Dr. Henry Lee

Home Rule in Allegheny County

The Allegheny County Law Library

Pittsburgh's Civilian Police Review Board

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On the Cover: Nationally renowned criminal pathologist Dr. Henry Lee speaking at Duquesne University School of Law on Feb. 18, 1998.

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"I think the challenge of a young lawyer in the 21st century is to be cognizant of the fact that we have more tools and power than any other generation of lawyers."

Over the last few weeks, I have been agonizing with myself and with my editors for a theme for this latest issue of Juris, but unfortunately I could not come up with any definitive idea. What kept going through my mind was that this would be just another typical issue of Juris. At first I thought "We can't have that!" Yet the more I thought about it, I thought "Why not?" Why not have just a "typical" issue of Juris?
What is a typical issue of Juris? It's no different than the previous hundred or so issues that have been committed to raising the eyebrows of its ever growing readership by addressing national and regional legal issues of the day.

This “typical” issue of the 31st edition of Juris is no different. This issue tackles a variety of legal issues ranging from the role of the special prosecutor to the history of medical malpractice. We also look at environmental law and touch on international law with some thoughts on the ever volatile situation in the Middle East. Closer to home, Juris provides its readers with a preview of both Pittsburgh’s new Civilian Police Review Board, and the proposed change in Allegheny County’s two-century-old form of government. From the halls of our law school, this issue features an interview with nationally renowned criminal pathologist Henry Lee, plus we take a rather lighthearted look at the Law School’s posting of final exam grades on the Internet. Believe it or not, there's even more than that, but you'll have to read on to find out...all this in just a “typical” issue of Juris.

This typical issue, also marks the end of my three-year tenure with Juris...and what a rewarding tenure it has been. I have had the honor of working with two previous editorial boards who led the magazine with both professionalism and integrity, and I say easily the same about the current editorial board members. Being part of Juris has enabled me to work with and meet many wonderful people. In particular, I’ve gotten to know a number of night students who I might not have gotten to know by my status as a day student (in recent history, the Juris staff has been dominated by night students—I don’t know how they do it). As for this year’s staff, through our collective thoughts and efforts, we have put together a very professional (and once again typical) 31st edition of Juris. And I have no hesitation in saying that our tradition of excellence will be carried on next year by Nick Rodriguez and his staff.

In this editorial comment, I also wanted to enlighten our readers about some Juris “secrets” as to why it has been an honor to have been a part of Juris for three years. First and most importantly, Juris is the product of law students who I believe love the law and want to make their own little mark in it. I can say that, because Juris’ editors and writers receive no compensation, nor academic credit for their efforts. The articles that you read in this magazine are written because the writer wanted to write them. Likewise, the meticulous process of editing and producing each issue is done through the much to be respected dedication of our editors—it is literally a year-round job.

While I hope our contributors, whether they be students or attorneys, continue to write because of their interest and dedication to the law, it is my hope that Duquesne Law School will grant academic credit to the future members of the editorial boards of Juris. Juris has established itself as a cornerstone of the academic excellence at the Law School through its three-decade commitment of addressing legal issues in the greater Pittsburgh and Pennsylvania legal communities. This excellence should be recognized with academic rewards.

On a closing note, (and to detour from my “editorializing”) I hope our readers have enjoyed this 31st edition of Juris; it has been a challenging, but rewarding endeavor. The underlying theme that I wanted for both issues was to remember our proud legal past, and use that as a foundation as we begin the new century. I think we’ve accomplished that.

Looking through our two issues, I realize that this a very exciting time to become a young lawyer (or a young lawyer at heart). Just think about the changes that are going on right now. We have revolutionary changes in telecommunications that give us instant knowledge—books and newspapers are becoming obsolete. It seems like everyday some civil liberty is argued in court—will cigarettes be outlawed? the Internet be regulated? etc... (read future issues of Juris to find out). This decade has seen so many high profile court cases—are they good or bad for us? Time will tell. On the other hand, this era of excitement in jurisprudence could also be dangerous. How politicized will our judiciary become when we begin to practice in the next century? How weakened will the presidency be? Will civil liberties be weakened, or expanded by the courts, or by events that develop in our streets?

I think the challenge of a young lawyer in the 21st century is to be cognizant of the fact that we have more tools and power than any previous generation of lawyers. Let us use these tools, power and our talents however we choose to redefine our profession. Let us adapt and persevere through all political, economical, and social changes. And, let us do this professionally and compassionately.

The next century will be an exciting time for young—and old—lawyers. I look forward to reading about it in all future “typical” issues of Juris.
At the Scene with Dr. Henry Lee

Dr. Henry Lee, the Director of the Connecticut State Police Forensic Science Laboratory, is arguably the foremost forensic criminologist in the world. On Wednesday, February 18, 1998, the Law School had the distinct honor of hosting a CLE lecture in conjunction with Dr. Cyril Wecht and sponsored by the Law School's Criminal Defense Clinic under the direction of Professor Joseph Sabino Mistick. After only a short time with Dr. Lee, one realizes why he is one of the most sought after experts in his field. Dr. Lee engages his audience and clearly vocalizes his profound knowledge. With his dry wit and the timing of a seasoned comedian, he is able to transform the complex issues of forensic science into clear concepts.

Because of his ability to impart his knowledge of forensics, Lee's reputation proceeds him. Attorneys in high profile cases often retain him to provide his expert opinion. Other times, he is retained not for his testimony, but to keep him from the "other side." He is so well respected by both sides, that even Phil Vannatter, retired Los Angeles Police Department (LAPD) detective and founder of the Vannatter Investigative School, recently asked Dr. Lee to speak to students at his investigative school for $5,000 per day.

He has been called on by the United Nations, the United States, Scotland Yard, and countless investigative departments worldwide for unrivaled ability to solve crimes. As Carl Noziglia, former director of the American Society of Crime Laboratory Directors, stated: "It's not a question of whether he can walk on water—that's an established fact. It's how far." When asked about his professional talent, this unassuming man would tell you, "It's elementary, don't forget the basics. Use simple logic. You have to use deductive reasoning to try to put the puzzle together. Not just see the tree, but the forest."

His presentations are well-known for their keen insights and peppering one-liners. If or when Dr. Lee decides to abandon the forensic science field, his career as a stand-up comic is awaiting him: "During the last 10 years, this country averaged about 23,000 to 26,000 homicides per year. The FBI did some interesting statistical analysis and found that in the U.S., a total of one out of every 153 people is going to be killed, which means today we need two volunteers. Usually, the Dean and Associate Dean. If you are male you have a better chance to get killed, one out of every 100, females one out of every 323. That's why in recent years, a lot of males had sex changes. They have a reason," said Lee.
Lee, the youngest of 13 children, was born in China in 1938. When his father was killed by mainland Communists, Dr. Lee’s family fled wartime China for Taiwan. Lee entered the Taiwan Central Police College and graduated at the top of his class. By age 22, he became one of the youngest police captains in his country’s history.

Commenting on what attracted him to forensic criminalities, Lee states: “In the early days in Taiwan, 40 years ago, we solved cases by confession. We usually interrogated a suspect by rounding up all potential suspects, until one confessed... After 20 minutes you may get six confessions. Sometimes you didn’t know which was real... So, I felt sometimes innocent people were not able to withstand interrogation, and were forced to make confessions; there had to be a better way to solve cases. This began my interest in forensic science while I was a student at the Taiwan Police University. I took courses: finger printing, crime scene investigation, traditional scientific technique. I was continually looking for the better, newer ways to learn. I was eager to further my studies. This is why I came to the United States.”

Dr. Lee and his wife arrived in the United States in 1965. At the age of 27, he left an established career for a new country, a new language, and a new challenge. “Initially, I got a scholarship to pursue a master’s degree in so-called Criminal Justice. Then I found out that Criminal Justice really doesn’t teach you any scientific aspects of criminal investigation. I went to New York City University (NYCU) to get my degree. At that time, it just so happened that forensic science became a major... NYCU’s John Jay College was the first college to offer a degree in forensic science, and they offered me a pretty good scholarship, so I switched my major from chemistry to forensic science. Of course, I had to take a lot of courses...”

“In theory, I had to take four years of college courses over and I was an older student. I didn’t have time to be fooling around. I went to the school and asked if I could take more courses each semester, and the registrar said, ‘No, you’re going to flunk all the courses.’ I convinced them to let me try. And so, my first semester I took 16 credit hours and got all As. After that, they let me take as many courses as I wanted to take. The second semester I took 24 credits, which was two times the amount other students were taking, and I had three jobs. I worked at NYU Medical Center as a medical technician, I taught self-defense classes, and at night, I worked in a restaurant waiting tables. I had a family to support and tuition to pay, and also two children. It was pretty rough, but in two years I finished my bachelor’s degree.”

“Then I went to New York University (NYU) to get a master’s degree in biochemistry, and I worked for a Nobel prize biochemist and molecular biologist. He was my boss and also thesis advisor. I was lucky to have a job and work on my Ph.D. simultaneously. I finished my Ph.D. in one year...in 1974. Then, of course, I had to make a career decision—to stay in molecular biology or pursue seriously forensic science. I decided to go into forensic science, and the University of New Haven was looking for a forensic scientist, and they offered me an assistant professor position. I started teaching and we created a laboratory at the University to work on physical evidence to help law enforcement work on cases. In 1979, the former governor contacted me and asked me to take over the state laboratory. It was in really bad shape and (was) widely criticized. I took over the laboratory and she appointed me as first chief criminalist of the State of Connecticut and director of the State Police Forensic Lab.”

The laboratory, which Dr. Lee directs, works on 20,000 criminal cases annually. Of these cases, 300 to 400 are homicides. To date, Dr. Lee has investigated over 5,000 homicides in nearly every state and country throughout the world.

One might wonder what fuels this man. “I have no weekends, I work seven days a week. Usually 16 hours a day, sometimes 18 hours, sometimes longer. Today I was up at 5 a.m., the police came and discussed some cases, then I was off to the laboratory. I rushed to Hartford to appear before the Connecticut Supreme Court about an issue of physical evidence. The Chief Justice wanted me to be an observer guest of the Supreme Court. At 10 a.m., I rushed to the airport to fly to Pittsburgh. I fly back tonight at midnight and I have another meeting and I don’t know when this meeting will finish...”

Whether it is his testimony and expert opinion, or the wisdom he shares in his lectures, Dr. Lee often gives his own personal time to help others. During the O.J. Simpson trial, he used his personal vacation time, and donated half of his fee to the Connecticut State Police Lab. The other half was used to establish a University of New Haven scholarship. He also used his weekends to fly to war-torn Bosnia with Dr. Michael Baden, director of forensic sciences for the New York State Police, to identify the remains of individuals who were murdered and buried in mass graves.

Before Dr. Lee presented his lecture at the Duquesne University School of Law, I was able to get his...
views of the following issues:

What is the role of the forensic scientist?

“The court room is like a symphony...and forensic scientists are like musical instruments. If you ask me the right question, hit the right key, I’ll give you the right answer. If you hit the wrong key, ask the wrong question, I’ll give you an answer. Don’t complain to me if you just hit the wrong key. I just give you the noise. A forensic scientist’s role is pretty simple, we deliver the facts to the court. As a scientist, we have no choice but to stay neutral. Anything that associates the suspect, we must report, and anything that disassociates the suspect I have to report too.”

Who sets the standards for forensic criminologists? Are they adequate? What standards would you like to see implemented?

“In any piece of scientific evidence you have two requirements—one is the legal issue and this is a standard set by the court. We have to live within the boundary of the law. In other words, the legal proceedings dictate what we can do and what we cannot do. The second requirement is the scientific issue, which as scientists, we must set—not lawyers. Scientists set not only procedure, but technical and ethical standards as well. At present, the crime laboratory accreditation standard is set by the American Crime Laboratory Directors, which has an accreditation program. There is also a certification program for individual scientists set by the American Board of Criminalists (ABC). However, there is serious debate. I am in favor of certification and accreditation, but in the same breath I must caution that certification will not guarantee that everything is fine. Certification will not say that the scientist is definitely qualified. He passed a written test, and this only shows general knowledge of forensic science. Whether or not his/her examination is correct is subject to peer review, and sometimes a proficiency test. That is why in our laboratory, I have two examiners on every case, and then I review the supervisor’s work. This kind of built-in review provides a check and balance to insure the quality of the work. Testifying at trial is another matter. Many times when we testify, it is not just giving a result. Giving a result is the easy part. Giving the opinion is the harder part. The opinion is subject to a person’s experience and knowledge. Certification will not insure accurate opinions. For example, it is almost impossible to ask a newly graduated, recently successful examiner candidate forensic scientist to give an opinion on a complicated forensic matter.”

