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"I want you to get involved in the American Association for Justice and to maximize your membership. We need people like you."



JESSICA PRIDE
The Pride Law Firm
San Diego, CA
jpride@pridelawfirm.com
www.pridelawfirm.com



Message from the Chair, Jessica Pride:

Maximize Your Membership

"It's expensive and I don't really feel like I get anything from it." This is a candid statement made by a friend, let's call her Amy, in response to me asking her to renew her American Association for Justice membership during the last phonathon. While Amy appreciates the wonderful political work AAJ does to ensure the rights of her clients, as a young lawyer struggling to make it, the hierarchy of needs requires her to invest her money in things that she feels help her day-to-day practice. This sentiment resonated with me because Amy is a great up-and-coming trial lawyer who is very involved in her local organizations. However, she doesn't have the resources to pay \$4,000 to attend convention or to travel across the country to regional events or seminars. So Amy has opted to keep her involvement local. Amy, like me, is a new lawyer who works in a two person firm and has a budget. Do you know that the majority of AAJ members are solo or small firm practitioners? It occurred to me that Amy's feelings may be shared by many others across the country who may have or will question why they should invest in AAJ every year. Or maybe you know a colleague that has an interest in joining but has similar concerns. I realize that lawyers have options when deciding what organizations to be a part of.

I want you to get involved in the American Association for Justice and to maximize your membership. We need people like Amy and like you. I want to make sure that you know that AAJ appreciates your dedication to this organization and is dedicated to providing you with a plethora of resources to help you fight the fight.

On page 2, I will share with you key perks, some well-known and others that should be, that you receive as a member of the American Association for Justice. Please note that I only highlighted a couple of the ways the association helps you and your clients. For a full list of the benefits, including the very important political work AAJ does on Capitol Hill, please see the Web site. If you have a suggestion as to how the NLD can better serve you in your practice, please do not hesitate to contact me. This is your membership and I hope that you take advantage of all the ways AAJ can help you.

Sincerely,

Jessica Pride
Chair, New Lawyers Division

continued on the next page

The Benefits of Being an American Association for Justice Member

Trial magazine. Every member receives a subscription. The magazine is chock full of informative articles that discuss all of the different aspects of our practice. The articles are authored by great lawyers from across the country who have valuable information to share. I keep an issue from February 2006 on my shelf. An article regarding the taking of an employee deposition in a products case was instrumental to a successful deposition in a case I was working on earlier in my career. Not only do the articles teach us how to be better lawyers, but most authors, if contacted, are happy to share advice and samples. The magazine also keeps us apprised of what is going on in litigation around the country.

The Sidebar. This is our quarterly newsletter, which provides news and information geared towards new lawyers. Interviews with judges, articles on trial skills and strategies, and useful web links are just a few of the aspects included in *The Sidebar* that will help you build your practice and career.

Convenience Learning. World-class continuing legal education that is taught by the nation's best lawyers is consistently offered. However, not everyone can travel to convention or to seminars. Sensitive to this issue, AAJ provides teleseminars and webinars so that you can receive the benefit of education from the comforts of your office. In the event that a topic you want to learn about is being discussed at a convention that you can't attend, the presentation is available via DVD, audio CDs and MP3s. A schedule of upcoming continuing legal education programs and more information about convenience learning is available on the AAJ website.

Media Assistance. The majority of firms do not have a PR person or media department to help them. The AAJ Communications department is here to help you. Going to be interviewed by the news or a radio station? Unsure of what to say, not to say, or how to say it? AAJ provides members with a free "Managing the Media" packet that provides guidelines and tips for talking to the media. The AAJ Communications department also provides free messaging preparation before you do an interview. Furthermore, they will help you with press releases.

Need help getting a pro-civil justice message out to your community? AAJ creates civil justice messages that you can disseminate to your local TLA, social networking sites, etc. to help promote positive messages about the work trial lawyers do to protect the health, safety and legal rights of our communities. If you have a website or blog and want to link to www.takejusticback.com, AAJ is happy to help you do this. The AAJ Communications department also works with projects like Let America Know, which provides firms with ready-made e-newsletters at a very inexpensive rate. These e-newsletters not only help to market your firm and your accomplishments, but provide your readers with great pro-justice articles on a wide array of topics. This month's edition is about truck collisions. For more information on this benefit, go to www.letamericaknow.com.

Access to Litigation Groups and Caucuses. Need information or samples for an energy drink or an Actos® bladder cancer case? Join the litigation group and receive access to a wealth of knowledge and documents. There are also meetings in which you can engage in active discussions.

Want to connect with other new lawyers from across the country? Your membership is your ticket to the NLD listserve, events and networking opportunities. I can't tell you how many times I have referred a case to an AAJ NLD colleague in another state or called to ask a question about the laws in another state. Why spend valuable hours researching stacking laws in a neighboring state when you can just pick up the phone and call an NLD friend? There are lawyers across the country, like myself, who are willing to help you. It is part of the NLD's mission to provide a support system for each other so that you know you never stand alone.

Work Your Way to Convention. Don't have \$800 to pay for convention registration? The Membership department is now offering a program that will give you COMPLIMENTARY registration to a convention when you recruit 20 new or reinstated members. With the new membership connector tool available online, it is easy to recruit members. If you have never attended a convention or are saving to return, this is an opportunity you do not want to miss!

