of the Younger Lawyer Division ("YLD") Perspectives e-newsletter. If you read the first newsletter, you have no doubt noticed something different. In our first edition, *Perspectives* was formatted in a traditional PDF-style newsletter, necessitating your download of the newsletter and content to your computer. Our new HTML format brings Perspectives directly to your in-box, facilitating your access to useful content and news about our Division on-line without cluttering your computer with unnecessary downloads.

The purpose of *Perspectives* is to provide substantive guidance to our Younger Lawyer members regarding networking, job search skills, and practice pointers. We are also excited to promote an increase in programming and our Division's social calendar. Of particular importance is the FBA's upcoming Annual Meeting occurring in San Juan, Puerto Rico from September 26-28. Featured at this year's meeting will be a special CLE presentation sponsored by the YLD and presented by nationally recognized appellate advocate David Mills. For more information about the Annual Meeting and other YLD events, please visit the **FBA's calendar of events webpage**. Join us in continuing to make the YLD one of the most active and vibrant divisions of the FBA.

For more information on our Division and the opportunities it holds for you, please **visit our website**.

For additional information and updates, please **"Like" us on Facebook** and **"Follow" us on Twitter**.

I am looking forward to seeing you all in San Juan!

Kelly T. Scalise
Chair of the Younger Lawyers Division



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# Message from the Editor



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## Message from the Editor

Greetings and welcome to the Spring/Summer Issue of *Perspectives*. For those of you who read our Winter Issue, you have no doubt observed something different. Our publication is now 100% digital! This transition is motivated exclusively by the YLD's desire to provide you, the reader, an ever evolving and convenient format to receive important news about the YLD as well as substantive evaluation of legal issues by some of the best and brightest our Division has to offer.

Toward that end, this issue offers incredible insights into the exciting world of litigation. For newer attorneys, the world of multi-district litigation (and its many acronyms) is a foreign concept. Read further to understand how to navigate the MDL waters and (more importantly) the questions newer attorneys should ask before setting sail.

Another topic that receives regular attention in the business litigation realm is the ever popular business records exception to the hearsay rule. What are business records? Continue reading to uncover how Florida's crowded mortgage foreclosure docket is influencing the way we answer this question.

It should come as no surprise that our technologically driven profession is venturing to the law library and flipping through the pages of treatise less and less. Is this trend a good thing? Uncover in this issue the value (and meaning) of the *Antilibrary*.

Finally, I would like to take a moment to encourage each of you become more involved in the YLD, both on the local and national level. A great way to increase your involvement is by attending the Annual Meeting and Convention this September 26th-28th in San Juan, Puerto Rico. This meeting is an excellent opportunity to contribute and volunteer with our national organization. It is also an incredible learning tool that will allow you to bring useful information and programming ideas to your local chapter.

I join our Chair, Kelly Scalise, in inviting you to continue your contribution to our Division, making it one of the most active and vibrant divisions of the FBA.

I hope to see you all in San Juan this September.

Glen R. McMurry
Publications Editor

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# The Business Records Exception to the Hearsay Rule: Do Financial Institutions Get a Free Pass?



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## The Business Records Exception to the Hearsay Rule: Do Financial Institutions Get a Free Pass?

How broad is the business records exception to the hearsay rule under Florida Rule of Evidence 90.801 and Federal Rule of Evidence 801, and how is it applied to an affidavit based upon data entered by a third party? The classic definition of hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered to prove the truth of the matter asserted.[1] Certainly, an affidavit is hearsay, but it may be used to admit qualifying business records where the affiant has personal knowledge about those records and the process by which they are kept. Personal knowledge satisfie the purpose of the hearsay rule, which is to ensure the trustworthiness of statements made outside the presence of the jury, without the opportunity to observe the declarant's demeanor at the time the statement was made.[2] This article will compare and contrast the business records exception to the hearsay rule under the Florida and Federal Evidence Codes, and explore the outer bounds of the business records exception in the context of several recent cases involving affidavits submitted by financial institutions.

Application of the business records exception is commonplace in commercial litigation. It is even more common in financial institution litigation, where summary judgments may be granted based upon affidavits from loan servicers who swear to the authenticity of loan documents, correspondence, notices, payment and amortization schedules, and other internal documents prepared from data that was created years earlier by lenders or prior loan servicers who are no longer real parties in interest.

Ensuring that the proper foundation is laid, and that the business records exception is properly applied, is critical to lenders seeking to invoke the equitable remedy of foreclosure, to borrowers seeking to remain in their homesteads, and to a Florida economy wracked by foreclosures. The State of Florida has the highest inventory of foreclosed homes in the nation, the highest payment delinquency rate in the nation, and the slowest foreclosure system in the nation.[3] Between 2008 and 2012, the FDIC closed over 465 failed banks, and the State of Florida had one of the highest number of total bank closings.[4] During this time period, banks filed hundreds of thousands of residential foreclosures lawsuits in Florida.[5] The onslaught was slowed briefly by evidence of pervasive and methodical abuses of the court systems through the submission of "robo-signed" affidavits,[6] but a second wave of foreclosures hit with the passage of the $25 billion mortgage relief plan in February of 2012.[7] The foreclosure crisis and bank failures led to increased foreclosure litigation, a massive backlog of cases, and the "fast tracking" of cases at abbreviated trials where the courts continue to push reluctant borrowers to court, and lenders push the limits of the business records exception.