At the O.J. Simpson crime scene investigation, what should have been done to learn the most from the crime scene?

“The active crime scene or the passive crime scene can tell you where the crime was committed, how it happened, and what the sequence of events were. Those are valuable, important (pieces of) information for proving and disproving... In (the O.J. Simpson) case, they didn’t have an original crime scene video, so nobody knows what’s the original version. Video tape should be used to memorialize the scene. There were a couple of blood drops on Nicole’s back which were vertical blood drops, low velocity blood dripping, and no sample was collected. If a sample would have been taken and it revealed the presence of O.J. Simpson’s DNA, we would not have had to spend $8.9 million trying the case. Likewise, if those blood droplets did not contain O.J. Simpson’s DNA, he would not have spent $4.3 million to defend himself. It is so important to collect evidence.”

What is the future of DNA testing? What are its benefits and pitfalls?

“The future? What we do today and in the next couple of years will change. Now, we can do a much older sample, a much smaller sample, and we can analyze this DNA. In addition, monochondria DNA, hair, nail, tooth—in the old days, we could not do DNA. Now, we have a chance to analyze monochondria DNA. With DNA you can include or exclude someone... Sometimes pseudo-forensic scientists create a problem for the profession. There are scientists available for hire who will say what you want them to say. That is not the correct way... Don’t get the impression that the letters D-N-A will make someone guilty. Don’t get the impression that because you have someone’s DNA that they definitely committed the crime. In many situations, there are perfect reasons to explain how the DNA got there.”

Matthew H. Clark is a second year evening student at Duquesne University School of Law.
ISSUES: ALLEGHENY COUNTY HOME RULE

Will voters let the three chairs of the Allegheny County Commissioners remain empty after the May referendum?

Home Rule by Brian K. Jensen

The proposed end of Allegheny County's two-century-old form of government

Question: Do Civil War and Spanish-American War veterans have a right to seats on Allegheny County's Soldiers and Sailors Memorial Hall board of managers? Answer—Until just last year, yes. Only the Pennsylvania General Assembly, by amending the Second Class County Code, could pass the torch from those venerable heroes to veterans of more recent wars. Should Allegheny County's legislators spend valuable political capital using scarce floor time to affect such changes to the County's basic laws?

To many in Allegheny County, the answer is a resounding “NO!” The Second Class County Code stipulates the County's structure, organization and functions, but its outdated restrictions are increasingly seen as obstacles to effective leadership, fair representation and competitiveness. Is there a solution? Yes, home rule.

The Pennsylvania Constitution authorizes local governments, including counties, to adopt home rule charters. While under the various municipal codes, local government can do only those things explicitly authorized, “home rule municipalities can act anywhere except where they are specifically limited by state law.” Home rule would free Allegheny County from tedious restrictions and allow the county to reform its government.

Government reform in Allegheny County is not a new idea. In 1929, a referendum was proposed that would have replaced the three-person Board of Commissioners with a county legislative council and a county executive and modestly expanded the county's powers vis-à-vis municipal governments. While the referendum garnered over 67 percent of the popular vote, it failed on a technicality.

Home rule charters were twice put to referendum in the 1970s but both failed. A legislative council and a county executive would have replaced the three-person Board of Commissioners. Most of the county's “row offices,” e.g., the Prothonotary, the Register of Wills and the Recorder of Deeds, would also have been eliminated. County officials were adamantly opposed due in large part to these “radical” changes.

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In 1993, County Controller Frank Lucchino proposed adoption of the Second Class County Code as the home rule charter. This would empower the county to change its form of government through referendum but avoided proposing specific "radical" changes that would surely be resisted by entrenched interests. State legislators were receptive, but first wanted to know the changes ultimately contemplated.

Then Allegheny County Board of Commissioners Chairman Tom Foerster (D) tapped Duquesne University President and Professor of Law Dr. John E. Murray, Jr. to answer that question. Dr. Murray convened a blue ribbon committee "to develop a more efficient, effective and professional county government able to meet the challenges of the 21st century." ComPAC 21, as the committee came to be known, with the technical support of the Pennsylvania Economy League, spent 10 months visiting dynamic counties across the country to size up Allegheny County's competition.

ComPAC 21 released its report in early 1996. Among its 17 recommendations was that "the current commission form of government in Allegheny County should be replaced with an elected executive and county council" and noted that this could be achieved only via a home rule charter. This recommendation, initially viewed with suspicion by the newly elected Republican majority commissioners, was embraced at the close of the year as the faults in the system became obvious to the new majority.

In May 1997, Governor Tom Ridge (R) signed into law a bipartisan bill authorizing the Allegheny County Commissioners to unanimously appoint a charter drafting committee. This committee would prepare a home rule charter within six months. With a county commissioners' race coming up in 1999, it was crucial that the question of home rule be decided by the end of 1998.

Home rule will accomplish many important objectives, but four are especially worth noting. First, home rule will provide focused, accountable executive leadership through the Chief Executive. Under the commissioner system, executive and legislative authority resides in the same three people—akin to a federal government with three presidents and no Congress.

With policy determined by any combination of two commissioners, the County's course can veer wildly from vote to vote. Commissioners A and B may decide to lower taxes, and plan to offset the resulting lower revenue with expenditure cuts. If that coalition falls apart, and a new coalition of Commissioners A and C decide not to make the necessary cuts, the budget will be out of balance. It may take yet a third coalition of Commissioners B and C to figure out how to fix the fiscal mess. These shifting alliances might make interesting reading in the morning paper but lead to finger pointing. Prospective new businesses wonder what the county's policies will be from day to day. Under the home rule charter, the buck stops with the elected Executive.

Secondly, with 13 council districts and two at-large seats, the 15-seat County Council will provide representation to every corner of Allegheny County. Over the past 30 years, five of 11 commissioners have been Pittsburgh residents, and three have been from the Mon Valley. None have come from the North Hills, the upper Allegheny Valley, most of the South Hills or anyplace west of Pittsburgh. All have been white and all but one have been
ISSUES: ALLEGHENY COUNTY HOME RULE

male. District seats will give the County’s various communities a direct voice in county government for the first time. Other urban counties with part-time councils are typically composed of a broad cross-section of occupations and income levels. With Council’s power over the budget, diverse representation is critical to ensuring that all County residents get a fair share of its spending.

Third, home rule will save money. The charter mandates a series of taxpayer protections including tax rate and spending caps and a two-thirds supermajority vote to change tax rates. The County will no longer have four press secretaries—one will suffice. The Economy League estimates the new government will immediately save from $1.1 to $2.3 million in administrative costs.

Finally, and most importantly, home rule will give Allegheny County voters control over their government. Harrisburg’s permission will not be needed to change marriage license office hours. Under home rule, the people can sort out these things themselves allowing the General Assembly to tackle more important issues.

Home rule has been a long time coming to Allegheny County. If the home rule referendum passes on May 19, the County will swear in its Council and Executive in the year 2000. With an accountable executive leadership, better representation, and authority to manage its own affairs, the resulting lower costs will be well worth the long journey.

Brian K. Jensen is the Program Manager at the Pennsylvania Economy League, Inc., Western Division, in Pittsburgh, Pennsylvania.

Endnotes


2 A last minute change in the enabling legislation required that approval rest on a two-thirds majority vote in a majority of the County’s municipalities. While the ballot question carried a simple majority in 82 of the County’s 123 municipalities, it passed by two-thirds in only 50 municipalities, 12 short of the necessary threshold.


4 Id. at 12.
On May 20, 1997, Pittsburgh voters, against the wishes of Pittsburgh City Council and Mayor Tom Murphy, approved a referendum that created a seven-member, independent review board to investigate complaints lodged against Pittsburgh police officers. The referendum was placed on the May ballot after 17,000 voter signatures were obtained on petitions early last year. The passage of the referendum, by a decisive 16 percent margin, called on City Council to amend the Pittsburgh Home Rule Charter to allow for the creation of the board.

Pittsburgh City Council approved the legislation to form the independent civilian review board on August 4, 1997. This vote came after nearly two years of debates, court challenges and public outcries. The public debates did not end with the affirmative vote creating the Board. Tim Stevens, president of the Pittsburgh Chapter of the NAACP and a strong advocate for creation of the Board, felt that more public input was necessary before the Board was created. On the other hand, Marshall “Smokey” Hines, president of the Pittsburgh chapter of the Fraternal Order of Police, feels that the decree will make police hesitant and more reserved in their arrest practices which in turn could lead to an increase in crime.

Is the Civilian Review Board the answer to police brutality in Pittsburgh or is it another example of politics trying to appease voters?

History of Review Boards

Review boards have existed since the 1950s and 1960s in most major American cities. The notoriety of the boards increased during the civil uprisings of the 1960s and
The new Civilian Police Review Board has proven to be a much debated issue in the halls of Pittsburgh's City-County Building.

early 1970s. Police response to the activities of that volatile era was highly abusive, excessive and discriminatory. At the time, police departments chose to deal with citizens' complaints informally through internal review mechanisms. Internal punishment was thought to be a faster and more effective process because police would behave so as not to be reprimanded by their superiors. Amid police opposition, most review boards did not endure nor were they very effective. Those boards that did survive were rendered virtually powerless. In the 1980s, review boards experienced a resurgence. By 1990, half of the 50 largest American cities' police departments had some form of civilian complaint review board.

Three Models of Review

Three models of complaint adjudication evolved out of the turbulent times of the 1960s and 1970s: internal review, civilian review, and civilian monitoring. The first model consists of internal review of police brutality by the police department. Oakland, California's utilization of this model has garnered respect and praise, namely for its cost and time efficiency in dealing with civilian complaints. However, there are a number of disadvantages to this model of review. Secrecy and internal disciplinary measures are the major drawbacks of internal review. In order to protect itself from potential civil liabilities, police departments will not release their findings to the public. Thus, there is no accountability for police misconduct that has occurred and no incentive to report misconduct that may occur in the future.

Civilian review is the second model of complaint adjudication. This model involves the direct review of police behavior by citizens of the community. Civilian review boards eliminate the secrecy and internal discipline problems associated with internal review, because they resemble traditional judicial proceedings. However, civilian review boards tend to be financially cumbersome and time consuming, particularly when the public wants fast action and a sense of justice. Currently, many civilian review boards simply advise the chief of police, but a growing number of boards are reporting directly to city officials to circumvent cries of politicism.

The Berkeley Police Review Commission, the longest standing civilian review board in existence, has been reviewing civilian complaints of police brutality for over 20 years. Thus, the Police Review Commission serves as an excellent model for the policies, procedures, and questions that surround civilian review boards. The Police Review Commission has specifically dealt with two problems that are currently plaguing several civilian review boards. First, the Police Review
Despite vehement opposition from City Council, Mayor Murphy, and the city police union, Citizens for Police Accountability...said that [the] citizens wanted an independent, fair process to support good policing efforts in Pittsburgh.

The secrecy problem of the internal review system is also alleviated because the public, the complainant, and the accused have access to the internal investigation files. This new model of complaint adjudication was developed to overcome the disadvantages of the other two review mechanisms, and it has been quite successful in Kansas City and other metropolitan areas.

**Pittsburgh's Model**

Pittsburgh will be utilizing the civilian review model to adjudicate complaints of police misconduct. Despite vehement opposition from City Council, Mayor Murphy, and the city police union, Citizens for Police Accountability, which led the effort to approve the Board referendum, said that the vote indicated that citizens wanted an independent, fair process to support good policing efforts in Pittsburgh.