Travel Reimbursement. Want to travel to an NLD event but either your firm won't pay for it or all your money is spent repaying student loans? Come to one of NLD's phonathons that take place all over the country. Not only will you get to network with lawyers from different states, but you will get to attend an event with the local TLA and see what the local town hosting the phonathon has to offer. In exchange for your help with increasing membership during the phonathon, you will be reimbursed with a \$500 travel credit as well as a complimentary hotel room for 1-2 nights (depending on the phonathon). The upcoming phonathons include Tampa, Florida on January 24, 2014; Denver, Colorado on March 13, 2014; and Dallas, Texas on April 3, 2014. If you would like more information about attending a phonathon, please contact Jennifer Rafter at Jennifer.rafter@justice.org.

Grow Your Practice. The networking with lawyers from across the country will improve your firm's bottom line if you get involved. Lawyers in other states are constantly getting hits on their websites about cases in other states or getting questioned about who to refer a case to in another state on their local list serves. The relationships made with fellow AAJ members often result in referrals, or designations as local counsel. Once you have the money to grow, if you have questions about the logistics of growing your practice or getting into a new practice area, the Solo & Small Firm Practice group and litigation sections can help. ⚖️



NLD Habitat Project San Francisco, CA



On July 19, 2013, the New Lawyers Division (NLD) of the American Association for Justice (AAJ) kicked off the AAJ Annual Convention in San Francisco by volunteering with Habitat for Humanity's Neighborhood Revitalization Initiative (NRI).

The NRI enables Habitat to revitalize and improve communities. Launched


in 2011, the NRI program responds to community identified needs through partnerships with community residents and nearby organizations. The NRI program consults with community residents to determine the specific needs of that community, focusing on improving the built environment. Whether it is repairing a homeowner's roof, refurbishing a youth center, or helping to create a community garden, these actions help to transform under-served neighborhoods into vibrant places to live.

The NLD participated in a park beautification project, which consisted mostly of pulling weeds and mulching, at Ocean View Park. Located in San Francisco's southwestern-most area, District 11, the Ocean View-Merced Heights-Ingleside (OMI) area is a vibrant community with a strong tradition of service. Ocean View was once a valley of dairy and vegetable farms, but because it was built around a railway station, it developed into a vital urban neighborhood. The OMI neighborhood is one of the most ethnically diverse neighborhoods in San Francisco. As of the 2010 Census, 45% of the population identified itself as Asian American, 25% as African American, 18% as white, and 12% as other ethnicities.

OMI community members have identified the following as key needs for their neighborhood:

- keeping the neighborhood clean and safe,
- developing programs for children and youth, and
- creating more public gathering spaces

The NLD members who volunteered their time with the NRI helped Habitat to further these goals. By pulling weeds and mulching, Ocean View Park is able to limit the use of sprays. Moreover, clean-ups like the one that the NLD performed help to improve the quality of life in the surrounding neighborhoods. Finally, through the work of volunteers like the NLD, Habitat is able to attract other forms of support—in kind donations of services, supplies, and grants.

The NLD organizes a public service project on the Friday before both the summer and winter conventions. The NLD is planning to volunteer with the construction of homes with Habitat for Humanity at AAJ's Winter Convention in New Orleans on Friday, February 7, 2014. If you would like to join us, please make sure to plan your travel arrangements accordingly. For more information, contact Public Service Committee Chair Donna MacKenzie at dmackenzie@olsmanlaw.com. 

PARTICIPANTS INCLUDED:

Yemi Ajayi (Khorrami Boucher Sumner Sanguinetti, LLP | Oakland, CA)

John Bair (Milestone Consulting, LLC | NY | CO | CA)

Nelson Boyle (Burg Simpson Eldredge Hersh & Jardine, PC | Englewood, CO)

Frank Cesarone (Meyers & Flowers, LLC | St. Charles, IL)

Cole Dowden (Fay Kaplan Law, PA | Washington, DC)

Caragh Glenn Fay (Fay Kaplan Law, PA | Washington, DC)

Chris Fitzgerald (Law Offices of Christopher H. Fitzgerald | New York, NY)

Amanda Greenburg (Khorrami Boucher Sumner Sanguinetti, LLP | Oakland, CA)

Javier Herrera (The Herrera Law Firm | San Antonio, TX)

Molly Hoffman (Fay Kaplan Law, PA | Washington, DC)

Paymon Khatibi (Khorrami Boucher Sumner Sanguinetti, LLP | Oakland, CA)

Jamie Knight (Fay Kaplan Law, PA | Washington, DC)

James Krenis (Hill-Boren, P.C. | Jackson, TN)

William Lamb (Gillam & Smith, LLP | Marshall, TX)

Kristin Loiacono (American Association for Justice | Washington, DC)

Stephanie Luzzi (Law Office of Charles Kannebecker | New York, NY)

Leah Mackie (American Association for Justice | Washington, DC)

Donna MacKenzie (Olsman Mueller Wallace & MacKenzie, PC | Berkley, MI)

Kevin Mansour (Of Counsel, Bruce Law Group | Louisville, KY)

John Michael Montevideo (Dimarco Araujo & Montevideo | Santa Ana, CA)

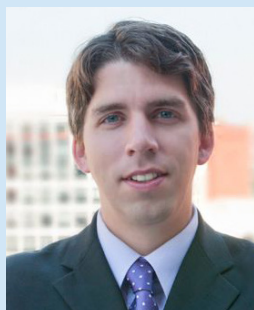
Christopher Nace (Paulson & Nace, PLLC | Washington, DC)