The "robo-signing" scandal put Florida courts on notice of the need to scrutinize the substance of certain lenders' affidavits, specifically, the affiants' personal knowledge of the contents of their affidavits,



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notwithstanding the backlog of foreclosure cases impeded by variables having nothing to do with the rules of evidence.[8]

**Florida's Interpretation**

In Florida, documents may be admitted into evidence as business records if the proponent of the evidence demonstrates the following through a records custodian or other qualified person:

> (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.[9]

In support of their motions for summary judgment, lenders in foreclosure cases often rely on the business records exception as the basis for their affidavits of indebtedness to demonstrate the fact of default and the amount due.[10] When moving for summary judgment, Florida Rule of Civil Procedure 1.510(c) requires the moving party to "identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence."[11] In *Glarum*, the Fourth District Court of Appeal reiterated that section 90.803(6)(a), *Florida Statutes*, requires an affidavit of indebtedness of a loan servicer to be based upon personal knowledge – and not hearsay in the form of data from a computer system about which the affiant was unfamiliar.[12] In so finding, the court stated:

> Orsini did not know who, how, or when the data entries were made into Home Loan Services's computer system. He could not state if the records were made in the regular course of business...He relied on data supplied by Litton Loan Servicing, with whose procedures he was even less familiar. Orsini could state that the data in the affidavit was accurate only insofar as it replicated the numbers derived from the company's computer system. Orsini had no knowledge of how his own company's data was produced, and he was not competent to authenticate the data.[13]

The court specifically noted that the law does not require an affiant who relies on computerized bank records to be the records custodian who entered or created the data, nor must the affiant identify who entered the data into the computer.[14] The court also noted there is no per se rule precluding the admission of computerized business records acquired from a loan servicer. [15] However, the affiant must have personal knowledge that the records were made in the regular course of business, and in *Glarum*, the affiant was unable to show even a rudimentary understanding of the servicer's regular business practices regarding input, collection and use of the computer data on which the affidavit was based.[16]

A similar holding was issued in another recent Florida case, *Mazine v. M & I Bank*, where the affidavit of indebtedness was signed by an affiant who lacked personal knowledge of the source of the information contained in the affidavit and the accuracy of that information.[17] Distinguishing *Glarum*, the Fourth District Court of Appeal upheld the introduction of the business records under the business records exception where the affiant testified that he was familiar with information in the records, the bank's record-keeping system, and he had personal knowledge of how the data was uploaded into the system.[18]

These cases demonstrate the role that personal knowledge plays in the business records exception. Florida law has always required an affiant to have personal knowledge of the facts set forth in an affidavit, and this is no less true for affidavits that seek to admit records created from data stored in a computer. The affiant must have personal knowledge as to the company's practice for inputting and keeping the data, and where the data came from.

The holding in *Glarum* is a particularly important reminder of the requirements to admit records under the business records exception, in light of the backlog of cases and the need to expeditiously resolve those cases. That the backlog of cases is large and harmful to the economy, or that homeowners may fail to respond to a complaint or lack the means to contest a foreclosure case, is not a reason to relax the requirement for personal knowledge under the rules of evidence. [19]

While *Glarum* is a standard application of Section 90.803(6)(a), would the same result occur in federal court, where the definition of hearsay is narrower and where the catch all exception can be used to admit hearsay evidence that has the indicia of reliability?[20]

**The Federal Interpretation**

Federal Rule of Evidence 803.6 provides for an exception to the hearsay rule if:

> (A) the record was made at or near the time byBor from information transmitted byBsomeone with knowledge; (B) the record was kept in the course of regularly conducted activity of a business, organization, occupation, or calling; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness; and (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

When applying Rule 803.6 in the context of an affidavit submitted by a financial institution, federal courts are often asked to determine the rights of a successor bank that has acquired the loan through a purchase from the FDIC. When that occurs, there is a body of case law and a federal statute that significantly restricts the defenses that may be applied to such a successor bank, known as the *D'Oench* doctrine.[21] The *D'Oench* doctrine was originally created as a way to stabilize the banking industry and protect the FDIC under federal common law.[22] *D'Oench* held that "in litigation between a bank customer and the FDIC, as successor in interest to a bank, the customer may not rely on agreements outside the documents contained in the bank's records to defeat a claim of the FDIC."[23] The *D'Oench* doctrine was later codified and expanded,[24] and it creates a significant bar to most defenses related to the predecessor bank's misconduct or omissions.[25]

The purpose behind the *D'Oench* doctrine – the protection of the banking system – has led Federal courts to weaken the evidentiary requirements for admitting failed bank records into evidence. During the bank failures of the 1980s and early 1990s, it was commonly heard that "12 U.S.C. § 1823(e) clearly manifests Congress' directive that the FDIC must be entitled to rely upon the accuracy of the records of financial institutions. Therefore, FDIC employees ... must be entitled to rely upon the accuracy and completeness of failed bank records."[26] This rationale is still applied today to bolster the successor bank's ability to admit records obtained from a failed bank.

In *Stringer,* however, the borrower attempted to show that the FDIC's affidavit was defective, and therefore, the FDIC's motion for summary judgment was not properly supported because the affiant lacked personal knowledge.[27] The affiant, a FDIC credit specialist, did not work for the failed bank and therefore could not have personal knowledge of the making of the notes or other loan documents attested to in her affidavit.[28] The Fifth Circuit rejected this argument, relying instead on its recent holding in *Dalton v. FDIC,* where the court held that "an affiant of an FDIC account officer is not defective solely because the officer did not have personal knowledge of the loan transaction when it occurred, and only learned about the loan after the bank went into receivership."[29] "To decide otherwise would be to hold the receiver to such a strict standard that summary judgment would be all but impossible for plaintiffs in cases such as these."[30] Such a position would be contrary to "prior jurisprudence which provides that suits on promissory notes provide 'fit grist for the summary judgment mill.'"[31] Further, in accordance with the Fifth Circuit's ruling in *Camp,* the borrowers needed to point "to evidence in the record to the effect that they had a legitimate fear that the [FDIC] was not the owner and holder of the note in question and that some other entity might later approach them demanding payment."[32] Because Stringer was unable to do so, the mere fact that the affiant, the FDIC account officer in charge of the documents, lacked personal knowledge, was insufficient to exclude the affidavit, and it was properly admitted pursuant to the business records exception.[33]

In the wake of the new wave of bank failures, federal courts have continued to broadly apply the business records exception when examining affidavits attaching promissory notes.[34] The policies underlying *D'Oench* and its progeny continue to apply in this economy.