Will the Civilian Review Board achieve the goals of the citizens of Pittsburgh? Pittsburgh is currently facing a situation very similar to that which was faced in Los Angeles. Both Los Angeles and Pittsburgh have enacted methods of complaint adjudication after a highly publicized incident of police brutality—the beatings of Rodney King and Jonny Gammage, respectively. Both cities quickly scrambled to develop reform that would appease their citizens. Los Angeles has since undergone several studies by commissions and reformers to evaluate and reconsider its civilian review board. Los Angeles is now utilizing the internal review model. The internal review model of Los Angeles is highly respected throughout the country because it has a direct and powerful impact on the city's police officers. Does the Pittsburgh Civilian Review Board have the same authority necessary to render it as...
effective as Los Angeles' reformed model of complaint adjudication?

Powers of Pittsburgh's Civilian Review Board

The passage of the referendum in May 1997 mandated that City Council enact a bill for the creation of Pittsburgh's first Civilian Review Board. Throughout the summer months, Council held several heated meetings of debates, proposals and amendments, until the final bill was completed and passed in early August.19

Under the legislation, the Board has specific powers. The Board will choose which police-related complaints to investigate from those sworn complaints it receives from citizens. This means that not all complaints will be investigated by the Board. Additionally, this means that the current investigatory office, the Office of Municipal Investigations, will continue to investigate complaints of police misconduct, sometimes in conjunction with the Civilian Review Board. The Board will conduct investigations, with the power to subpoena witnesses and documents to be used at the public hearings it will hold. Further, the Board will have the power to obtain court orders to compel the release of records to which it is entitled and to compel testimony of witnesses.20

One misconception is that the Board will be punishing the officers. However, this is not one of the Board's powers under the bill created by Council. The Board's function with regard to punishment is simply to investigate alleged misconduct and to recommend disciplinary measures. The Mayor and Chief of Police, then have the options to accept, reject or modify the recommended measures in writing, and to discipline the guilty officer.21

The new bill has also made provisions for "bad faith" complaints. These complaints may be referred, for prosecution, to the District Attorney's Office. Further, the citizen/complainant may be required to pay attorney fees for the accused officer. The Board's mission is quite simple: to make police misconduct public and to restore community confidence in the investigation and adjudication of this behavior. The bill makes it clear that the investigatory phase of the process will be held in strict confidence. Some cases will never reach the public hearing phase due to settlement during pre-hearing mediation. Thus, the public will only be privy to allegations of misconduct that reach the public hearing stage of the adjudication process.22

One of the biggest obstacles that City Council had to overcome in writing the Civilian Review Board legislation was the question of whether the Board would have subpoena power. Proponents of the subpoena power said the Board needed to be able to compel witnesses to testify to give the Board some "power." The argument was that witnesses would not want to speak, as a way of not getting involved, even though they were not incriminating themselves by their testimony. Because no rights are at stake, proponents said subpoena power is necessary and legal. Opponents of the power argued that the measure is unconstitutional, as a violation of the right against self-incrimination. This argument, however, held little weight because subpoenaed witnesses would be free to come to the hearing just to assert their rights against self-incrimination. The second argument by opponents to the subpoena power was that this power exceeds the power given by the referendum. This argument too was unpersuasive. In the end, Council's legislation included subpoena power as one of the powers of the Board.23

Membership on Pittsburgh's Civilian Review Board

Along with the powers given the Board, some qualifications and limitations were set forth as to the seven people who would constitute the Board. According to the bill approved by Council, board members must be Pittsburgh residents, and must not have been convicted of any criminal offense greater than a summary offense.24

As the members will not be paid to serve on the Board, few restrictions were placed as to current or former employment. However, board members may not be employed by the City or any City authority and they may not hold public office. Further, the appointees cannot be current law enforcement officers, and a limit of two former law enforcement officers may be appointed.25

The question of how many former law enforcement officers would be allowed to sit on the Board was a topic of hot debate even beyond the passage of the legislation, with frequent proposals to increase the number of former officers to three.26 Marshall "Smokey" Hines of the Pittsburgh Fraternal Order of Police argued that all seven board members should be police officers to ensure fairness to the accused officers.27 Conversely, Tim Stevens of the NAACP did not like the idea of having any former law enforcement officers on the Board.28

Only days after the legislation to create the Board was passed by Council, Pittsburghers began submitting resumes and recommendations for appointment as Council members. In mid-September, each Council member made a determi-
"Despite the passage of the referendum creating the Board, and the swearing in of the Board members, questions still remain. Answers to these questions may come from the Pennsylvania judiciary in the next several years..."
Endnotes


11 Id. at 209.

12 Id.

13 Id. at 211.

14 Id.

15 Id. at 212


20 Id.

21 Id.

22 Id.

23 Id.


26 Id.


31 Id.


33 Id.


35 Id.
If you can figure out how to navigate your way to the correct elevator or stairwell in the City-County Building located in downtown Pittsburgh, you will eventually find yourself in the proper part of the ninth floor (if you end up in the County Bar offices go back to start and try again). Once there you will find a cramped and gloomy space, filled to the brim with almost every type of legal text imaginable, which is in desperate need of a few coats of paint to brighten it up, better ventilation, and a number of other small and medium repairs; all projects County maintenance has yet to get around to. Congratulations, you have just made your way to the Allegheny County Law Library. Don’t let the plain exterior fool you because you have just found Pittsburgh’s greatest legal resource.

The Allegheny County Law Library was one of the first county law libraries in the nation. It was created by statute in 1867, and this year will be celebrating its 131st birthday. The library was originally in the Court House, but it has called the City-County Building home since 1919. The Law Library would like to move to a larger location, but a change in address does not seem likely in the near future due to the premium on space in Pittsburgh, especially around the Court House. Over the years, the Law Library has had six Head Librarians, with Joel Fishman being the current Head Librarian.

Fishman, who has been the director of the Law Library for 21 years, studied history at Hunter College in New York City and then went on to the University of Wisconsin to earn a Master’s and a Ph.D. in History. He specialized in 17th century English history, but has done extensive work in Pennsylvania history over the past few years. After the University of Wisconsin, Fishman earned a degree in library science from Queens College in New York and took a position as a librarian at Seton Hall Law School. He ended up in Pittsburgh after answering an advertisement in The New York Times, and following a 45-minute interview, the job was his, and he has been here ever since.

As the Head Librarian, Fishman maintains a busy schedule which includes everything from shelving books to helping patrons with research problems. During the two hours in which we spoke, Fishman helped people with puzzles ranging from Washington’s original rules of government civility (which the library had) and how they related to the present session of congress and President Clinton, to finding the latest trends in communications law. However, Fishman is not the only one working hard at the Law Library.

The library has several full-time and several part-time staff members. The library has more than enough work to go around.

The reason the library staff remains so busy is because of the number of people the library serves stemming from every part of the community. While the library is used by students and private individuals, the library is easily the life line for the Pittsburgh legal community circulating over 14,000 books a year. This may seem strange since
Lawyers, law students and the public regularly use the Allegheny County Law Library.

The modern lawyer has such easy access to up-to-the-second legal information via Westlaw or LEXIS. But online research is not preferred by everyone. In fact, a large number of Pittsburgh’s lawyers want little if anything to do with online research. However, the enormous costs of these searches and services will not make an employer happy, so even the large law firms see the benefit of sorting through the stacks instead of logging on. The library is particularly important to small firms and sole practitioners who cannot afford online services or the skyrocketing cost of legal publications.

This past year’s budget was approximately $500,000 with an additional $300,000 coming in from Bar filings and other projects. The rising cost of legal materials accounts for most of the Law Library’s expenditures; over 95 percent of the Law Library’s budget was spent in a desperate battle to keep up with the fast pace of the law by purchasing serial supplementation for current materials and continuing subscriptions to various periodicals.

Unfortunately, this is a battle the Law Library is in danger of losing for two reasons. The first is the reorganization of the legal publishing and the price increases that have followed. Over the past few years, most of America’s legal publishing houses have gone out of business or have been incorporated into large international companies. The need to recapture the money spent in acquiring these companies and the international view that American legal material is generally underpriced has resulted in record jumps in prices and a lack of choices for the consumers. This has affected law libraries across the country which contribute over $2 billion a year to the $3.5 billion industry. On average, a law library has to increase its budget 10 to 20 percent per year just to stay current, which brings us to the Law Library’s second problem, budget cuts.

For years the Law Library was part of the Court of Common Pleas. Last year, because of political and organizational factors the Law Library became part of the Allegheny County Law Department. With this change came a budget cut. The budget cut and the increasing price of legal publications resulted in the loss of a number of reference services and legal materials previously available. Any future budget cuts or even the lack of an increase could cause the Law Library to drastically cut back on the serial supplementation needed as the law changes in various fields.

Despite cutbacks, the Law Library still offers a large number of basic services. For a $10 fee, a li-
Library card can be purchased allowing patrons to take out most materials for up to one week at a time. The library has multiple volumes of Federal and Pennsylvania reporters and other Pennsylvania materials for easy access. Reporters and codes are available for other states as well. All of the library's material are accessible by electronic card catalog. The Law Library also provides access terminals for online research and other purposes. The library also has a large collection of treaties and since it is a full Federal Depository it has the latest available federal law and policy. The library subscribes to a number of legal periodicals and has a large collection of bound volumes as well as an extensive collection of microfilm available for circulation and viewing. All of this, and much more, result in an impressive collection of legal reference materials despite lack of funding and limited space.

The Law Library offers a number of unique and specialty services as well. To begin with, the library acts as the court library for the Court of Common Pleas and orders most of the court’s materials as well as taking care of its filings. The library has an extensive rare book collection that is accessible to the public, but not for circulation, creating a link to the origins of American and Pennsylvania law. It also uses its historical collections to help people do genealogy research. The Law Library operates a self-sustaining book publication service that is one of the leading sources of new material regarding Pennsylvania family law, civil procedure, and local history, and, for the first time, the library will be publishing the local court rules. The library offers a reference and photocopying service where patrons can call in for cases and the staff will provide the research and deliver it by mail or fax. This service costs $2 per cite, 50 cents a page, and between 75 cents to $1.75 per fax. In the future, there are plans to extend this service to legislative and historical materials as well.

The Law Library is preparing for the future, and this spring it will jump on to the information superhighway as part of the Pittsburgh Free Net with its own web page containing access to its card catalog, historical projects, and a number of other resources. The Law Library has a number of other projects in development, but it waits to learn what the future will hold, especially with the proposed unification of the State court system in the year 2000.

No matter what the future holds for the Law Library, rest assured, Joel Fishman and the rest of his staff are out there doing everything they can to make sure the Law Library provides the Allegheny legal community with the best legal resources available.

Location:
9th Floor City-County Building

Hours of Operation:
Monday-Friday
8:30 a.m. to 5:00 p.m.
(September-June)
8:30 a.m. to 4:30 p.m.
(July-August)
(Closed all County holidays)

Phone: (412) 350-5353
Fax: (412) 350-5889

Internet:
HTTP://TRFN.CLPGH.ORG/ACLL
Pittsburgh Free Net
(under organizations)

John Ewart is a second-year day student at Duquesne University School of Law. He wishes to thank Joel Fishman, Ph.D. for his interview.
When Special Prosecutors Become Ordinary

A look at the office of the independent counsel

We increasingly forget why the independent counsel law was enacted two decades ago.

When Archibald Cox was appointed Watergate special prosecutor in May 1973, the country was sinking into a worsening crisis. Growing mounds of evidence implicated high-level White House officials in authorizing the break-in of the Democratic National Committee headquarters at the Watergate hotel complex. John Dean and others indicated that the president’s men had used the CIA and FBI to block the federal investigation and obstruct justice by intentionally covering up these crimes.

In appointing Elliot Richardson to take over the crippled Justice Department (two previous attorneys general had resigned amid the scandal), President Nixon himself recommended the appointment of a special prosecutor: “I want the public to learn the truth about Watergate,” Nixon told the American people in May 1973, “and those guilty of any illegal actions brought to justice.”

Twenty-five years, 18 special prosecutors and $136 million later, the independent counsel law adopted by Congress in the wake of the Watergate debacle has proved bad medicine for what ails us.

Taxpayers have funded special prosecutors to investigate cocaine use by two Carter advisers ($186,000); falsehoods uttered by an assistant attorney general in the Reagan administration ($2 million); and the questionable search of Bill Clinton’s passport file during the Bush administration ($2.8 million). In each case, no charges were filed.