Chris Owens (Washington, DC)

Patrick Salvi, II (Salvi, Schostok & Pritchard, P.C. | Chicago, IL)

The Lone Pine Order: What All Tort Plaintiffs Can Learn From Recent Hydrofracking Decisions

By James Bilsborrow



James Bilsborrow
Weitz & Luxenberg
New York, NY
jbilsborrow@weitzlux.com
www.weitzlux.com

James Bilsborrow is an attorney with Weitz & Luxenberg's Environmental and Toxic Tort Unit. He serves as Second Chair to Robin Greenwald on the Plaintiffs' Steering Committee for the BP Oil Spill MDL, and has experience litigating both class actions and mass torts. Mr. Bilsborrow is a graduate of the William & Mary School of Law. He clerked for the Hon. Christopher C. Conner in the Middle District of Pennsylvania and the Hon. D. Brooks Smith in the Third Circuit Court of Appeals.

Picture this: You represent a handful of property owners who live near wells used for hydraulic fracturing, or fracking. Shortly after use of the wells commenced, your clients began to suffer frequent headaches, skin rashes, nausea, sleeplessness, and bloody noses. This was not normal for these otherwise healthy adults. You know—and allege in court papers—that certain chemicals used in the fracking process likely contaminated the air, water, and ground around your clients' property. You speak to a medical professional who tells you that human exposure to these chemicals can cause the conditions exhibited by your clients. You feel you have a good faith basis to pursue these claims. However, shortly after you file suit, but before discovery commences, defendants request and obtain a *Lone Pine* order, halting the regular discovery process until you can produce evidence identifying the location of the contamination, the source of contamination, and general and specific causation with respect to each plaintiff.¹ Production of this evidence will be costly. Some information may be difficult or impossible to obtain without propounding discovery on the defendants. The court has given you only a short time to produce it. Failure to produce the evidence will result in dismissal.

The scenario described above is not hypothetical. It tracks the fact pattern set forth in a recent Colorado Court of Appeals decision, *Strudley v. Antero Resources Corp.*, — P.3d —, 2013 WL 3427901 (Colo. Ct. App. July 3, 2013). Nor are *Lone Pine* orders limited to fracking litigation. Defendants routinely seek such orders in toxic tort, pharmaceutical, and property damage litigation. These orders sometimes prove dispositive; if plaintiffs are unable to muster the evidence required by the order, their cases are dismissed with prejudice with no opportunity to engage the discovery process. A good lawyer cannot help but factor the specter of a *Lone Pine* order into his or her decision whether to pursue a case, regardless of the merits. Fortunately, the *Strudley* decision, as well as recent others like it, suggests that courts may be open to curtailing defendants' reliance on

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A station for natural gas by hydraulic fracturing method.

restrictive *Lone Pine* orders. This article highlights recent decisions in fracking litigation and suggests factors for plaintiffs to emphasize in any litigation to defeat the *Lone Pine*.

A *Lone Pine* order is a case management order that typically requires plaintiffs to make a *prima facie* showing before they are permitted discovery on matters central to their claims. These orders vary in their breadth and originate with the decision in *Lore v. Lone Pine Corp.*, a case alleging that a variety of allergies, skin rashes, and similar ailments was caused by exposure to pollution from a nearby landfill. The case pitted numerous plaintiffs against 464 defendants, one of which owned the landfill and 463 of which were generators and/or haulers of toxic materials. Early on in the case, defendants presented an Environmental Protection Agency report indicating that plaintiffs' properties were not contaminated or polluted. The court thereafter issued a case management order requiring plaintiffs to provide medical records or other documentation supporting general and specific causation, as well as detailed records relating to their diminution of property value. Plaintiffs failed to comply and the court dismissed their claims, all the while suggesting (after repeated plaintiff foot-dragging) that plaintiffs were delaying merely to extract a nuisance value settlement.²

This unfortunate factual scenario spawned the *Lone Pine* jurisprudential universe. Since that decision, numerous courts have issued *Lone Pine* case management orders; where they were once characterized as "extraordinary,"³ they have recently been dubbed "routine."⁴ But *Lone Pine* orders should not be routine. They interfere with the truth-seeking purpose of discovery and threaten to adjudicate a plaintiff's rights

continued on next page

¹*Lone Pine* orders derive their name from the decision in *Lore v. Lone Pine Corp.*, 1986 WL 637507 (Sup. Ct. N.J. Nov. 18, 1986), which is discussed in more detail below.

²*Id.* at *4.

³See, e.g., *Roth v. Cabot Oil & Gas Corp.*, 287 F.R.D. 293, 295 (M.D. Pa. 2012).

⁴See e.g., *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 743 (E.D. La. 2008) (citing cases).

through a case management order rather than on the merits through summary judgment.⁵ Indeed, the facts and underpinnings of the *Lone Pine* decision demonstrate that *Lone Pine* orders should be limited to cases involving large numbers of plaintiffs or defendants; those that present unique case management concerns; those whose underlying facts have been questioned by objective third parties (like the EPA); and those where plaintiffs have engaged in delaying tactics, ostensibly to leverage settlement. Where some combination of these factors is absent, and where litigation is in its earliest stages, recent court decisions — especially in the fracking realm — have been reluctant to issue the “extraordinary” *Lone Pine* order.