Where failed banks are not involved, would a federal court be more willing to apply the requirements of *Glarum* in the context of the Fed. R. Evid. 803(6)? In *U.S. v. Glasser,* another case involving an affidavit submitted by a financial institution, the Eleventh Circuit, held that the computer records attached to the lender's affidavit were admissible under the business records exception, even though the affiant apparently did not testify to how or when the computer data was input or stored.[35] That case involved compilations of various transactions relating to the mortgage accounts which were the basis of a prosecution for embezzlement and making false entries into bank records. [36] The court stated that the computer records were admissible upon a showing that the records 1) were kept pursuant to some routine procedure; (2) were created for a motive that suggested

accuracy, and not one that would create suspicion, and (3) must not themselves be mere accumulations of hearsay or uninformed opinion. [37] Thus, the government did not need to show that the custodian had personal knowledge that the records were made at or near the time of the event depicted, or that the records were created as part of a regular business practice, or that the data was secure from manipulation, even in the context of a criminal prosecution where the defendant's liberty was at stake. [38]

**The *Glarum* Effect**

While banks and lenders' counsel may have feared a ripple effect from *Glarum* on the hundreds of thousands of foreclosure cases pending in Florida, it appears that those fears are unfounded. The limited holding in *Glarum* is simply a reminder that the affiant must have personal knowledge of the basic business practice for making, keeping and storing financial records. It has had little effect on the actual outcome of cases when it comes to the issue of the admissibility of affidavits which are not based on personal knowledge, as demonstrated by more recent cases admitting affidavits based upon computer data or information from a predecessor lender or servicer.[39] While *Glarum* may have encouraged borrowers to depose affiants in advance of the motion for summary judgment hearing, lenders are now forewarned about the need to locate and prepare the proper custodians. *Glarum* and *Mazine* are reminders that overwhelmed banks and underwater borrowers should pay close attention to affidavits that may be challenged even though the affiant has successfully testified as to similar records in many prior uncontested foreclosure cases.

With respect to the federal courts, the application of the business records exception will continue to be molded by the narrower definition of hearsay and public policy to protect the solvency of the banking industry. Both Congress and the courts have painstakingly sought to protect the FDIC from most, if not all, defenses for nonpayment, and it is unlikely that any heightened standard could be argued successfully. Even where the federal court is reviewing an affidavit from a bank employee outside the context of the *D'Oench* doctrine, the standard for personal knowledge appears to be applied with less vigor than the Florida standard.

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1. *See* Charles W. Ehrhardt, *West's Florida Practice Series*, 1 Fla. Prac., Evidence §801.2 (2012 Ed.)

[2]. It has been noted that "[t]he proper definition of hearsay has long been a matter of debate." *Id.* Indeed, Florida chose not to adopt the catch-all exceptions that apply in federal court. "[T]he narrower definition of hearsay set forth by the Advisory Committee to the Federal Rules and adopted in Federal Rule 801 [and section 90.801(1)(c)] is much easier for practicing lawyers and judges to understand than the expansive definition."). *Id.*

3. Brian Tackenberg, *Instituting Nonjudicial Foreclosure In Florida: When It Comes To Instituting Nonjudicial Foreclosure In Florida: When It Comes To Foreclosure, Florida's Judiciary Should Let Lenders Lead*, 64 Fla. L. Rev. 1839 (2012).

[4]. *See* Federal Deposit Insurance Corp., *Failed Bank List*, http://www.fdic.gov/bank/individual/failed/banklist.html. These figures apply to banks insured by FDIC, including banks chartered by the federal government as well as most banks chartered by the state governments.

*See also* Abe Chernin, et al., *FDIC Lawsuits Against Directors and Officers of Failed US Financial Institutions*, Financial Regulation International (March 2013, Issue 16.2) http://www.cornerstone.com/files/Publication/75c98fbb-18d4-45e3-b1b6-bed4f8e14b30/Presentation/PublicationAttachment/6a2262ed-1df7-447d-966b-ca8478f41f87/FRI_FDIC_Litigation_Chernin_Galley_Richardson_Schertler.pdf

5. Florida Supreme Court, *Final Report And Recommendations On Residential Mortgage Foreclosure Cases;* (No. AOSC09-54) (Fla. 2009). http://www.floridasupremecourt.org/pub_info/documents/AOSC09-54_Foreclosures.pdf

[6]. *See* S. Interim Rep. No. 2012-130 (2011), Committee on Judiciary, http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-139ju.pdf

(Robo-signing is "a practice under which someone signs many affidavits each day. The person signing the affidavit may have no

personal knowledge of the case but swears to processes that may or may not have taken place.").

[7]. See Morgan Brennan, *The Foreclosure Crisis Isn't Over Just Yet, (Dec. 1, 2012)* http://www.forbes.com/sites/morganbrennan/2012/12/01/the-foreclosure-crisis-isnt-over-just-yet/

[8]. *Supra* note 6. ("Practitioners and judges cite variables that can separately or in convergence impede foreclosures. Examples include lending industry practices of assigning mortgages, which can complicate establishing who has authority to foreclose; failure on the part of some plaintiffs to produce documents or submit filings integral to adjudication of the matter; litigation strategies of some defendants which may be designed to forestall foreclosure for as long as possible; workload constraints that prevent judges from reviewing case files to identify problems in advance of hearings; and a depressed housing market that may create a disincentive for lenders to proceed with a foreclosure sale and assume ownership and responsibility for the property.")