Today, we have a Whitewater prosecutor, whose jurisdiction has been expanded to investigate far beyond the original subject of a land development deal in Arkansas (over $40 million and ticking), four miscellaneous independent counsels (over $7 million) and a loud clamor for more.

It isn’t the cost that is most worrisome. It is the fact that special prosecutors aren’t special anymore.

Kenneth Starr, a smart and decent lawyer, has been trapped for over three years investigating the Whitewater scandal—an alleged crime that took place long before the president took federal office and only vaguely implicates the member of the Clinton family who was elected by popular vote.

Sadly, the original purpose of the independent counsel statute, fashioned to deal with extreme national crises like Watergate ... has been supplanted by an undignified game of political pinball.
machine to rack up big points and instigate media-worthy scandals. Now that everybody knows which buttons to push, we seem doomed to a half-dozen special prosecutors (at least) in each new administration.

The party outside the White House can weaken the party inside the White House. Individual politicians can catapult themselves into the limelight. Contenders can begin jockeying for the next presidential race. The game works.

Unfortunately, it also trivializes the independent counsel statute.

Ours was never meant to be a system of permanent inquisitions, even when public officials—rather than average citizens—are the subject of suspicion.

The threshold for triggering the law must be set much higher. Alleged crimes committed before a president took office were never within the contemplation of people like Archibald Cox, who supported the original independent counsel law.

Alleged crimes committed by spouses, in presidential years, are even further afield.

In Watergate, this much was certain: If the acts in question were proved—burglary, using the CIA and FBI to obstruct justice, covering up afterwards—a string of serious felonies would be established.

Switch now to the alleged White House "sex scandal." We have allegations that the president may have committed adultery, and lied about it. He may have even suggested that others—including Monica Lewinsky—lie about it. Morally reprehensible conduct? No doubt. Horrible judgement for the leader of our nation? Absolutely. Proper fodder for a multi-million dollar investigation by an independent counsel whose specific charge was to investigate an Arkansas land deal? Extremely doubtful.

Even if the allegations are proven, a sitting president most likely cannot be indicted for "perjury." At best, the information can be passed along to the House of Representatives for impeachment proceedings. But does this conduct amount to a "high crime or misdemeanor?" Even the best lawyers in America will have trouble proving that.

A simple rule for longevity of special prosecutors is this: He or she should come in with a clear, strong foundation. Err on the side of avoiding tenuous cases.

Should we let guilty politicians go free or unpunished? Of course not. We simply should not trigger the extraordinary mechanism of the independent counsel law—with its potentially limitless resources—unless we are damn sure it makes sense. Every scandal that touches a federal official in Washington does not make sense.

In our post-Watergate cynicism, we have forgotten that we have less alarmist ways to investigate charges against administration officials that still work.

We have competent, honest prosecutors in our state attorney general offices, who would hardly "throw a case" just because the first lady was involved. We have aggressive, professional U.S. attorneys and Justice Department lawyers who are just as anxious to gain a conviction against a Cabinet officer—if that is where the evidence points—as against a racketeer.

If a conflict arises or if evidence surfaces that an administration is actively interfering with a criminal investigation (as in Watergate, when White House advisers were funneling grand jury information from the Justice Department to the president), this in itself may justify a special prosecutor.

Otherwise, let the system work the way it has worked for over 200 years.

The alternative is a hammer-to-knee approach toward which we are, unfortunately, moving: Every allegation against a state or federal official soon triggers the need for a special prosecutor, because by definition there is always a potential conflict.

This is a horribly costly, inefficient way to investigate our own leaders. It makes us look foolish in the international eye. It also says little for our faith in those people who examine evidence and prosecute crimes for us every day.

If they are good enough to handle murderers, rapists, sophisticated white collar crimes and all of our society's most serious problems, we should not deem them incompetent just because a whiff of politics is in the air.

If we don't save the extraordinary machinery of the special prosecutor's office for extraordinary circumstances, we will soon find that we have been defeated by our own zeal.

Men and women of integrity—public servants like Archibald Cox, Lawrence Walsh and Kenneth Starr—will soon conclude that it is not worth accepting these jobs.

Even a cynical society should take pause at that prospect.

Ken Gormley, Esq. is a professor of law at Duquesne University School of Law. He is the author of the recently published "Archibald Cox: Conscience of a Nation" (Addison-Wesley).

This piece was adapted from an article that appeared in The Boston Globe and the Pittsburgh Post-Gazette. It is reprinted with permission.
“Med Mal” through the Ages

BY JULIE FREEMAN

Early Medical Malpractice
In 14th century common law, the terms “negligence” and “malpractice” were not yet used. Medieval physicians were basically held accountable for “professional misfeasance.” The first medical malpractice action which resulted in a damage recovery by the plaintiff occurred in 1374 during the reign of Henry IV. A surgeon incorrectly treated the plaintiff’s hand, causing damage. The doctrine used at the time was that of “common calling” in which a skilled professional was “to act as would any reasonably competent person practicing under like conditions or be liable for an action in trespass on the case.”

EMERGENCE OF “MEDICAL MALPRACTICE”

Ordinary Care
The phrase “malpractice” apparently was not utilized until the early 19th century. “Common callings” was replaced by “professional” and “mal-practice.” Physicians were held liable as any other person for a failure to exercise ordinary care. No special basis was provided then to hold a doctor harmless merely because the physician’s conduct followed custom.

Duty of Care
An 1898 New York Supreme Court case, Pike v. Honsinger, defined the physician’s duty. It is still largely applicable today, “A physician or surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places on him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality in which he practices. ... Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge. ... The rule in relation to learning and skill does not require the surgeon to possess that extraordinary learning and skill that belong only to a few men of rare endowments, but such as is possessed by the average member of the profession in good standing.”

Prima Facie Case
The elements for a cause of action for medical malpractice have evolved to correspond to those of a negligence action. To be successful, the plaintiff in a medical malpractice action must establish “(1) that the physician owed her a legal duty; (2) that the physician breached that duty by failing to conform to an acceptable standard of care; (3) that the plaintiff suffered actual injury; and (4) that the physician’s conduct caused the injury suffered.”

Professional Custom Rule
Hawthorn v. Richmond, 48 Vt. 557 (1876), gave birth to the professional custom rule “not by reason, but by linguistic and conceptual mutation — unintended, unplanned, and, at the very time of its birth, unseen.” The professional custom rule provides that physicians
are required to possess and use the knowledge, skill, and care of other physicians in good standing. Where there is more than one method of acceptable treatment, the physician can show that he or she follows one of the medical schools of thought if it is held by a respectable minority of his profession. The use of the custom rule replaced the ordinary care rule. Physicians are now compared to other physicians.

Best Judgment

The “best judgment” rule has evolved to qualify the professional custom rule. A physician must use her “best judgment” in the practice of medicine, not just do what is required by accepted practice.

“This would be to say that as long as a course of conduct, however unreasonable by ordinary standards, is the norm for the group, all members of the group are thereby insulated from liability so long as they do not deviate therefrom. That is not the law.” In collingo v. Ewing, 444 Pa. 263, 282, 282 A.2d 206, 217 (1971).

Locality Rule

In addition to the professional custom and best judgment rules, the locality rule was used to determine malpractice liability. The locality rule “obliges physicians to treat their patients with such care and skill as would be furnished by a reasonably competent practitioner operating in the same community.” This rule was established to protect rural physicians who did not have the same training and resources as urban physicians. During the early part of the 20th century the rule was relaxed to compare physicians to standards prevailing in localities “similar” to their own. Beginning in the 1960s, the locality rule has mostly been replaced with a “national” standard of care.

Informed Consent

One rule which differentiates medical malpractice from standard negligence is “informed consent.” In negligence, consent can vitiate liability under the doctrine of assumption of the risk. The doctrine of informed consent provides that a physician must inform her patient of the risks involved in treatment. In early cases, a lack of consent resulted in liability for battery.

A physician has a “duty to warn a patient of the hazards, possible complications, and expected and unexpected results of standard treatment. A doctor may be liable for an adverse consequence which the patient was not informed about, even if the doctor performed skillfully.” Beginning around 1960, however, it began to be recognized that the matter was really one of the standard of professional conduct, and so negligence has now generally displaced battery as the basis for liability.

For the plaintiff to be successful in a malpractice suit using informed consent, he would have to prove a causal link between the non-disclosure and the harm the plaintiff incurred. The plaintiff must prove that he would not have succumbed to the treatment had he known the risks.

Res Ipsa Loquitur

Another negligence doctrine with rules which has become tailored for medical malpractice is the doctrine of res ipsa loquitur. The doctrine of res ipsa loquitur, used when no direct evidence exists, “is applicable where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the one responsible.”

In Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687 (1944), the doctrine of res ipsa loquitur was used to find all medical personnel in an operating room liable for an injury to the shoulder of the patient. The defendants were found liable although the plaintiff was unconscious under the effects of anesthesia and could not say which defendant actually caused the injury to his neck and shoulder. Some states have enacted statutes regarding res ipsa loquitur.

Damages

While various rules and doctrines have evolved to differentiate medical malpractice from negligence, “The measure of damages in a medical malpractice case is the same as it is in other negligence cases.” Money damages will often be higher in cases where the injuries are more severe or where the injured party suffers a salary. Punitive damages are now permitted in rare cases.

HOSPITAL LIABILITY

Charitable Immunity

In America, non-profit hospitals enjoyed “charitable immunity” until the 1940s.
"On the basis of an English decision of 1846 [Feoffees of Heriot's Hosp. v. Ross, 1846, 12 C. & F. 507, 8 Eng.Rep. 1508], American courts established a general doctrine that charities were immune from tort liability. The English case was soon repudiated, but American courts continued to apply the immunity for many years on the ground that to impose liability would be to divert trust funds for purposes outside the donor's intent, that respondent superior should not apply to impose liability upon non-profit charities, that a beneficiary of a charity assumes the risk of the charitable negligence, or that donations to charities would be discouraged if the charities were held liable.

Today, most states have rejected immunity of charities, including hospitals, either by judicial decision or by statute. Now, the Restatement (Second) of Torts § 895E provides that charitable and other benevolent enterprises have no immunity due to their charitable nature.

Emergence of Liability

Liability for hospitals is imposed pursuant to the doctrine of respondeat superior which holds the hospital responsible for the acts of its employees. In fact, the liability of the hospital under this doctrine is extensive. Hospitals will be held liable for independent contractors that render services on behalf of the health care facility where the public would normally expect the service to be provided by the health care institution. Liability of the hospital also may arise under the theory of apparent or ostensible agency, when a hospital "holds out" individual physicians as agents and where the patient looks to the hospital rather than to the physician as the provider of care, the hospital may be held liable for the negligent acts of those physicians. Estoppel also may be applied when a hospital represents to a patient that an individual physician is its agent and the patient acts in good faith on this representation in seeking care at the hospital. Finally, the doctrine of "corporate negligence" provides a direct duty of a hospital to the patient.

In addition to common law, public statutory and regulatory law defines standards which hospitals must meet to be licensed and to receive government insurance payments.

MEDICAL MALPRACTICE CRISIS

The medical malpractice "crisis" began in the late 1960s and early 1970s. This crisis was marked by an enormous rise in the number of medical malpractice suits, in the size of damage awards, and in the cost of medical malpractice insurance.

In the 1970s, there was a medical malpractice insurance availability crisis. Due to the increasing number of malpractice claims and higher awards, many insurers stopped selling malpractice insurance. By the 1980s, medical malpractice insurance was available, but there was an affordability crisis.

Despite decades of liability for medical malpractice, the frequency and severity of claims remained relatively stable until the 1970s. In 1968, there was one claim per 37 physicians. A 1987 survey of physicians showed that 62 percent of the physicians sued for medical malpractice had more than one claim filed against them. Additionally, 72 percent of the physicians interviewed anticipated that they would be sued "before they take down their shingles." In 1975, the average medical malpractice payment for grave injuries in America was $213,777. It increased to $349,203 in 1978.

Cause: Why More Lawsuits

The increases in the number of claims filed has been blamed on an increased litigiousness among Americans. Reasons suggested for why people sue include: (1) a deterioration in the physician/patient relationship; (2) that patients expect modern medicine to work miracles, and are unwilling to accept unavoidable bad outcomes when it does not; (3) we live in an age of consumerism in a "litigious society"; and (4) with today's highly specialized and sophisticated care, patients increasingly look to hospitals and other providers of care as the focus of their complaints and grievances.