Most notable among recent decisions is the Colorado Court of Appeals’ ruling in *Strudley v. Antero Resources Corp.*, whose facts are set forth in the opening paragraph above. There, the appeals court reversed a lower court decision requiring plaintiffs to provide pre-discovery evidence of general and specific causation, the identity and dose of any hazardous substance to which any plaintiff was exposed, the precise location of any plaintiffs’ exposure, extensive medical records for each plaintiff, and the quantification of contamination of plaintiffs’ real property. All the while defendants were required to produce nothing. When plaintiffs were unable to come forth with all of the required evidence in 105 days, the court dismissed their claims with prejudice.


In rejecting the lower court decision, the *Strudley* court ruled that the pre-discovery *Lone Pine* order deprived plaintiffs the opportunity to acquire information that would enable them to “respond fully to the *Lone Pine* order,” which thereby “interfered with the full truth-seeking purpose of discovery.”⁶ The court was bothered that defendants sought the *Lone Pine* order early in the litigation before any facts were discovered, and the court contrasted this practice with cases in

which significant discovery transpires before plaintiffs are asked to produce prima facie evidence to support their claims.⁷ The court also compared *Strudley*’s facts with those in *Lone Pine* and courts following it: here there were only four plaintiffs litigating over a single parcel of property; third-party evidence suggesting there was no contamination was questionable and better dealt with at summary judgment; and the case was not “any more complex or cost intensive than the average toxic tort claim.”⁸ Thus, there was no need for “extraordinary” case management procedures such as a *Lone Pine* order.⁹

Two recent fracking cases from the Middle District of Pennsylvania followed a similar approach. Both *Roth v. Cabot Oil & Gas Corp.*,¹⁰ and *Kamuck v. Shell Energy Holdings GP, LLC*,¹¹ involved allegations by plaintiffs that defendants’ gas drilling operations caused toxic contamination, personal injury, and property damage. In both decisions, the court observed that there were only a handful of plaintiffs and defendants litigating “what appear to be ... relatively straightforward tort claims.”¹² Further, although neither the plaintiffs in *Roth* nor *Kamuck* had produced much to support their respective claims, the court was convinced that the merits of plaintiffs’ claims could be dealt with by dispositive motion practice, after adequate facts had been discovered and developed. Defendants’ arguments, as they do in many *Lone Pine* motions, cast doubt on plaintiffs’ ultimate ability to prove their claims; the court in *Roth* and *Kamuck* indicated that it preferred to answer those merits questions under the appropriate procedural vehicle (i.e., summary judgment or motion to dismiss) rather than via *Lone Pine*.

These fracking cases, and other decisions in concert with them, tend to avoid early stage *Lone Pine* orders that unduly restrict discovery. Indeed, an MDL court in *In re Digitek Products Liability Litigation*,¹³ recently indicated that when presented with a *Lone Pine*

motion, a court’s first focus should fall upon the litigation’s case posture and management needs, and it should assess whether measures less “extraordinary” than *Lone Pine* may effectively strike a balance between equity and efficiency.¹⁴ As the *Digitek* decision explained, courts have an array of case management tools that can address the parties’ concerns without requiring the type of burdensome, unilateral evidentiary production envisioned by *Lone Pine*.¹⁵ Practitioners would be wise to encourage courts to employ such less intrusive tools.

The good news is that these cases, and others like them, suggest that *Lone Pine* orders can be defeated, especially at the early stages of litigation before a case is capable of reasonable development. Where litigation involves few plaintiffs, defendants or properties, traditional procedural tools of case management should be preferred. Even where large numbers of plaintiffs are involved, however, cases such as *In re Digitek* and other MDLs suggest that courts are hesitant to impose sweeping *Lone Pine* orders before the parties have a realistic shot at discovery. What is more, *Lone Pine* motion practice need not be an all-or-nothing affair; litigants can successfully argue for narrow case management orders and encourage the court to require less burdensome evidence (plaintiff information sheets as opposed to expert reports, for example). In sum, *Lone Pine* orders can and should remain an “extraordinary” remedy, one that should require defendants to explain how the litigation at hand differs from most other civil litigation and to specifically set forth the shortcomings of traditional procedural rules. If defendants’ contentions are really merits arguments, those are better left for summary judgment and its attendant procedural protections. In short, by defeating and narrowing *Lone Pine* orders, tort plaintiffs have a realistic shot at proceeding to the merits rather than being dismissed at an early stage. 

⁵See *Strudley*, — P.3d —, 2013 WL 3427901, at *6; Simeone, 872 N.E.2d at 349-50.

⁶*Strudley*, — P.3d —, 2013 WL 3427901, at *7.

⁷*Id.* at *6. For cases issuing *Lone Pine* order only after significant discovery, see *Avilla v. Willits Env. Remediation Trust*, 633 F.3d 828, 833 (9th Cir. 2011) (affirming *Lone Pine* after five years of discovery); *Vioux*, 557 F. Supp. 2d at 744 (issuing *Lone Pine* after seven years of litigation); see also *In re Digitek Prod. Liab. Litig.*, 264 F.R.D. 249, 258 (S.D. W. Va. 2010) (explaining that a *Lone Pine* order was premature after only two years of litigation transpired).

⁸*Strudley*, — P.3d —, 2013 WL 3427901, at *8.

⁹On an interesting note, the Colorado appeals court also ruled that *Lone Pine* orders are not permitted under the Colorado Rules of Civil Procedure. See *id.* at *7-8.