[9]. Fla. Stat. ' 90.803(6) (2012).

[10]. *Glarum v. LaSalle Bank Nat. Ass'n,* 83 So. 3d 780, 782 (Fla. 4th DCA 2011).

[11]. *See Thompson v. State,* 795 So. 2d 1946, 1048 (Fla. 4th DCA 1998) ("While the business records exception to the hearsay rule allow the admission of a memorandum, report, record or data compilation, it does not authorize hearsay testimony concerning the contents of business records which have not been admitted into evidence.") (internal quotations and citations omitted).

[12]. *Glarum,* 83 So.3d at 783.

[13]. *Id.*

14. *Id.* at 782, n.2.

15. *Id.*

16. *Id.* at 782.

[17]. *See Mazine v. M & I Bank,* 67 So. 3d 1129, 1131-32 (1st DCA 2011) (reversing the lower court's decision to admit an affidavit of indebtedness due to the lack of foundation for the business records exception. "[N]one of the requirements for admission of a business record were met. As noted, Taxdal candidly admitted that he had no knowledge as to the preparation or maintenance of the documents offered by the bank, including the affidavit as to amounts due and owing. Taxdal did not testify, and indeed, could not testify, that the affidavit as to the amounts owed was actually kept in the regular course of business. Further, he did not know if the source of the information contained in the affidavit was correct. He did not know if the amounts reported in the affidavit were accurate. There was no attempt to admit the affidavit by certification or declaration pursuant to section 90.803(6)(c), Florida Statutes. Accordingly, because no foundation was laid, the admission of the affidavit was erroneous."); *see also United Auto. Ins. Co. v. Affiliated Healthcare Centers, Inc.,* 43 So. 3d 127, 130 (Fla. 3d DCA 2010) ("[An] affidavit in support of summary judgment which merely states that documents appear in the files and records of a business is not sufficient to meet the requirements of the business records exceptions to the hearsay rule.")

18. *See Weisenberg v. Deutsche Bank Nat. Trust Co.,* 89 So.3d 1111 (Fla. 4th DCA 2012) (distinguishing *Glarum*).

[19]. *See id.* at 782; *see also Mazine,* 67 So. 3d at 1131-32.

20. *See Cynergy v. First American Title Ins. Co.,* 706 F. 3d 1321 (11th Cir. 2013)(finding the affidavit of a former Bank president properly admitted in a loan dispute over a land development project under Rule 807 of the Federal Rules of Evidence where the Bank officer was deceased prior to the start of the litigation, but had been the one who originated the subject loan. The 11th Circuit agreed with the district court finding that the affidavit speaks directly and comprehensively to a key issue for which very little alternative evidence exists, the need for the statements was great, and because the Bank's knowledge "is the fulcrum upon which liability turns.")

[21]. *See D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.,* 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942).

[22]. *See id.*

[23]. *Baumann v. Savers Federal Sav. & Loan Ass'n.,* 934 F. 2d 1506, 1514-15 (11th Cir. 1991).

24. See 12 U.S.C. § 1823.

[25]. *See Langley v. Federal Deposit Ins. Corp.*, 484 U.S. 86, 108 S. Ct. 396, 98 L.Ed. 2d 340 (1987) (holding that even if the bank fraudulently induces a customer into signing a note, the customer is barred by section 1823(e) from relying on those misrepresentations as a defense to payment); *Federal Sav. & Loan Ins. Corp. v. Gordy*, 928 F. 2d 1558, 1566 (11th Cir. 1991) (holding that the *D'Oench* doctrine applies to bar defenses even where the customer is completely innocent of any bad faith, recklessness or negligence); *Baumann*, 934 F. 2d at 1515 ("In a suit over the enforcement of an agreement originally executed between an insured depository institution and a private party, a private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution's records.")

[26]. *Talmo v. Federal Deposit Ins. Corp.*, 782 F. Supp. 1538, 1541 (S.D. Fla. 1991) (citation omitted).

[27]. *See F.D.I.C. v. Stringer*, 46 F. 3d 66, No. 94-10668 (5th. Cir. January 13, 1995)

[28]. *Id.* at 2.

[29]. *Id.* (*quoting Dalton v. FDIC*, 987 F. 2d 1216, 1223 (5th Cir. 1993)

[30]. *Id.*

[31]. *Stringer*, 46 F. 3d at 2 (*quoting FDIC v. Cardinal Oil Well Servicing Co.*, 837 F. 2d 1369, 1372 (5th Cir. 1988))

[32]. *RTC v. Camp*, 965 F. 2d 25, 29 (5th Cir. 1992)

[33]. *Stringer*, 46 F. 3d at 2.

[34]. *See U.S. v. Herndon*, 2012 WL 4718622, C.A. No. C-11-318 (S.D. Tex. 2012) (finding an affidavit of a loan specialist properly admitted because the affiant's position and sphere of responsibility gave him sufficient personal knowledge to speak about the loans and the borrowers did not provide anything showing a "legitimate fear" that his testimony was untrue or unreliable).

35. *U.S. v. Glasser*, 773 F.2d 1553 (11th Cir. 1985)

36. *Id.* at 1558.

37. *Id.*

38. *Id.*

[39]. *See Weisenberg v. Deutsche Bank Nat. Trust Co.*, 89 So. 3d 1111 (4th DCA 2012) (finding an affidavit properly admitted where the affiant demonstrated sufficient knowledge of how the data was produced, who was responsible for collecting payments, information regarding serving, and reliance on very specific figures); *see also Slipkovich v. Deutsche Bank Nat. Trust Co.*, 94 So. 3d 703 (4th DCA 2012).