Another reason cited for the increased number of malpractice claims and awards is the expansion of legal doctrines which make it easier for plaintiffs to recover damages in medical malpractice cases. These include the proposition that attorneys take too much of the award money, that the contingency fee system results in too many suits, and that the costs of medical malpractice are passed onto patients. The current system has been accused of becoming inefficient. The high overhead costs (attorney fees for both sides, insurance costs, and administrative costs) contribute to the inefficiency. It is estimated that only between 20 percent and 35 percent of the malpractice premium dollars reaches the hands of the injured patient. Despite criticisms that the malpractice crisis is a result of an increase in litigiousness among patients, research has shown that most claims are justified.

Response: Tort Reform

Despite the apparent legitimacy of the majority of medical malpractice claims, some states have enacted
tort reform legislation. The legislation was an effort to stem the increased number of medical malpractice cases and the size of awards to solve the medical malpractice insurance availability problem and to solve the affordability problem. State statutes in response to the "medical malpractice crisis" include: (1) damage caps; (2) shorter statutes of limitation; (3) screening panels; (4) limitations on minority status [repeal of infant tolling statute]; (5) modification of joint and several liability rules; (6) creation of excess insurance funds; (7) abolition of ad damnum clauses; (8) periodic payment of large verdicts; and (9) limiting contingency fee arrangements. Other statutory responses were modification of the collateral source rule, changes in the Good Samaritan statutes, setting arbitration guidelines, requirements of writings for warranty actions, and various changes in the burden of proof, the standard of care, the informed consent doctrine, and the rules of evidence.

The success of the methods of tort reform varied. Caps on awards had a marked effect on damage awards. Laws providing for collateral source offset have reduced malpractice claim severity by 11 to 18 percent and claim frequency by 14 percent compared to states that have no collateral source offset. Arbitration laws have had mixed effect, increasing claim frequency, but reducing overall average severity. Pre-trial screening panels appeared to have no effect. Limits on contingent fees did not appear to have any systematic impact on claim frequency or severity.

THE FUTURE

One of the fastest changes in the delivery of health care is the switch from indemnity medical insurance to the use of managed care organizations (MCOs). With indemnity medical insurance, the patient can select his own physician, both the primary care physician and specialists. Patients of a MCO must first see their primary care physician (an internist, family practice doctor, or pediatrician) before being referred to a specialist. The physicians can be directly employed by a health maintenance organization (HMO) or have a contract to care for the HMO's patients.

Most MCOs provide financial disincentives for referring patients for medical tests or to see specialist physicians. President Clinton recently suggested changes to the law to disallow these financial disincentives, but the lobbying groups of the HMOs successfully fought the new law. Tests not ordered and referrals not made can lead to missed diagnoses and mistreatment. This is an area of potentially huge liability. The number of medical malpractice cases may continue to increase. However, if most are valid claims, then tort law is operating effectively and appropriately.

Julie Freeman is a third-year day student at Duquesne University School of Law.

Endnotes

1 Theodore Silver, One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice, 1992 Wis. L. Rev. 1195 (1992).
2 Id. at 1196, 1241 n.13.
3 Id. at 1196.
4 Silver, supra, at 1241 n.11.
5 Id. at 1241 n.32.
6 Id. at 1211.
7 Patricia M. Danzon, Medical Malpractice: Theory, Evidence, and Public Policy, 139-40 (Harvard University Press, 1985). The case was taken from New York Reports, 155, p. 201.
9 Id. at 93-95.
11 Id. at 1225.
14 Silver, supra, at 1226.
15 Id.
16 Id. at 1227.
17 Id. at 1228-1229, 1234.
ISSUES: MEDICAL MALPRACTICE

19 Id.
20 Id. at 190.


24 Id. at 235. For example, see NEV. REV. STAT. 41A.100. Id.

25 11 Health Care L., supra, + 11.05[1].

26 Id., + 11.01[2].

27 Prosser and Keeton on the Law of Torts, supra, § 133, at 1069-70.

28 Id. at 1070. See Pierce v. Yakima Valley Mem’l Hosp. Ass’n, 43 Wash.2d 162, 260 P.2d 765 (1953).


31 11 Health Care L., supra, + 11.01[2].


33 Prosser and Keeton on the Law of Torts, supra, § 32, at 192.


35 Danzon, supra, at 59-60.

36 Id. at 60.


38 Blackman, supra, at 28.


41 10 Health Care L., supra, + 10.05.

42 Law, supra, at 206.

43 Id.

44 Prosser and Keeton on the Law of


46 Id. at 78.

47 Id. at 77.

48 Id. at 78.

49 Id.
Lead-Based Paint Disclosure Requirements for Residential Property Owners

A local environmental attorney provides an overview

by Shirley K. Duffy, Esq.

The Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. §§4851-4856 (1992) [hereinafter "the Act"] was enacted in response to the public health concern of lead poisoning in children living in residential dwellings constructed before 1978 which may contain lead-based paint. The Act acknowledges that low-level lead poisoning is widespread in children under six years of age, with minority and low income areas being disproportionately affected. Pregnant women are also at risk, because exposure to lead may cause complications during pregnancy.

The health effects of lead are well known. Lead exposure in children may cause lowered intelligence quotients, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity and behavioral problems, as well as impaired memory. Children are more at risk than adults upon exposure to lead for two reasons. First, children swallow non-food items such as chips of paint, dirt, etc. (a behavior known as "pica") and mouth toys and other items which may be contaminated with lead dust, thus increasing real exposure to the toxin. Second, more lead is absorbed through the gastrointestinal tract of children than adults.

Once absorbed, the lead passes into the blood and travels to other parts of the body. Under 42 U.S.C. § 4852d (a) (1992), the Environmental Protection Agency and the Department of Housing and Urban Development are required to promulgate regulations to effectuate disclosure of information concerning lead-based paint and lead-based paint hazards upon the purchase and sale or lease of target housing.

The Act provides for certain general requirements of the regulations, including that the seller or lessor provide the purchaser or lessee with a lead hazard information pamphlet written by the Environmental Protection Agency (EPA) and disclose known lead-based paint hazards and provide available reports. Additionally, purchasers are given a 10-day period to conduct a risk assessment or inspection. Also, contracts for purchase and sale are to contain a Lead Warning Statement and a statement signed by the purchaser indicating that he/she has read and understands the lead warning statement, has received a lead hazard information pamphlet and has had an opportunity to conduct a risk assessment or inspection.

The contents of the lead Warning Statement were also prescribed in 42 U.S.C. § 4852d (a) (3) (1992). The statement warns of the health effects of lead in children and pregnant women. Further, it indicates that the seller is required to provide the purchaser with any risk assessments or results of any inspections for lead-based paint and disclose any known lead-based paint hazards.

The regulations controlling lead-based paint disclosure requirements are found at 40 C.F.R. 745 (1996). Under this section sellers or lessors must provide the purchaser, lessee and any agents involved in the transaction with an EPA approved lead hazard information pamphlet, and disclose any known lead-based paint and/or lead-based paint hazards in the target housing being sold or leased. Furthermore, sellers and lessors must disclose the basis for the determination that lead-based paint or hazards exist, and the location of the same, and the condition of painted surfaces.

If the sellers or lessors have any records or reports concerning lead-based paint or lead-based paint hazards, these must be provided to the purchaser, lessee, and any agents. Additionally, the sellers or lessors must disclose to the buyer or lessee records or reports regarding common areas and other dwellings in multifamily target housing if this information is part of an evaluation or reduction of lead-based paint or
hazards in target housing as a whole. If disclosure activities occur after the purchaser or lessee has made an offer to buy or lease the dwelling, then they must be completed before acceptance of the offer. Additionally, the buyer or seller must have an opportunity to review the information and amend the offer.

The purchaser must be given a 10-day period (unless a different period of time has been agreed upon by the parties) to conduct a risk assessment or inspection. The buyer may waive this opportunity in writing.

The seller or lessor is under no duty to conduct an evaluation to determine if any lead-based paint hazards exist. Also, sellers or lessors are under no obligation to conduct reduction activities.

Under 40 C.F.R. § 745.113 (1996), certification and acknowledgment that the disclosure activities have taken place is required. In addition to the pamphlet, contracts to sell target housing must include an attachment (in the language of the contract, i.e., English, Spanish), containing the Lead Warning Statement, a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards or a statement indicating no knowledge thereof, and a list of available records or reports regarding lead-based paint or lead-based paint hazards. If none are available this must be indicated. A statement by the purchaser that he/she received this information and the pamphlet and has had an opportunity to conduct a risk assessment or inspection or has waived it, must accompany the contract as well.

Agents for the seller provide a statement that he/she has informed the seller of his/her obligations under the Act and is aware of his/her duty to ensure compliance. Signatures of the seller, buyer and agent along with dates are required as certification of the accuracy of statements.

There are similar requirements for lessors and their agents, but the contents of the Lead Warning Statement are different. Also, the lessee need not be given an opportunity to do a risk assessment or inspection.

Certification and acknowledgment information must be retained by seller and his/her agent for three years from completion of the sale. This documentation must be kept by the lessor and his/her agent for three years from the commencement of the leasing period.

Agents of the seller or lessor must ensure compliance with the regulations by informing their principals of the requirements and ensuring that all activities are performed, or by personally ensuring compliance.

There are penalties for knowingly failing to comply with the Act and regulations. Anyone who knowingly violates the Act is subject to monetary penalties under the Department of Housing and Urban Development Reform Act, 42 U.S.C. § 3545 (1989) and may be held jointly and severally liable to the purchaser or lessee for treble damages. In civil actions brought pursuant to the Act court costs, reasonable attorneys fees and expert witness fees are recoverable by the party commencing the action if he/she prevails. Failure or refusal to comply with the requirements is prohibited under section 409 of the Toxic Substances Control Act, 15 U.S.C.S. § 2689 (1976), and violators may be subject to civil and criminal penalties under TSCA in an amount not to exceed $11,000 for each violation occurring after July 28, 1997, and all violations occurring on or prior to this date are subject to a penalty not to exceed $10,000.

In summary, sellers and lessors of target housing are required to inform purchasers and lessees of the existence of lead-based paint hazards, if known. Sellers and buyers are under no affirmative duty to inspect for lead-based paint, obtain a risk assessment or remediate hazards. Potential substantial penalties may be incurred by sellers and lessors who knowingly fail to comply with the disclosure requirements.

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"Sellers and lessors of target housing are required to inform purchasers and lessees of the existence of lead-based paint hazards, if known."
The Residential Lead-Based Paint Hazard Reduction Act 42 U.S.C. § 4851b(23) (1992). The term residential dwelling means: "(A) a single-family dwelling, including attached structures such as porches and stoops; or (B) a single-family dwelling unit in a structure that contains more than one separate residential dwelling unit, and in which such unit is used or occupied, or intended to be used or occupied, in whole or in part, as the home or residence of one or more persons."

Lead-based paint means paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight.


8 40 C.F.R. § 745103. "Lead-based paint hazard means any condition that causes exposure to lead from lead contaminated dust, lead-contaminated soil, or lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects established by the appropriate Federal agency."

9 U.S. Environmental Protection Agency and Dept. Of Housing and Urban Development, EPA-747-F-93-002, Fact Sheet. Target housing means any housing constructed before 1978, including most private housing, public housing, federally owned housing, and housing receiving Federal assistance; EPA and HUD Move to Protect Children Lead-Based Paint Hazards in Housing 2 (1996). Housing built after 1977 is not covered under the Act, because the Consumer Product Safety Commission banned lead-based paint for residential use in 1978. Certain housing is not covered under the Act including zero-bedroom units and housing for the elderly or disabled unless children under the age of six reside or are expected to reside there; 40 C.F.R. § 745.101. This provision some exceptions: leases for less than 100 days where no lease renewal or extension can occur; foreclosures sales; rental housing that has been inspected by a certified inspector and is lead-based paint free; and, renewals of existing leases in which there has been previous disclosure and no new information has been obtained.


12 40 C.F.R. § 745103. "Lead-based paint hazard means any condition that causes exposure to lead from lead contaminated dust, lead-contaminated soil, or lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects established by the appropriate Federal agency."