¹⁰287 F.R.D. 293 (M.D. Pa. 2012).

¹¹2012 WL 3864954 (M.D. Pa. Sept. 5, 2012).

¹²*Id.* at *5.

¹³264 F.R.D. 249 (S.D. W. Va. 2010).

¹⁴*Id.* at 257-58.

¹⁵In *Digitek*, for example, the court noted that it had issued multiple pretrial orders, required plaintiffs to submit informational sheets detailing some contentions about each claimant’s case, and required plaintiffs to provide a release of medical records form. These measures, explained the court, were superior and more narrowly tailored than the *Lone Pine* order requested by defendants, which sought expert affidavits interpreting the medical records of each plaintiff. See *In re Digitek*, 264 F.R.D. at 253, 258-59.



Quarterly Book Review: Posner's *Reflections on Judging*

By Christopher D. Bryan

Richard A. Posner has long been among the most cited legal writers of the past forty years. As a judge on the U.S. Court of Appeals for the Seventh Circuit since 1981, he has written thousands of opinions. Prior to his appointment to the federal bench, and throughout his judicial career, he has continued teaching, mostly at The University of Chicago Law School; his academic writings, covering many areas of the law (particularly law and economics), enjoy frequent citation in law-review articles. On top of that, he has written dozens of nonfiction books that, while not necessarily for the “general reader,” do appeal to the intelligent lay reader as well as judges, lawyers, and professors.

Posner is so often read because he approaches legal and societal problems in a fresh, compelling, insightful way; his “pragmatism” literally means that he is interested in identifying and formulating practical solutions to problems that lawyers and judges are presumably in the business of solving for society. But Posner is also very widely read because he is an exceedingly clear and highly readable author. An English major in college and a heavy reader of the classics, Posner contends that “people who write well tend to be people who have read a great deal of classy prose [.]” That is perhaps the best reason a new lawyer who wants to become a good legal writer should read Posner’s latest book, *Reflections on Judging* (Harvard University Press, 2013; 380 pp.; \$29.95).

The book is in some ways a follow-up to his earlier book, *How Judges Think* (Harvard University Press, 2008; 387 pp.; \$29.95). Many of the themes he addressed there (and in other of his works) are revisited in *Reflections*. For instance, he again argues persuasively for a “legal realist” approach to lawyering and judging as opposed to the increasing “formalism” that has had a recent resurgence. Here he expounds on his pet peeves, such as

judges who cede the writing of judicial opinions to their law clerks. And he savages the 511-page nineteenth edition of the *Bluebook* for outgrowing its purpose and needlessly “complexifying” legal citation format.

But the new book contains more autobiography than did *How Judges Think*. His educational background is recounted, including why he attended Yale for college and Harvard for law school, as well as his early professional career clerking for U.S. Supreme Court Justice William Brennan and arguing cases for the Solicitor General’s office. Posner analyzes the increasing complexities of law—both external and internal—and what to do about them.

Posner then reflects on how his years as a judge have formed his strongly held opinions concerning appellate judges: how they should approach and decide cases, write

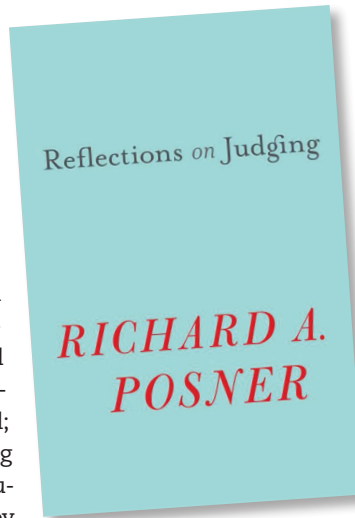
opinions, hire and manage law clerks, and that they be conversant with science, math, and technology. This is therefore a book that all federal appellate judges should read. But new lawyers, especially, should read *Reflections* to soak up Posner’s wisdom about the state of the legal profession and to take his cues about how better to brief and argue cases.

Litigators who want to persuade judges in the current era will set scenes, use pictures, radically simplify complex concepts and processes, and give factual and legal context. Lawyers will be more effective if they form these habits and best practices. In the end, Posner wants lawyers to understand that they are most valuable when they assist judges in becoming better “product managers”—the product being a written legal opinion or judgment.

New trial lawyers will also benefit from Posner’s new book. His anecdotes about serving as a volunteer federal district court judge contain useful advice for new lawyers on how to conduct effective cross-examinations, treat expert witnesses, and approach jury selection and instructions.

The other parts of *Reflections* are interesting, too, though the chapters on judicial “self-restraint” and theories of “interpretation” will appeal more to academic readers than young practitioners who represent clients on a daily basis.

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Christopher D. Bryan
Garfield & Hecht, P.C.
Aspen, CO
cbryan@garfieldhecht.com
www.garfieldhecht.com

Christopher D. Bryan is a graduate of The University of Chicago Law School and a litigator at Garfield & Hecht, P.C., 601 East Hyman Avenue, Aspen, Colorado 81611.