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## Meet a Board Member: Adine Momoh

Adine Momoh currently serves as a member-at-large on the National Board of Directors for the Federal Bar Association's Younger Lawyers Division. She also serves as the Co-Director of the Thurgood A. Marshall Memorial Moot Court Competition and Chair of the Robyn J. Spalter Outstanding Achievement Award Committee, and assists the FBA YLD with the Summer Law Clerk Program and U.S. Supreme Court Admissions Ceremony, among many other committees and FBA initiatives. Adine is an associate trial attorney in the Minneapolis office of Leonard, Street and Deinard, P.A., where she specializes in complex business and commercial litigation, including securities, transportation and railroad and estates and trusts litigation, and creditors' rights and bankruptcy.

Adine received her B.A., *summa cum laude*, in business administration-legal studies in business, psychology and pre-law from the University of St. Thomas and her J.D., *magna cum laude*, from William Mitchell College of Law. During law school, Adine was a member of the Warren E. Burger Inn of Court and worked as a research assistant for two law professors. In 2009, the Minnesota Justice Foundation recognized Adine for her pro bono efforts, and she received the 2009 Clinical Legal Education Association Outstanding Student Award for her work in the William Mitchell College of Law Civil Advocacy Clinic. Adine continues to provide pro bono legal services through the Leonard, Street and Deinard Legal Clinic and FBA Minnesota Chapter's *Pro Se* Project.

In spring 2011, Adine left Leonard, Street and Deinard to serve as a law clerk to the Honorable Jeanne J. Graham of the U.S. District Court for the District of Minnesota at Judge Graham's personal request. In the fall of that year, she returned to the firm. Before joining the firm as an associate, Adine worked at the firm as a summer associate.

Adine sits on the Minnesota FBA Chapter's Board of Directors, co-chairs the Chapter's Law School Outreach Committee, and serves as a member of the Chapter's Communications Committee, for which she has written several articles for the Chapter's nationally recognized and award winning *Bar Talk* publication.

Outside the office, Adine enjoys exploring the Twin Cities' art museums. Adine has even painted a few oil paintings herself (she had her first art show in January 2011). Adine tempers her schedule with circuit training and Zumba, which she finds time to do most days. She is an active participant of Twin Cities Diversity in Practice, serving as a student mentor, participating as a mentee, and working on other diversity initiatives to attract, recruit, advance and retain attorneys of color in the Twin Cities legal community.

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## Acquiring a Personal Legal Antilibrary

Lawyers are professionals. And lawyers are professional writers. Since professional writers are most persuasive when their written work appears professional— and written work is more likely to appear professional with the usage and consultation of a personal antilibrary—every lawyer should have a personal legal antilibrary.

It is uncontroversial to state that lawyers are professionals. When "professional" is used as a common noun to describe lawyers, it may be too apparent to require justification. After all, a "professional" is "[a] person who belongs to a learned profession or whose occupation requires a high level of training and proficiency."[1] Using "professional" as an adjective modifying "writer" to describe lawyers should be no more controversial. After all, a lawyer's written work is "suitable for a profession."[2] Whether a lawyer practices transactional law, litigation, or a combination of the two—Atticus Finch was a great courtroom litigator but he is also reputed to have been able to "make somebody's will so airtight can't anybody meddle with it"[3]—he or she is a professional writer. As professional writers, lawyers are most persuasive when their written work appears professional. And written work appears professional when it is clear, concise, and grammatical. An appropriate antilibrary can help with clarity, concision, and grammaticality.

The term "antilibrary" is not a neologism. Nassim Nicholas Taleb coined the term in describing Umberto Eco's large personal collection of books.[4] Inasmuch as a library is a research tool, individuals tend to acquire more books over time. With the acquisition of more books, the number of unread books grows. And the potential of a library as a research tool grows in proportion to the number of unread books. The collection of unread books is an "antilibrary." The volumes in a personal legal antilibrary are a personal choice. But the following volumes provide a starting point for acquiring an appropriate legal antilibrary:

Black's Law Dictionary (9th ed. 2009). "*Black's* is the most widely used law dictionary in the United States."[5] It is the standard American law dictionary and has been cited in hundreds of Supreme Court opinions.[6] Indeed, it is the most-cited technical dictionary.[7] The Supreme Court's use of dictionaries, including *Black's*, is not without criticism.[8] As Judge Posner has recently noted, "Dictionaries are mazes in which judges are soon lost. A dictionary-centered textualism is hopeless."[9] But criticism of the Court's use of legal-dictionary definitions as a method of controlling statutory meaning does not detract from the value of dictionaries as resources for attorneys. *Black's* is indispensable.

It is "linguistically naïve" to suppose that dictionaries are all basically the same.[10] There is no dictionary bill of rights. All dictionaries are not created equal. Because dictionaries are not all created equal, below is a list of recommended general dictionaries for a personal legal antilibrary. (*The Oxford English Dictionary*[11] is not listed on account of size (the full print set is 20 volumes, plus additions) and cost (in excess of $1,000 with the additions series).)

Webster's Third New International Dictionary Unabridged (1961).[12] Despite being the most controversial dictionary in American history,[13] *Webster's Third New International Dictionary* is a valuable resource. From 1998 to 2011, the Supreme Court of the United States published no less than seventy-three decisions citing *Webster's Third*

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*New International Dictionary*,[14] making it the most frequently cited contemporary American general dictionary.[15] But be forewarned, it is "scholarly but infamously permissive in neglecting to include accurate usage tags."[16]

The American Heritage Dictionary of the English Language (5th ed. 2011).[17] Since a fourth edition of *Webster's New International Dictionary* has not been issued and *Webster's Third New International Dictionary* was published more than five decades ago, a more contemporary general dictionary is recommended. *The American Heritage Dictionary of the English Language* has an esteemed usage panel, which includes Justice Antonin Scalia and law professors Peter Tiersma and Eugene Volokh.[18] And despite its recent minting, the fifth edition already has received its first Supreme Court citation.[19]