13 40 C.F.R. § 745102. Risk assessment means an on-site investigation to determine and report the existence, nature, severity, and location of lead-based paint hazards in residential dwellings.

14 40 C.F.R. § 7452d(a)(2).

15 40 C.F.R. § 7452d(a)(2).

16 40 C.F.R. § 745110).

17 Id.

18 40 C.F.R. § 746.107(a).

19 42 U.S.C. § 4852d(a)(3). Every purchaser of any interest in residential property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based hazards from risk assessment or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase; See also, 40 C.F.R. § 745.113(a)(1).

20 A sample disclosure form for target housing sales is available from the National Safety Council National Lead Information Center at (800) 532-3394. Similar forms are available for rental property as well.

21 40 C.F.R. § 745.113(b)(1). Housing built before 1978 may contain lead-based paint. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.

22 40 C.F.R. § 745.113.

23 40 C.F.R. § 745.115.
Law Student Questions
Arafat's Commitment to the
International Peace Accord

by Justin Daniels

Introduction
In the West Bank town of Jenin, Palestinians carried a model of an Iraqi Scud missile and a poster of Yasser Arafat with Saddam Hussein over the words “Together with you in Jerusalem.” Other protestors in Gaza shouted in Arabic “Dear Saddam, destroy Tel Aviv,” and “Powerful Saddam, strike with chemical weapons.” Five years after signing the Oslo Peace Accords, Palestinian attitudes toward Israel remain the same. The Clinton Administration, and the Western media, however, blame Israel for failing to bargain as a good faith peace partner. Those who criticize Israel ignore the inherent flaws in the Oslo Peace Accords that make it a dead letter for achieving lasting peace in the region.

Oslo’s reality is that Yasser Arafat and his Palestine Liberation Organization (PLO) entered the peace process out of the necessity of political survival, not a sincere desire for reconciliation. Understanding Arafat’s motivation reveals why he had little interest in upholding Oslo’s core bargain. At Oslo’s core, Israel relinquished control of territory vital to its security in exchange for mere promises that a group previously committed to the complete annihilation of Israel would renounce terrorism and live together in peace. Predictably, Arafat’s behavior since signing Oslo demonstrates his contempt for it as evidenced by his refusal to amend the PLO charter calling for Israel’s destruction and resorting to violence whenever Israel does not comply with his wishes.

Arafat’s Motivation for Peace;
Political Survival
Yasser Arafat and the PLO did not magically transform themselves into peace makers by choice; they did so out of political necessity. The PLO’s reputation as a terrorist organization is alive and well. Arafat’s support for Saddam Hussein during the Gulf War, moreover, triggered the events that caused Arafat to embrace Oslo. After the war, the Gulf states responded to Arafat’s support for Hussein by cutting off financial aid to the PLO. The PLO’s revenue, consequently, dried up and curtailed the social and economic services it previously provided to Palestinians in the Israeli occupied areas. The average Palestinian, feeling the pinch, began to look elsewhere for leadership.

The PLO Remains a Terrorist Organization
A wealthy, educated construction engineer named Yasser Arafat founded a guerrilla army to attack Israel in 1959. Five years later, Arafat’s group joined others to form the Palestine Liberation Organization, which dedicated itself to destroying Israel and replacing it with an Arab Palestine. The PLO Covenant, also adopted in 1964, memorialized the PLO’s avowed goal. The Covenant declared the establishment of Israel “null and void” and advocated armed struggle as the only way to liberate Palestine. Articles 15, 19, 20, 22, and 23 of the Covenant directly deny Israel’s right to exist, by declaring that the purpose of “the liberation of Palestine” is to attain “the elimination of Zionism in Palestine.” No fewer than 30 of the 33 articles in the Covenant denied Israel’s right to exist or called for the use of violence against Israel.

Arafat, faithful to the Palestinian Covenant, launched one of the most ruthless and violent wars against civilians in modern history. The PLO hijacked and blew up airliners and shot up crowded marketplaces. PLO gunmen kidnapped and murdered 11 Israeli athletes at the 1972 Munich Summer Olympics. The PLO was also directly responsible for the murder of Leon Klinghoffer, a Jewish-American citizen, on the Achille Lauro cruise liner in 1985. Even during the ongoing Arab-Israeli peace talks in 1992, PLO groups committed 75% of the 340 serious terrorist attacks against Israelis.

This non-exhaustive list of PLO atrocities, committed in furtherance of their Covenant, emphasizes the simple fact that the PLO remains a terrorist organization. The United States Congress, in passing the Anti-Terrorism Act of 1987, determined
that the “PLO and its affiliates are a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States.” One of the PLO’s critical promises made throughout the peace process is that they will change all of the provisions in the Covenant that deny Israel’s right to exist or call for its destruction. At the time of this writing, the PLO has not made any changes to the Covenant. In fact, the new official map of “Palestine” issued by Arafat’s Palestinian Authority (PA) shows the state of Palestine as encompassing all of the West Bank, Gaza, the State of Israel, and a slice of the Kingdom of Jordan.

The Gulf War and its Aftermath

The Gulf War and its aftermath played a decisive role in pushing Yasser Arafat and the PLO towards the peace process. When Saddam Hussein invaded Kuwait in August 1990, the PLO threw its support behind the Iraqi dictator. The PLO even sent units of the Palestinian Liberation Army to serve with Hussein’s forces in occupied Kuwait. Nightly news reports vividly depicted Palestinians cheering on Scud missiles as they hit Israel.

Yasser Arafat and the PLO paid a steep price for supporting Hussein during the war. The PLO’s budget from 1987 to 1990 was $199 million, of which Saudi Arabia contributed $85.7 million and Kuwait $47.1 million. As a result of Arafat’s support of Hussein, Saudi Arabia, the United Arab Emirates, and Kuwait cut off their aid to the PLO and expelled hundreds of thousands of Palestinians working in those states. The governments of these countries also refused to pay the taxes they collected from Palestinians who had been working abroad. As a further blow, the breakup of the Soviet Union cost Arafat an ally as well as a source of revenue. In total, the PLO budget and reserves shrank from prewar levels of $199 million and $7 billion to postwar levels of $100-120 million and $2.5 billion respectively.

The loss of revenue profoundly curtailed the services the PLO provided in the West Bank and Gaza Strip. The Palestinian Welfare department distributed $2 million in funds a month, down from previous levels of $8 million. PLO monies earmarked for hospitals, universities, community centers, and newspapers dried up. Hospitals reported nursing staffs being furloughed or working without pay. Students could no longer afford to attend college without PLO subsidies. Bayader Assiyassi, a pro-PLO newspaper, cut its staff from 28 employees to five once PLO money ran out. The PLO’s cash problems, in short, started hurting the average Palestinian.

Palestinian newspapers began comparing the situation brought on by the PLO’s support of Hussein to the catastrophe—the term Palestinians used to describe the creation of Israel and Arab defeat in the 1948 war. The average Palestinian began losing faith in the PLO leadership which still operated out of Tunis, some 1,500 miles away. Privately, Saudi leaders said they were looking for a new PLO leader. By 1993, the PLO leadership was declining—it had lost significant funding from the Persian Gulf States and lost much of its international credibility by backing Hussein during the Gulf War.

In the final analysis, it should not come as a surprise that the Arafat who shook hands with the late Israeli Prime Minister Yitzhak Rabin on the White House lawn is the same man who bet on Saddam Hussein and lost. As a result of Arafat’s horrible judgement, many of the PLO’s wealthy benefactors capped the revenue well. Nothing concentrates the mind quite so well as being financially strapped and politically irrelevant. Arafat, shrewd politician that he is, seized on the Oslo accords as a matter of political survival without regard for his unrelenting hatred for Israel. They were the only game in town. With this background in mind, we now turn to the peace agreements themselves.

The Oslo Peace Agreement

The PLO and the Israeli government agreed to a core bargain—the PLO would renounce terrorism and explicitly accept Israel’s right to exist. Israel, on the other hand, would reject continued occupation of the Gaza Strip and the West Bank and recognize that the Palestinians living there had political rights. The Oslo agreement, however, was deeply flawed. It never changed one fundamental fact. The PLO or the average Palestinian, despite Oslo, wants the complete destruction of Israel with an Arab Palestine in her place. This pervasive belief reveals why the PLO has no interest in adhering to the promises contained in Oslo.

The Oslo Peace Accords

The Declaration of Principles on Interim Self-Government Agreements (DOP) signed in August of 1993 and again at the White House that September did not represent peace. The DOP served two purposes: (1) to provide for Palestinian self-rule in Gaza and Jericho, and (2) to act as a framework for guiding the various stages of Israeli-Palestinian negotiations to be conducted over a five-year period.
The DOP provided for an Israel Defense Force (Israeli Army) withdrawal from Gaza and the West Bank town of Jericho, which would then fall under the PLO’s civilian control. Nine months later, the Israeli Army would redeploy throughout the remainder of the West Bank in preparation for Palestinian elections and extension of autonomous rule to the entire West Bank. The DOP permitted the PLO to establish a strong “police force” to ensure public order and internal security for Palestinians in Gaza and the West Bank. Israel, however, retained the responsibility for defending against external threats as well as safeguarding the security of Israelis in those areas. Finally, the DOP contained Article XV, Resolution of Disputes. This provision required that disputes arising from interpreting and applying the DOP be resolved by arbitration, not violence.

The DOP established the following framework as a guide for future negotiation stages. The previously mentioned withdrawal of Israeli forces from Gaza and Jericho and the assumption of PLO civilian rule served as a first step in the implementation of the DOP. Israel and the PLO concluded that agreement in Cairo on May 4, 1994. In addition, the DOP called for a comprehensive Interim Agreement which broadened the powers of a Palestinian Council responsible for governing the West Bank and Gaza. Israel and the PLO signed the Interim Agreement on the West Bank and Gaza Strip on September 28, 1995. This voluminous agreement with appendices detailed security arrangements, elections, civil affairs, and release of Palestinian prisoners. In particular, the Interim Agreement addressed guidelines for redeployment of Israeli troops in Hebron and transfer of civil powers and responsibilities to the Palestinian Council. Terrorist attacks, however, delayed deployments in Hebron. Israel and the PLO resolved this issue by signing a Protocol on January 15, 1997.

The DOP, however, did not address the thorny issues that defined the Israeli-Arab dispute. Article V, Transitional Period and Permanent Status Negotiations, merely stated that “Permanent status negotiations would commence as soon as possible, but not later than the third year of the interim.” Permanent status negotiations covered remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations, and cooperation with other neighbors, and other issues of common interest. Nowhere did the agreement recognize any Palestinian claims to Jerusalem. The DOP, therefore, merely recognized the problem: the Palestinians and Israelis claimed the same land as their own. It provided no basis for Arafat’s later claims about securing East Jerusalem as the capital of a Palestinian state.

Arafat wrote a letter accompanying the DOP defining PLO commitments essential to the peace process. In a September 9, 1993 letter to Israeli Prime Minister Yitzhak Rabin, Arafat promised to renounce terrorism and amend the 30 provisions in the PLO charter that called for violence against Israel or denied its right to exist. The Oslo Accords and Arafat’s letter to Rabin reveal the asymmetrical nature of the agreement. At Oslo’s core, it requires that Israel relinquish the tangible (territory vital to its security) in exchange for the intangible (mere promises of peace). It requires that Israelis trust Arafat to deliver on promises that the PLO historically has no interest in keeping.

Oslo Violations Committed by the PLO

Has the PLO lived up to its core commitments signed and sealed with the famous handshake? The PLO pledged to recognize Israel’s right to exist and renounce the use of violence and terror. In practice, the PLO has not fulfilled either promise.

Failure to Amend the Palestinian Covenant

Yasser Arafat committed the PLO to submit to the Palestinian National Council for formal approval the necessary changes in regard to the Palestinian Covenant so that they no longer denied Israel’s right to exist or call for its destruction by violence and terror. The Interim Agreement, signed by both parties on September 28, 1995, re-affirmed Arafat’s earlier commitment:

“The PLO undertakes that, within two months of the date of the inauguration of the Council, the Palestinian National Council will convene and formally approve the necessary changes in regard to the Palestinian Covenant, as undertaken in the letters signed by the Chairman of the PLO and addressed to the Prime Minister of Israel, dated September 9, 1993 and May 4, 1994.”