If you have not read anything Posner has written, *Reflections* is a fine place to start. Knowing Posner's background and range of experiences provides a useful backdrop in understanding his suggestions for improving the judiciary, the professoriate, and the bar. Today's young lawyers and young academics are tomorrow's judges, so hopefully *Reflections* is read by all current and future judges, as well as the lawyers who do and will appear before them. ⚖️

Here are Posner's recommendations for how to be a better legal writer, regardless of where and what type of law you practice:

- Put yourself in the judge's shoes: look at the entire case and the issues presented from that vantage point.
- Draft "self-contained" motions and briefs that explain what the case is about, what the background law is, and why the case matters (for the parties, the community, and law generally).
- Minimize substantive footnotes and citations to your adversary's brief.
- "Make everything easy for the judge" — e.g., quote the statute whose interpretation is in dispute; ask yourself what you would want to see in a brief if you were the reader.
- Resist the temptation "to try to convince judges that the case law *compels* them to rule in your favor." Instead, explain to the court that your position is the more reasonable one in light of the relevant circumstances. This has long been Posner's preferred approach—a "case-based reasoning" or "purposive interpretation" that identifies the purpose behind the relevant legal principle and shows how that purpose is furthered by a favorable decision.
- Provide context and a realistic understanding of a case to judge by, whenever possible, using pictures, props, maps, diagrams, and other visual aids in motions and briefs.
- Avoid jargon and over-reliance on statutory language and precedent.

UPCOMING EVENTS

AAJ Winter Convention

FEBRUARY 8 – 12, 2014

Sheraton Hotel
New Orleans, LA

Habitat for Humanity Service Project

February 7, 2014
Sheraton Hotel
New Orleans, LA

NLD Welcome Reception

February 7, 2014
Victory
New Orleans, LA

NLD Business Meeting

February 8, 2014
Sheraton
New Orleans, LA

NLD Party

February 9, 2014
Republic
New Orleans

NLD Membership Drive

March 13-14, 2014
Denver, CO

AAJ Spring Board of Governors Meeting

April 3-4, 2014
Dallas, TX

NLD Membership Drive

April 4, 2014
Dallas, TX

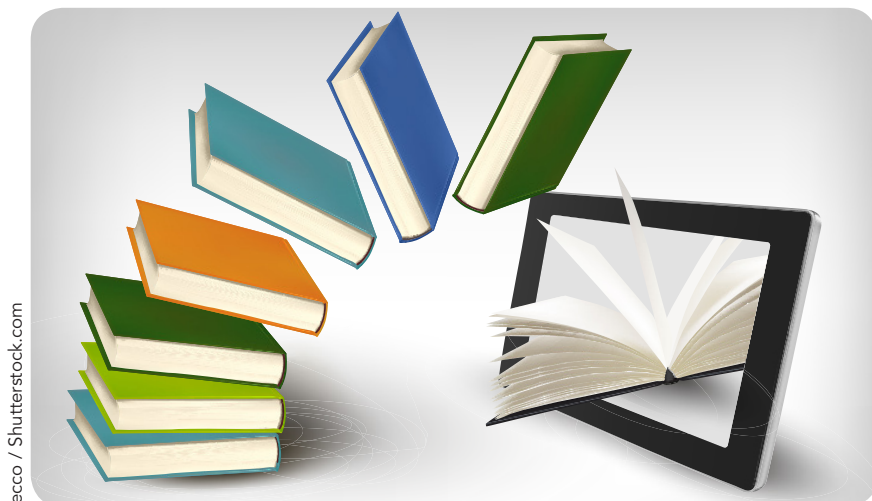
NLD Membership Drive

May 30, 2014
Philadelphia, PA



Depositions In The New Age Of Technology

By Melissa Fry Hague



ecco / Shutterstock.com



Melissa Fry Hague

Anapol Schwartz
Philadelphia, PA
MHague@anapolschwartz.com
www.anapolschwartz.com

Melissa Fry Hague received her law degree from Widener University School of Law in 2006, where she was a graduate of the Intensive Trial Advocacy Program. Melissa has dedicated her career to the successful and diligent prosecution of mass torts, defective medical devices, consumer products and class action litigation. Melissa is admitted to practice in Pennsylvania and New Jersey. In 2011 Melissa was also admitted to the United States Supreme Court of America.

Cases these days seem to involve more paper than ever. Maybe it's just a result of the modern world that tends to document every little thought, call, discussion, and move. While detailed documentation may generally be a good thing, it has also resulted in an additional seat at the deposition table just for all the documents. A decade ago you could walk into a deposition with a large binder full of documents and remain confident that you had every possible document that you might need. Now, such assurances consist of several banker's boxes full of documents.

These banker's boxes of documents brought to a deposition seem to take on a life of their own. After we have diligently identified every last document that we intend to use and all the documents that we might use and want to have at the deposition - just in case; we then spend hours printing them and making copies for every last person sitting at the deposition table. Then we painstakingly try to organize them in what we believe to be a chronological order based on our prediction of how the deposition will go. After all this is done we have them labeled and put in the boxes based on what we believe will be the easiest way to find a needle in a haystack during the deposition. If the deposition is local, the boxes can keep you company in the passenger seat of the car; but, if it is out-of-town, the documents may need their own plane ticket. Once at the deposition you begin with everything neatly organized,

the outline, a note pad and the first group of documents that you know you are going to start with. By the end, you have skipped all over your outline and if you were lucky you were able to find all the documents even though you went through them in a different order. Then there is always that moment where the witness says something and you wish you had fingertips that one document at your fingertips that you were using for a completely different purpose or was part of the documents that didn't make the cut and were left back at the office.