Garner's Modern American Usage (3d ed. 2009)[20] and Garner's Dictionary of Legal Usage (3d ed. 2011).[21] "Many lawyers don't even know that usage guides exist. But they do, and the best ones are wonderfully informative. Essentially, a usage guide is a compilation of literary rulings on common language questions."[22] Usage guides are necessary because dictionaries are not always sufficient. If someone needed to know the proper spelling of the plural form of "money," and looked up the word in *The American Heritage Dictionary of the English Language*, entries for "moneys" and "monies" would both be found. And the Dictionary's guide states that the variant spellings "occur with roughly equal frequency in edited sources ...."[23] But *Garner's Dictionary of Legal Usage* notes "monies is an illogical and misconceived plural. Because it is too common, however, it cannot be labeled a gross error. Still, *moneys* remains the preferred form, used, e.g., in the heading of 18 U.S.C. § 2314 (1988). *Monies* is only as logical as the obsolete plural *attornies*."[24]

Whether wondering if it is proper to begin a sentence with "because" or deciding whether quoting the term "acknowledgement" in an early nineteenth century English case requires "[sic]" to demonstrate error, *Garner's Modern American Usage* provides succinct guidance. If *Garner's Modern American Usage* is a general guide to English usage, *Garner's Dictionary of Legal Usage* is a technical guide to legal usage. Whether uncertain if a given interrogatory is "vague," "ambiguous," or both, *Garner's Dictionary of Legal Usage* provides accessible guidance.

The Winning Brief (2d ed. 2004).[25] Even if you have a degree in English and participated in the Scripps National Spelling Bee—as an official contestant, not by shouting at those who "have neither turned 16 nor passed beyond the eighth grade"[26] while watching ESPN—and know to hyphenate phrasal adjectives, *The Winning Brief* is an invaluable resource for writing more persuasively.

Typography for Lawyers (2010).[27] Lawyers often overlook the importance of typography. But just as lawyers should avoid linguistic naivety, lawyers should also avoid typographical naivety. Typography—"the visual component of the written word"[28]—matters. Good typography helps attorneys appear credible, allowing readers to focus on the content of the written work. Bad typography has the opposite affect. Regular reference to *Typography for Lawyers* promotes good typography.

The Bluebook: A Uniform System of Citation (19th ed. 2010).[29] *The Bluebook* has had its fair share of criticism.[30] But there are good reasons for following a uniform system of citation. "The case for standardization and uniformity provided by following any legal style guide is that it serves as a *lingua franca* across disparate fields of the law. Following a style guide enhances communication and clarity between authors and readers by providing a common set of defined styling conventions that reduce ambiguity, impression, and reader uncertainty."[31] The justification is generic: "any legal style guide," and there are competing systems of citation, most notably *The ALWD Citation Manual* and *The University of Chicago Manual of Legal Citations* (the "Maroonbook"). But *The Bluebook* is ubiquitous in legal circles. And it helps avoid reader uncertainty because most attorneys and judges are familiar with its uniform citation system.

The Chicago Manual of Style (16th ed. 2010).[32] When *The Bluebook* rules are insufficient, *e.g.*, when they fail to "address a particular question of capitalization," users are directed to "refer to a style manual such as the *Chicago Manual of Style* ...."[33] It is authoritative and exhaustive.

The Redbook: A Manual on Legal Style (2d ed. 2006).[34] With the exception of typography, the editing process is probably the most overlooked aspect of legal writing. It may also be the most important. The legal profession may not have a style guide that has achieved the ubiquity of *The Bluebook* as a citation guide. But *The Redbook* is close.

These recommendations are not an exhaustive list. Young lawyers may want to purchase a copy of *The Associated Press Stylebook*, a thesaurus, or a book on logic. But these recommendations provide a starting point for attorneys concerned with good writing and interested in acquiring an appropriate legal antilibrary.

Even Atticus Finch likely could have benefited from the suggested volumes. Unless, of course, he appreciated that "last will and testament" is likely a needless doublet.[35]

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[1] Black's Law Dictionary 1329 (9th ed. 2009).

[2] The American Heritage Dictionary of the English Language 1406 (Joseph P. Pickett ed., 5th ed. 2011) (hereinafter "American Heritage Dictionary").

[3] Harper Lee, To Kill a Mockingbird 104 (Harper Collins 40th ann. ed. 1999) (1960).

[4] Nassim Nicholas Taleb, The Black Swan 1 (2d ed. 2010).

[5] Sarah Yates, *Black's Law Dictionary: The Making of an American Standard*, 103 Law Libr. J. 2, 175 (2011–12) (hereinafter "*Yates*").

[6] *Id.* at 179–80.

[7] *Id.* at 178 n.25 (citing Lawrence Solan, *When Judges Use the Dictionary*, 68 Am. Speech 50, 51 (Spring 1993)).

[8] Ellen P. Aprill, *The Law of the World: Dictionary Shopping in the Supreme Court*, 30 Ariz. St. L.J. 275 (Summer 1998).

[9] Richard A. Posner, *The Incoherence of Antonin Scalia*, New Republic (Aug. 24, 2012), http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism (reviewing Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts (2012)).

[10] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 416 (2012) (hereinafter Reading Law).

[11] The Oxford English Dictionary (John Simpson & Edmund Weiner eds., 2d ed. 1989).

[12] Webster's Third New International Dictionary Unabridged (Philip B. Gove ed., 1961).

[13] *See* David Skinner, The Story of Ain't (2012).

[14] Yates, *supra* note 5, at 178.

[15] *See supra* note 7.

[16] Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 213 (2008).

[17] The American Heritage Dictionary of the English Language, *supra* note 2.

[18] *Id.* at xii.

[19] *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 n.6, n.8 (2012).