In January 1997, Israel and the PLO agreed to a Note for The Record appended to the agreement concerning Israel’s redeployment around Hebron. Once again, the PLO pledged to complete the process of amending the Palestinian Charter. To date, the PLO still has not changed any of the 30 Articles which call for the destruction of Israel.

To most Israelis, the Covenant represents one of the most threatening expressions of Palestinian hatred to ever come out of the Palesti-
On April 24, 1996, the Palestinian National Council (PNC) issued a statement concerning the Covenant's amendment. At the time, Prime Minister Shimon Peres called it the "greatest revolution that the Middle East had known in the last hundred years." According to the English version of the statement Arafat previously sent him. Peres made the statement based on the PNC's declaration that "the Palestinian National Chapter is hereby amended." As it turned out, the PNC released three different versions of the statements about the charter. The Arabic version, deemed legitimate by the Palestinian Authority (Arafat's government), read as follows:

"The PNC decides: (A) to amend the National Chapter by the cancellation of those articles that contradict the letters exchanged between the PLO and the Israeli Government on the 9th and 10th of September 1993; and (B) to authorize the legal committee to reformulate the National Charter and to submit the new draft before the Central Council in its first session." A bipartisan Israeli peace monitoring organization, Peace Watch, issued the following legal opinion the next day:

"The [PLO's] decision fails to meet the obligations laid out in the Oslo accords in two respects. First, the actual amendment of the Covenant has been left for a future date. As of now, the old Covenant, in its original form, remains the governing document of the PLO, and will continue in this status until the amendments are actually approved... There is a sharp difference between calling for something to change and actually implementing the changes. Second, the decision does not specify which clauses will be amended." Peace Watch, moreover, obtained an internal PLO document composed at the end of April asserting that the Covenant had definitely not been annulled, merely "frozen" while the committee considered the composition of a new chapter.

Arafat, meanwhile, exhibits a Dr. Jekyll and Mr. Hyde approach to the issue. When he speaks in moderation to the West in English, he is Dr. Jekyll. Arafat, however, transforms into Mr. Hyde when speaking to his own people in Arabic, using language prohibited by Oslo. In January 1996, Arafat spoke to Arabic Diplomats in Stockholm's Grand Hotel. He proclaimed that "we intend to eliminate the state of Israel and establish a Palestinian state... We will make life unbearable for Jews by psychological warfare... I have no use for Jews." Arafat, in short, did not undergo a magic transformation when he signed Oslo. Arafat signed the agreement knowing full well that it did not represent the popular aspirations of his people. The PLO, moreover, is viewed by most Palestinians as a corrupt party who sold out to the Israelis. As long as Israel makes unilateral concessions however, the PLO turns off violence and terror. When Israel refuses to unilaterally concede, the PLO loses domestic support and incites violence that results in dead Palestinians and Israelis. The Palestinian hope that Saddam Hussein reduces Tel Aviv to rubble comes as no surprise since it merely echoes their desire to destroy Israel.

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Endnotes


2 Id.


6 Id.

7 Buchsbaum and Olson.

8 Id.


10 Leiter, at 4.


12 The PLO refusal to amend the Covenant is a blatant violation of Oslo and will be treated in greater detail in IV(A) below.


18 Duffy, et al. at 49.

19 Duffy, et al. at 51.

20 Id.

21 Id. at 50.

22 Id. at 51.

23 Id. at 27.

24 Id.

25 Id.

26 Duffy et al. at 51; Buchsbaum and Olson.

27 The Arabs: The Wages of Fear, at 36.


30 Amiel.


32 Id.


34 Perlmutter at 60; DOP, Articles VI, VII, and XIII.

35 Perlmutter.

36 DOP, Art. VIII.

37 Id.

38 DOP, Art. SV.

39 The Middle East Peace Process at 6.

40 Id. at 11.

41 Id.
An Introduction to
The Rain Dance

A common "Lawyer Joke" goes as follows: "A small town that cannot support one lawyer can always support two." This joke is funny because it plays on the public's perception that lawyers will make work for themselves; that more lawyers will inevitably lead to more lawsuits and more legal work.

As funny, or as unfortunate, as this joke may be, the reality in many cases is otherwise. More lawyers means more competition and less business, or no business at all for those who do not know how to compete successfully.

Many new attorneys will end up with less work and less income than they want. Indeed, many small firms expect individual lawyers to take on the responsibility and have the initiative to market themselves.

Take, for example, the case of John (not his actual name). During law school, John clerked for a small suburban law firm. After graduating and passing the bar, John went on to work for the same firm. The firm agreed to pay John 1/3 of what it bills for his time and gave him about 10 hours of work per week. John's student loans are in forbearance and he is living with his parents. As you can imagine, John is displeased with his situation and is looking for work elsewhere.

This article is directed at simple, easy, no-cost or minimal cost tactics that people like John and indeed all lawyers can use to market their practice. Successful marketing will generate more income, get you promoted faster, and generally cause your life to be happier than it otherwise would be.

Of course the first barrier is that attorneys are not, for the most part, natural marketers. If they were, they would have gone to business school instead of law school. The good news is that you do not have to be a marketing "natural" or "expert" to do a better marketing job than most attorneys are doing. Most attorneys are effectively doing no marketing at all.

A common barrier is the fear of running afoul of ethics rules or appearing "needy" or "unprofessional." This article will touch on some of the limits imposed by ethics rules but it is not intended as an ethics course. If your approach to marketing is reasonable and conservative, few members of the public will perceive you as other than capable, professional, and dedicated.

A successful marketing effort will benefit you no matter where you work. The rewards may come in different ways; direct income, more clients, faster promotion, personal development, etc., but the rewards will come. With that in mind, what follows includes the basics of inexpensive, but successful marketing tactics, as well as some ethical considerations in marketing a legal practice. The materials referenced in the endnotes list are highly recommended.

THE FOUR Ps

In 1971 Jerome McCarthy authored Basic Marketing: A Managerial Approach. This book is a classic marketing text for introductory level business students. McCarthy identified the components of marketing as the "Four Ps": "Product, Price, Place, and Promotion." This section will consider the "Four Ps" in the context of marketing legal services.

Product

This term would include items such as filings prepared by the lawyer, articles he has authored and talks he has given, and inevitably his or her success at achieving the client's objectives. For many clients the real method used to measure the "product" is their visual impression of the lawyer and his or her work rather than a technical evaluation of his or her legal writing and reasoning skills.

At least one commentator has asked, "If a client is going to shell out money, why would he or she want to pay for a lousy-looking lawyer?" The same commentator noted, "It never ceases to astonish me, when I give presentations on marketing and rainmaking, how bad how many lawyers look."

Given the above, your work, dress, and manner should be neat and professional and speak of quality. This is because the appearance of your work, your dress, and your manner are in many cases the only ways the public has of evaluating the "Product."

On a related note it is always a good idea to send copies of all memoranda, pleadings, filings to the client. Not only does this show the
“product” in progress, but it also keeps the flow of information and communication going. Communication with clients is often overlooked by lawyers and is quite important to most clients. Failure to communicate has been identified as one of the most common reasons that clients complain to Disciplinary Boards.8

Price
New attorneys need not and should not sell themselves “short” simply to get clients. Simply put, “If you want good clients, you have to look like you know what you are doing. If you know what you are doing, you will charge respectable rates and respectable retainers. Overall, you do not get good clients by discounting heavily or offering cut-rate prices.”7

Notwithstanding the above, free initial consultations have become accepted practice in the profession. Further if a reduced price service is given in connection with a seminar or to a group with which the attorney has a special connection the pitfall described can be avoided.

New attorneys should be careful not to discount price so much as to influence negatively the client’s perception of the “product.”

Place
I know of a law firm that has its office in an apartment complex notorious for criminal activity. The firm doesn’t handle estates and trusts, it handles criminal law. By being easily accessible as well as visible to the market, this firm has kept quite busy. This firm is in the right “Place.” Efforts to be in the right place need not be as extreme as locating yourself near criminals.

“The Term ‘Place’ represents the distribution function, or those tasks and activities involved in getting the product to the customer. For a company this might include warehouses, trucks, and retail outlets, for a law firm, however, the distribution function is indistinct, and it is difficult to establish parameters around it.”8

Thus the concept of “place” in the context of providing legal services involves accessibility. New attorneys commonly have little or no control over the location or layout of the office. New attorneys nonetheless can improve the distribution and perception of their “product” through the effective use of technology.

Communication with clients via e-mail is incredibly powerful and time saving. “The basic act of obtaining an e-mail address for your firm conveys a positive image… It shows potential clients that you are accessible. E-mail makes it easier for clients to communicate with you.”9

“For many, contacting a lawyer is a highly intimidating experience. E-mail is perceived by some as a less scary way of making an initial communication with a lawyer…”10

Attorneys communicating with clients via e-mail should be aware of the lack of security on the Internet. Accordingly, confidential information should be communicated via more secure means or encrypted in some manner to avoid violating the rules on confidentiality.11

More sophisticated users of the Internet might host a web site posting their articles, information from bar-sponsored legal information pamphlets, and the like. Such a site could have pictures of the attorney, a map to the office which users can print, and would also accept e-mail messages. This is the equivalent of locating your practice on the “Information Superhighway.”

Promotion
Promotion is the “meat” of marketing—getting new clients to call, to walk in, and to bring you their legal business. Promotion is perhaps the most important aspect of marketing for the new attorney that does not already have a developed client base.

Examples of promotional activities include seminars, newsletters, advertising, public relation activities, community relations activities, directory listings and brochures.12

However, these examples can all be very expensive. Further, directory ads usually must be ordered in late summer, before the new attorney gets his or her bar results. Thus, for the new attorney, seminars and public and community relations in particular, are the only remaining traditional promotional activities.

Seminars are a good idea. Select an area you wish to practice in. Find a group that has an interest in that area, contact them and offer a free seminar to their members. For example, if you wish to practice estate and trust law, offer free estate planning seminar at your local senior center.

By conducting a seminar the attorney gets to present himself or herself as an expert, choose the audience, and demonstrate the breadth and depth of his or her subject matter knowledge.
Rather than conducting a formalized, "Are their any questions" type question and answer session at the end of the interview, the attorney might take advantage of the opportunity to socialize and entertain questions in a less formal manner. In this way the attorney can build a more personal connection with the attendees of the seminar. Another tactic might be to offer nominal or no cost service to the group in attendance; for example, do everyone's will for $10. Each will would be a connection to a potential new client. Public and Community Relations activities open to the new lawyer include participation in public service, involvement in local government, and the like.

Some positive, nontraditional marketing techniques have been suggested.

One source suggested that new attorneys might keep a watchful eye on the media for events that could potentially generate legal need. While attorneys are generally prohibited from making in-person solicitation, it is ethically permissible to solicit letters to people potentially in need of legal services, provided, of course, that any applicable waiting period is observed.

One author intimated his informal relationship with a credit-counseling agency that would refer clients to his practice. When the agency determined that an individual needed to file bankruptcy rather than to rearrange his or her finances the agency referred the client to the attorney. The attorney responded in kind by referring persons not really in need of bankruptcy to the credit-counseling agency. Attorneys should take care in relationships of this type not to engage in fee splitting, which may be an ethics violation depending on the jurisdiction. Consider this model in your dealings with marriage counselors, accountants, police, brokers and other professionals.

There are other ways attorneys can develop client contacts. Attorneys can get involved in providing no-cost tax preparation assistance to the poor and elderly through the IRS's VITA program. Attorneys that participate will get excellent free training and certification from the IRS as well as being able to make contacts, although the program does prohibit direct solicitation of business. Similarly, work can be had from various public interest groups; for example, the American Automobile Association (AAA) provides its members with legal representation in simple traffic matters. Contact senior citizen groups, labor and small business organizations, and even clergy and the like, and ask for referrals or to participate in their legal services delivery program.

Conclusions

By no means does this article intend to provide an exclusive or exhaustive analysis of how new attorneys can get work in a tight market. It is intended to be a general outline of some good suggestions that you may or may not implement, but will at least get you thinking about marketing your practice. By borrowing these simple marketing techniques from the business world, new attorneys can find work for themselves and begin a rewarding career in law.