In many industries this process would be looked at as archaic. As a young attorney who is supposed to be technologically advanced, I was eager to move into the 21st century and take advantage of all that technology has to offer; but, as a young attorney surrounded by nationally recognized highly successful attorneys who have been taking depositions for many years, I was hesitant to look foolish trying something so out of the ordinary. What I found is that practice makes perfect.

Consider Whether the Type of Exhibits in the Case Can Be Better Presented Electronically

Not every deposition will be ideal to do as paperless. Depositions that involve a lot of medical records and corporate documents tend to lend themselves to the paperless deposition. However, in a deposition of an expert where many of the documents are medical and journal articles, you may be making things more difficult than they need to be with a paperless deposition. In a deposition where you are asking an expert to review a study — asking specific questions about the findings and how the study was conducted, the deponent in that situation will want to take time to carefully read the entire study and likely go back and forth between different pages. If the deponent is not comfortable reading those types of documents electronically, going paperless could prove to be a hassle. In a deposition involving experts it's important to make sure they are comfortable reading studies and articles electronically. The last thing you want to do is get to the deposition and be forced to print everything out last minute because the expert is only comfortable with paper.

The paperless deposition can be hugely beneficial with corporate fact witnesses or other fact witnesses where most of the exhibits are only a couple of pages. Most corporate witnesses these

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days are actually more comfortable reading things on a computer because that is part of their everyday experience. However, you still always want to inform the other side beforehand so that they aren't surprised the day of the deposition and object. I have found that usually the attorney is more uncomfortable reading the document electronically than his own witness. In that case, you could always bring one paper copy just for opposing counsel.

Cases involving large sets of medical records are also ideal for paperless depositions. However, make sure that your electronic version of the medical records are broken up into smaller sequences. If you plan on going through the records and asking about specific visits on certain dates, export the pages for that particular visit out from the larger medical record. The same thing can be done with hospital records—operative reports, progress notes, medications, discharge records should be extracted out as separate documents. However, if the deposition requires the deponent to review the entire hospital chart or something akin, and testify as to whether something exists or doesn't exist in the record, you may want to have that printed out for the witness to review in hand. Thus, the paperless deposition requires quite a bit of advance planning.

Preparing for the Paperless Deposition

First, notify your opposing counsel that you intend to use electronic exhibits so that they do not object to the process at the deposition. For many attorneys it may be their first exposure to the paperless deposition, and they tend to be skeptical of viewing the documents electronically. Some attorneys are so afraid of technology they cringe the minute you open your laptop as if it has the capability of reading the witnesses' mind.

Second, you need to determine what software, if any, you want to use for organizing the documents. There are many different types of software you can purchase that will aid in organizing, labeling,

THINGS TO REMEMBER

Always prepare well in advance for your paperless deposition, especially for your first one. The key to making it run smoothly is organization, which make take longer on the front end.

Practice using the technology in advance. If you choose to use an app, make sure you know it very well and have tested it in advance. Mostly importantly you want to make sure that you are able to quickly locate the exhibits, whether they are embedded in your outline or not. It's inevitable that you will want to access a document that is not embedded. Typically locating the documents is much easier because you can use the electronic search options.

Test your AV connections several times and make sure you know what AV connections will be available at the deposition site.

Make sure you know your location. If you are using screens for everyone at the deposition table to view the documents, make sure that you are at a large enough table to accommodate all the equipment. Another very important thing to know about your location is its internet connection strength. If your documents are located remotely in a cloud you need to be sure that you will have access to them. The last thing you want to risk not being able to access your exhibits.

Make sure you have several different options for accessing your exhibits. If you plan on accessing through a cloud app and need the Internet, you may want to have them also downloaded onto a USB or external hard drive as a backup in case there are connection problems. You can also make sure that you have other internet options available to you such as using your phone as a personal hotspot in the event that Wi-Fi doesn't work or is spotty.

and presenting the documents electronically. This software ranges from very expensive to less so. Typically, the cloud based systems are less expensive. One cloud based software is eDepoze. It is a deposition software with an iPad interface that allows you to securely upload the documents in advance and they remain confidential until they are shared and used at depositions in real time. Once the examining attorney uses an exhibit, it becomes immediately viewable electronically to an opposing counsel who is logged into the same program. The program also allows you to make notes on the document while still maintaining an official copy, and to access all exhibits from other depositions. This app was developed by a lawyer and is aimed to mimic the traditional paper format of a deposition. Surprisingly, this app is free but that may not last for long—it's still fairly new, having just been released in February 2013. It has a great interface and appears to be very user friendly.

One of the most popular apps to use is TrialPad. It's been around since 2010 which means that many of the glitches have been fixed with the updated versions, while becoming more sophisticated. This app is also cloud based, which means all exhibits are imported in Dropbox or another similar app. There are endless features, including the ability to view documents side-by-side for comparison and adding exhibit stickers to documents. This supports many file types including photos and videos, and has annotations capabilities. It also allows you to make multiple callouts from documents and other deposition transcripts. In depositions where the witness is trying to describe what something looked like it has a whiteboard tool that allows you to draw free hand and can be marked as an exhibit. While this app costs \$89.99, it is the top rated trial presentation app.

Before you decide to do a paperless deposition using any of this software, you need

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time. Time to prepare and upload everything, but most importantly time to practice with the software and understand how it works and all its capabilities. This is not something you can start the week before the deposition. You need to practice. However, if you don't have the time to learn a new software, you can also do the paperless deposition with just your laptop.