[20] Bryan A. Garner, Garner's Modern American Usage (3d ed. 2009).

[21] Bryan A. Garner, Garner's Dictionary of Legal Usage (3d ed. 2011) (hereinafter Garner's Dictionary).

[22] Reading Law, *supra* note 10, at 63.

[23] American Heritage Dictionary, *supra* note 2, at xxi.

[24] Garner's Dictionary, *supra* note 21, at 586.

[25] Bryan A. Garner, The Winning Brief (2d ed. 2004).

[26] National Spelling Bee, http://www.spellingbee.com/about-the-bee (last visited March 25, 2013).

[27] Matthew Butterick, Typography for Lawyers (2010).

[28] Matthew Butterick, *What Do the Rules of Court Really Say About Typography?*, 25 Cal. Litig. 2, 9 (2012).

[29] The Bluebook: A Uniform System of Citation (Columbia Law Review Ass'n et al. eds., 19th ed. 2010) (hereinafter Bluebook).

[30] Richard A. Posner, *Goodbye to the Bluebook* 53 U. Chi. L. Rev. 1343 (1986); Richard A. Posner, *The Bluebook Blues* 120 Yale L.J. 850 (2011).

[31] Edward Jessen, *Citation Style: Why Do We Care?*, 25 Cal. Litig. 2, 6 (2012).

[32] The Chicago Manual of Style (The University of Chicago Press, ed., 16th ed. 2010).

[33] Bluebook, *supra* note 29, at 84.

[34] Bryan A. Garner, The Redbook: A Manual on Legal Style (2d ed. 2006).

[35] Garner's Dictionary, *supra* note 21, at 294-96.

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# A Young Lawyer's Guide to Multidistrict Litigation



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## A Young Lawyer's Guide to Multidistrict Litigation

Eighteen months ago I had never even heard the term "multidistrict litigation." I had heard the term "mass torts" before, but I hadn't actually given any thought to what that practice area might actually involve. In short, I was only dimly aware that the world of mass tort litigation existed. That all changed when, as fate would have it, I began my career as an attorney working for a mass tort law firm. Fortunately, although it was at times akin to drinking from a fire hose, I seem to have survived my first year in the world of mass torts. This article is a brief summary of what I have learned.

For starters, mass tort attorneys use at least as many acronyms as the cast of *Jersey Shore*. Since it's always helpful to understand the language, following is a quick list of the most commonly used mass tort acronyms.

MDL = multidistrict litigation
JPML = Judicial Panel on Multidistrict Litigation
PSC = Plaintiffs' Steering Committee
DSC = Defense Steering Committee
CTO = conditional transfer order
PFS = plaintiff fact sheet
DFS = defendant fact sheet
PPO9 = Practice and Procedure Order #9

I will use these acronyms throughout the rest of this article. One other piece of preliminary information (before I begin my summary of MDLs) is that there is a bible of sorts for this practice area, entitled *Manual For Complex Litigation* by David F. Herr. If you intend to practice mass torts, you must obtain a copy of this book.

**What is Multidistrict Litigation?**

Multidistrict litigation (MDL) is a special federal procedure intended to more efficiently process complex litigation. The authority for creation of an MDL derives from 28 U.S.C. § 1407, which provides that "when civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). The procedure is typically used in instances where hundreds (or even thousands) of plaintiffs were injured by the same conduct of a defendant or defendants, such as in a plane crash or an oil rig blowout or by an allegedly unsafe drug or medical device. (*See, e.g., In re Air Crash over the Mid-Atl.*, MDL No. 2144; *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179; *In re DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation*, MDL No. 2197.)

MDLs are created by the Judicial Panel on Multidistrict Litigation (JPML). The JPML was created in 1968 by an Act of Congress. *See* http://www.jpml.uscourts.gov/panel-info/overview-panel. It consists of seven sitting federal judges who are appointed by the Chief Justice of the United States. *Id.* Its role is to decide motions for centralization (i.e., to determine whether actions pending in different district courts involve common questions of fact sufficient to establish an MDL) and to assign the created MDLs to federal district court judges. *Id.* A party seeking creation of an MDL must file a motion for centralization (also called a motion for 28 U.S.C. § 1407 transfer) with the JPML itself. The

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procedures for filing such a motion, as well as sample forms, are available on the JPML website. Such a motion must consist of at least two actions pending in district courts which arguably involve common questions of fact.

Once an MDL has been created, the procedure for transfer to the MDL changes slightly. The party seeking transfer files what is called a notice of "tag-along" action with the JPML. This "tag-along" notice can be filed for any case pending in a federal district court and involving the common questions of fact specific to the MDL. It does not matter whether the case was initially filed in federal court or initially filed in state court and then removed to federal court. The JPML then issues a conditional transfer order (CTO), which, as the name implies, conditionally transfers the case to the MDL. Within seven days of the issuance of the CTO, any party opposing the transfer must file a notice of opposition in the JPML. This is done using a form available on the JPML website. The opposing party must then, within fourteen days of filing its notice of opposition, file with the JPML a motion to vacate the transfer and a brief in support thereof. If the transfer is not opposed, then the MDL court will issue a "finalized CTO," transferring the case to the MDL docket.

**What Happens after a Case Is Transferred to an MDL?**

Once a case is transferred to an MDL, it is subject to the pretrial procedures established by the MDL court, most notably the discovery procedures and deadlines. These differ somewhat from the discovery procedures typical in non-MDL cases. Since the purpose of creating an MDL is to avoid the proverbial reinvention of the wheel in every cause of action, the defendant or defendants produce their documents only once (and not hundreds or thousands of times), and they are then used for the benefit of all plaintiffs in the MDL.