Joseph P. Murphy is a fourth-year evening student at Duquesne University School of Law.

Endnotes

3 See Pa. St. R.P.C. 7.1 - 7.7; these are generally recognized as the rules governing "advertising."
5 Mindy G. Farber, Avoiding the Worst Mistakes: Unless You Are Alan Dershowitz, Don't Look Like a Schlep, in Marketing Success Stories: Personal Interviews with 66 Rainmakers 41, 42 (Hollis H. Weishar, Ed., 1997).
7 Farber, supra note 5, at 41,44.
10 Id. at 53.
12 Schmidt, supra note 8, at §1.02(2)(d).
14 For further information on the VITA Program, contact the Internal Revenue Service at (800)829-1040. In Pittsburgh, call (412)359-6504.
FEATURES: VOLUNTEERISM

Chicken Soup for the Community: Volunteerism

by Linda King, Esq.

I will, in the brief course of this article, address a particular area of our profession that strikes terror in the hearts of some, resignation in the demeanor of others and apathy in the attitudes of many of my legal colleagues: VOLUNTEERISM. In regards to volunteerism, there is a distressing trend that appears to have sprung from a desire on the part of many lawyers to emulate the lifestyles of the characters on the 1980s television program “L.A. Law.”

Gone are the days when many colleges and graduate schools let loose upon society a plethora of young adults eager to immerse themselves in selfless endeavors. For instance, when was the last time you read an article about the Peace Corps or viewed a public service announcement touting the idea that we must all work together to create a better, more humanistic world? In the 1960s and through the 1970s, there appeared to be a concerted effort on the part of government agencies, media representatives and social service organizations to have us view and understand the segments of our civilization that heretofore had gone unrecognized and unheard. Young people responded to this effort with great enthusiasm. Legal aid societies flourished, college students worked summers in the inner cities of New Jersey and New York teaching reading skills to underprivileged youths and volunteerism was held in high regard by institutions of higher learning.

So, what happened? To be perfectly frank, I don’t know. Somewhere along the way, we have lost much of the desire to understand those whose lives are different from ours. Perhaps it is too painful to witness the stark realities of deprivation and the struggles inherent to that way of life. Maybe the knowledge that others suffer great hardships interferes with the enjoyment of our own comfortable lives. Or maybe we really have become ultimately selfish, materialistic beings hellbent on pursuing the “what’s good for me is good for the world” ideology. The latter, I feel, is the most daunting of the prospects. People who turn from painful knowledge can usually be persuaded to take another look. They are at least somewhat compassionate and usually empathetic. Selfish persons, on the other hand, are the destroyers of civilizations.

I have been fortunate in my professional practice to have been given the opportunity to serve various organizations in a volunteer capacity. One of the most important has been my association with the Pittsburgh AIDS Task Force (PATF). Many people are not aware of the fact that PATF provides, among other things, free legal services to persons living with AIDS. As an attorney, by providing face-to-face legal advice to clients of PATF, you get to touch the lives of individuals who are often barely surviving on the bottom of our social strata. In most cases, the disease has often forced them from the work force, occasionally caused them to lose their health insurance and generally ravaged their savings. These individuals would, without legal assistance from PATF, never have access to an attorney and would essentially be unable to take care of necessary matters such as dealing with landlord tenant issues, preparing a will or durable power of attorney among other needs.

The volunteer work at PATF is to a degree hands-on, although not in any way as difficult as that done by the people who provide direct personal care to individuals with AIDS. Those volunteers deserve the highest of praise for being in the trenches when needed. However, providing legal services that afford comfort and peace of mind is very satisfying (and urgently needed by most PATF clients).

For those of you who find a more glamorous endeavor to your liking, the possibility of serving on the board of directors of a nonprofit organization should be considered. For the past two years, I have been involved with the board at Pittsburgh Action Against Rape (PAAR), a non profit entity that provides services directly to victims of sexual violence, usually women and children. As a director, I have been able to take part in shaping many aspects of the organization’s long term goal of eliminating violence, sexual and otherwise. Although I am not involved directly in providing the ser-
The most compelling argument I can make for a renewal of the spirit of volunteerism is this: We are a civilization, i.e. we are all an integral part in this world and more particularly this society. Our fortunes ultimately rise and fall together. If we allow segments of our society to live in worsening conditions with no hope of a reasonable level of comfort and security, we will without doubt bring down civilization. It is our responsibility, those of us who are fortunate enough to have access to good housing, decent food, and educational opportunities to make sure that those things are available to all. We are in this world together and what happens to the least of us happens to us all (even lawyers).

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JURIS
Flashback

Recent events in the later half of the 1990s have brought to light a growing debate over the limits of the right to privacy regarding thoughts, discussions, and knowledge. Some incidents which have sparked this debate include the taping of discussions of former White House intern Monica Lewinsky by her confidant about her alleged affair with President Clinton, the intercepting of a cell phone conversation by House Speaker Newt Gingrich by a Florida couple last year, and the heightened rise of politically motivated domestic violence (i.e. the Oklahoma City bombing and the Olympic Park bombing in Atlanta to name a few). These events have raised a legitimate debate as to how far the federal government should go in protecting the domestic peace. Should the government allow our discussions to be recorded? Should there be limits as to what kind of information can be accessed on the Internet? The questions abound.

To provide some thought and insight on this questions, the following editorial from the March, 1969 (Vol. 2, No. 3) issue of Juris addressed the very essence of this “current” debate:
Law and Order or Law Versus Order

The Constitution calls for our right to privacy; the Court's promulgated chronicles reflect this commitment. The Mitchell 'solution' raises the issue:

Whether or not one of the basic freedoms specifically enumerated in our Constitution, the right to privacy, shall be abrogated in order to implement the Attorney General's concept of law and order.

What comes to mind is that the Mitchell 'design' resembles the scheme of another "advocate of justice," one who rose to power in Germany in the 1930's. This national figure used, along with the devices of fear and hate, electronic and human eavesdropping devices to acquire information relevant to his purposes. This, despite the similarity of the American and the Weimar Constitutions.

The comparison, extreme as it may seem, is without some validity. The Mitchell 'design' seeks the ideal of the ordered state, the capture and confinement of state enemies...the other presumably sought the same.

Is it not possible then that an abuse of the Mitchell 'solution' could result in another "ordered" state, a state where the rulers and not the people are the determiners of the people's destiny?

The simple fact remains that any disregard of our constitution or the recognized interpreters of our constitution, i.e., the Supreme Court of the United States, by a result-orientated, over enthused advocate of justice may well result in additional disregard of our legal rights.

The Mitchell solution may present a cure to American law enforcement problems, but history shows that similar remedies when not constrained can be more dangerous than the illness.

We have little doubt that the Mitchell "prescription" will fail. He has, in his view, created an issue—law and order versus the constitution—that can be no issue.

Issue cannot be taken with the Constitution.

Juris
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March, 1969
A Light Look at Law Grades on the Internet

This past fall, Duquesne Law School posted the final exam grades on the Internet for the first time. Now law students could access their grades quickly and easily with the touch of a button. Down with the "wailing wall" upon which exam grades had been historically posted. Long live the Internet! Unfortunately, things did not work out to be quite so rosy...

For those readers who are not currently law students at Duquesne, here is what happened. When students completed the fall 1997 semester and departed for Christmas break, they left with the knowledge that when they returned their grades would be waiting online to access. For the first-year students who never knew the wailing wall, the change would matter little. But for the second- and third-year students, the change meant the end of crowding around the "wailing wall," jostling each other to find grades, and hiding either disappointment or elation (a.k.a. practice for a career in politics).

When we returned for the spring semester, no grades were posted. Within hours, the first rumblings of discontent were echoing in the lounge and halls. Two weeks passed and the first grades were finally posted. You could get your grades—if you were able to get time on the computer (because grades could only be accessed on the law school's computers). If you took classes that had a final exam, and not a paper. If the grades for your class were posted. If the bookmark (a "high-tech" Internet term) was there. If you wrote down the lengthy Internet address that was posted at the front of the library and not in the lab itself. If you wrote down the class codes posted at the library front desk and also not in the lab. Yaada. Yaada. Yaada. As should be plain, the system was not without its flaws.

As I began my investigation of the events in question, four major players emerged: Mark Falk, the law library's audio-visual librarian and resident computer guru, Molly Ann Sacks, law school registrar, Law Professor Ken Hirsch, and CCIT (Campus Computer Information Technologies).

First, there is Mark Falk. Without a doubt, Mark took the brunt of the student complaints and thus it was a logical place to start. Mark's role was "to bookmark the computers [in the law library lab] and help people in getting their grades." As to one student complaint that availability to computer time was scarce, Mark was not surprised—"We had 525 students trying to access grades on nine machines. Any time you have that volume of traffic, you are bound to have some problems," he stated. An understatement, to say the least.

Registrar Molly Ann Sacks was next on my list. The role of the registrar was to write out the student identification cards passed out at the start of exams and then match each card to its student. From her perspective, it went "pretty well" for the first time. The registrar had to deal with students forgetting their passwords, the complaints about the speed of the posting of grades, and privacy. Molly's advice to students: "Clear the screen after you are finished!"

Next, I was led to Law Professor Hirsch, the motivating force behind this change. One year ago, when Professor Hirsch looked at the grade folders (a one-semester alternative to the "wailing wall" that was met with limited success), he thought, "This is what computers are for." The professor identified several problems with both the "wailing wall" and the grade folder systems, most notably the lack of privacy, and the time consuming nature of updating the grades. He then proceeded to speak with Dean Nicholas Cafardi about a system to post grades on the Internet which would guarantee privacy, and would be easy to update. The subtext to the
system was to encourage the use and increase student familiarity with the computers. On how the system worked the first time, Professor Hirsch had this to say: "I think that students have been very tolerant in not tarring and feathering me."

The problem with the system can be traced to two sources: CCIT and a lack of information. What students did not know was that grades were not due prior to the return from Christmas break and that even if they had been turned in over break, the University was closed down and could not be entered. What Hirsh asked for from CCIT was an Internet page requiring a password and a student number. Unfortunately, CCIT delivered a page with codes for courses, complete with a defect in the data entry programming code. Hence, for a two-week period after returning from Christmas break, no grades could be entered.

Based on my investigative research of of the "wailing wall" (antiquated and problematic with respect to protecting the privacy of students), the failed folder system (a modicum more of privacy, but inefficient), and the Internet posting system, it is clear that for the time being, the Internet posting system is the best choice available. Some future changes for the Internet posting system include: access from home; installation of a “grades” icon on the screen (to remove the “idiot factor”); user-friendly course codes (like the actual course names, instead of a string of numbers); 14 new computers; and, a possible remodeling job for room 231 with Internet connections and electric outlets. I think it is safe to say that posting grades on the Internet is here to stay.

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Law School Exam Student List

Enter your exam number at the prompt.
Next, enter your assigned password.
Your grades will then be displayed.

Exam Number: ___________
Password: ___________
Submit  |  Reset Form

Some Interesting Quotes on Law and the Such¹...

Ignorance of the law excuses no man from practicing it.
Addison Minzer

Lawyers spend a great deal of their time shoveling smoke.
Oliver Wendell Holmes, Jr.

A jury consists of twelve persons chosen to decide who has a better lawyer.
Robert Frost

When you have no basis for an argument, abuse the plaintiff.
Cicero (Roman Jurist)

Agree, for the law is costly.
William Camden

Laws are like sausages. It's better not to see them being made.
Otto von Bismarck

Fond of lawsuits, little wealth; fond of doctors, little health.
Hebrew Proverb

The first thing we do, let's kill all the lawyers.*
Shakespeare

* From the play, Henry V (Part 2, Act IV, scene 2). The statement is uttered by Dick the Butcher to Cade in reference to the idea that by getting rid of the barristers, bedlam and chaos will result, and thus help their conspiracy to overthrow the king to succeed.

Endnotes

¹Michael D. Shook and Jeffrey D. Meyer Macmillan Inc., Legal Briefs 1995
Pittsburgh legal icons John L. Doherty, Esq., Chief Disciplinary Counsel of the Pennsylvania Disciplinary Board, and Allegheny County Coroner Cyril Wecht with nationally renowned criminal pathologist Dr. Henry Lee.