You may now be wondering exactly how this production and sharing is accomplished, since it quite obviously involves a significant amount of coordination from both sides of the aisle. The answer to this question is steering committees. At the beginning of the litigation, an MDL court establishes a Plaintiffs' Steering Committee (PSC) and a Defense Steering Committee (DSC). Attorneys seeking appointment to these committees must submit an application to the MDL court. Once the appointments are made and the committees are formed, the PSC and the DSC then work with each other and with the MDL court to move the litigation forward. Throughout the process, there is an emphasis on streamlining discovery so that it progresses as efficiently as possible.

For instance, both sides seek to standardize the paper discovery process as much as possible by developing fact sheets, which are then completed in lieu of initial written interrogatories. The parties create a plaintiff fact sheet (PFS) and a defendant fact sheet (DFS). Each is designed to collect relevant information, and the parties often argue over the content and scope of the information sought as well as the individual questions themselves and the number of questions. When the PSC and the DSC can't agree on an issue related to one of the fact sheets, the MDL court decides the issue. All objections with respect to the fact sheets are addressed before the fact sheets are put to use. Indeed, the MDL court must approve the proposed fact sheets, and the final, approved version of each is then used in each cause of action within the MDL.

Similarly, the PSC and the DSC work together regarding the production of documents. As stated earlier, defense documents are produced to the PSC. The PSC then coordinates its review of the produced documents among the plaintiffs' attorneys involved in the MDL. This eliminates the need for defendants to repeatedly produce the same documents and for multiple plaintiffs' attorneys to review the exact same documents. Similarly, the PSC notices defendant depositions and appoints plaintiffs' attorneys from within the MDL to take them. The testimony elicited in these depositions is then available for use in every cause of action pending within the MDL.

So far (with the possible exception of the PFS), I've discussed only discovery relating to the common question(s) of fact on which formation of the MDL was based. So what happens with respect to case-specific discovery? Well, in the parlance of mass tort lawyers, they are "PPO 9'ed," which means they are transferred back to the transferor federal district court for the purpose of conducting case-specific discovery. Practice and Procedure Order #9 (PPO9) establishes this procedure; hence, the term "PPO9'ed." The MDL court designates cases for PPO9 discovery in "waves," and these "waves" typically follow the completion of much of the consolidated discovery.

The MDL court, the PSC and the DSC work together throughout the litigation. If the PSC and the DSC are unable to resolve a discovery or other type of dispute, the MDL court will intervene. The MDL court addresses issues and sets scheduling deadlines at case status

conferences, which are held as frequently as the MDL court deems necessary. Although it is the members of the PSC and the DSC who address the MDL court during these conferences, typically counsel for all parties in the MDL participate via telephone.

**Bellwether Trials**

If you've reached this point in this article, you may be wondering what all of this means for the trial of MDL cases. Consolidating cases with common questions of fact for pretrial purposes certainly saves time and resources and promotes efficiency, but what good is all that if hundreds or thousands of similar cases must still be tried?

The solution to that conundrum is bellwether trials. The immediate goal toward which the MDL court, the PSC and the DSC all work is bellwether trials. In its initial scheduling order, the MDL court sets dates for bellwether trials, which, as long as the parties have agreed to waive any venue objections, are tried before the MDL court. Other cases within the MDL are remanded to the transferor court for trial.

As their name implies, the purpose of bellwether trials is to conduct trials that will allow all parties and the MDL court to assess the strengths and weaknesses of the MDL cases as a whole and to provide a bench mark by which the cases can be valued. Bellwether cases must therefore be as representative of the MDL cases as a whole as is possible. As with discovery and scheduling, the PSC and the DSC work together during the bellwether process. Typically, criteria are first established to create a finite universe of possible bellwether cases. Then, both sides review the cases from within that universe and select a specified number of cases to be their bellwether submissions. Each side submits its bellwether choices to the MDL court, often with a short summary of the case and the reasons why it would be an ideal bellwether. The MDL judge then selects the bellwether cases.

**A Few Things to Watch Out For**

If you find yourself in the world of multidistrict litigation, there are more than a few nuances specific to the practice that you should become aware of sooner rather than later. First, at least browse through the *Manual for Complex Litigation*. I know I already mentioned this book, but it would be impossible to understate its usefulness. Now that you know of its existence, read some of it. Also, exploring the JPML website is a must.

My second additional tidbit of advice also involves reading. As soon as you find yourself in an MDL court, download and read a copy of that court's local rules. Not all MDL judges are sticklers when it comes to applying the local rules to MDL proceedings, but some are, so learn them. Besides, even if your MDL judge isn't a stickler, abiding by local rules and customs garners good will. As the saying goes, "When in Rome, do as the Romans do."

Third, keep your eyes wide open for choice-of-law issues. Choice-of-law issues are, of course, inherent in complex litigation. MDLs, however, can add new wrinkles when it comes to such analysis. For instance, in multidistrict litigation, matters of federal law are governed by the law of the transferee court. *See Ricupito v. Indianapolis Life Ins. Co.*, No. 3:09-CV-2389-B, 2011 U.S. Dist. LEXIS 97334, at *5 (N.D. Tex. Aug. 31, 2011) ("As to matters of federal law, however, the Court applies the law of the transferee court."); *Bhatia v. Dischino*, No. 3:09-CV-1086-B, U.S. Dist. LEXIS 97339, at *15-16 (N.D. Tex. Aug. 29, 2011).

**Conclusion**

Given the staggering complexity of multidistrict litigation, and the break-neck speed at which many MDL cases proceed, I'm hopeful that the above paragraphs will provide you with at least enough guidance to determine that you are not actually in Oz. It may certainly seem that way at first. But, trust me, in hardly any time at all, you too will be peppering your speech with acronyms like "MDL," "JPML" and "PPO9."

Maria Janoski is an associate at Williams Cuker Berezofsky in Cherry Hill, New Jersey. She works on complex litigation involving mass tort cases in environmental and pharmaceutical matters.

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