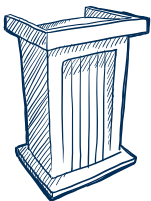
My first attempt at the paperless deposition involved only my Mac laptop and went far smoother than I expected. I uploaded all the documents that I could possibly use for the deposition in a folder on my laptop. Then I used Circus Ponies Notebook for the Mac for my outline. This allows you to insert links directly to the documents, so when you want to pull up an exhibit it exists right in your outline. This gets rid of the additional step of searching for the document in the folder when you want to pull it up as an exhibit. However, if you don't use the notebook app and you have your outline in traditional Pages app, it's best to have the documents identified by a case's stamp number throughout your

outline. That way you can simply copy the case's number and paste it in the search tool bar and it will pull up that document from your folder. When using your laptop to show the exhibits, I have found it easiest to ask the videographer to bring extra computer screens. Ideally one for the examiner, the witness, and opposing counsel. This way you can make sure you know what the witness is looking at. When you are using a Mac the document pulled up on the main screen of your laptop is what the witness is able to see. However, if you swipe over to a different screen, you are the only one who can see it. This allows you to display exhibits and utilize an outline all on one machine. One thing to consider is when it is done this way the examiner remains in control of the electronic document so if you think that the witness is going to need to read through several pages of a long document at his or her own pace this may not be the best option.

Finally, make sure your videographer is aware that you are using electronic exhibits. The videographer can help you

determine the best way to electronically present the exhibits to the people in the room. You will either need them to bring a projector and screen for the exhibits to be displayed on or small computer screens that can be set up for the witness and counsel. Also ask the videographer if he has dual feed capabilities. This allows him or her to have one feed on the expert at all times and one feed on the electronic document at all times so that the video deposition will show both the witness and the document on a split screen.

The first time you walk into your deposition with just your laptop or iPad, you will surely feel like you forgot something very important. But you will never want to search through the bankers boxes of paper again to find that one very important document that you know is in there somewhere. Thus, every deposition after that where you walk in with just your laptop and an iPad with all the confidence in the world that you have access to every possible document you could need, it will be freeing. ⚖️



From the Bench: An Interview with Chief Justice Rita Garman of the Illinois Supreme Court

By Miranda L. Soucie

"I was lucky to become a lawyer."

Q Did you always know you wanted to be a Justice of the Supreme Court of Illinois?

A I could not have imagined it. In my early days, I was lucky to become a lawyer. I wanted to be a lawyer from the time I was 15 years old. I could not have dreamed that I would ever be where I am now. When I was young, women were not seen as being Judges or Justices. There were no women on the Supreme Court or the Appellate Court, and very few women Circuit Court Judges. When I began to practice law, I was focused on being a lawyer and trying to figure out the kind of law I wanted to pursue.

Q What is the best piece of advice you have ever received?

A Follow your dreams and aim for the top. That piece of advice came from my family and was very good advice. I think for a younger attorney, you don't know what you can achieve. You really do not have an idea of all the wonderful things you can accomplish unless you set your goals high and work hard to pursue them.

Q What is the best piece of advice you could give to a young attorney?

A Young attorneys should get as much experience as possible in as many areas as possible. They should challenge themselves to always be learning and growing. It is also very important to have good

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habits. As a Judge, it becomes very obvious who is well prepared. It is troubling when an attorney comes in that is not well prepared. It is troubling because the client might not be getting the best of advice. It sometimes also paints the picture of being uncaring, or apathetic. When an attorney is prepared, well researched, and principled, it is fun. It is great to have the intellectual give-and-take with attorneys that are well prepared and ready to have well thought out dialogue. As a Judge, there is nothing more frustrating than seeing someone who was ill prepared and, as a result, messed up a case.

Q What frustrates you most as a Judge?

A It is frustrating to see a self-represented litigant with a potential case, who, even with encouragement, did not go see a lawyer. Some people are scared of lawyers. I remember once presiding over a small claims case where a family had been rear-ended on the interstate by a semi-tractor trailer. There had been injuries and the only thing the family wanted was compensation for the damage to the car. I recall suggesting to them that they may want to speak with an attorney about their options and available remedies. They refused, and insisted they just wanted the money for the car. It is frustrating as a Judge to have the knowledge that people are not getting the results that they are entitled to, but not really be able to do much about it.

Q What can we as attorneys do to change the public perception that so many people have of attorneys as being scary or unapproachable?

A Community involvement is really important. It is important to be involved with law related groups. But, you do have to be involved in the community, whether it is the United Way, coaching a children's sports team, Boys and Girls club, or other service clubs.

We need to meet people that are non-lawyers and break down the mystique about attorneys. When we are active in the community, community members get to see attorneys as real people, as friends, and as acquaintances. That will help to allow people to feel comfortable approaching attorneys with questions. Attorneys should also be involved in local schools by assisting with presentations or giving speeches about the law. Whether it is about substantive areas of the law or just legal initiatives, it is imperative.

Q What has been your biggest challenge as a Supreme Court Justice?

"I really enjoyed the interaction I had with attorneys on a daily basis. I enjoyed hearing the cases. I enjoyed finding out what issues were emerging in the law and seeing how it all came together."


A One of the biggest challenges was leaving the trial court and going to the Appellate Court. Trial Judges preside over all of the action. I loved that. I really enjoyed the interaction I had with attorneys on a daily basis. I enjoyed hearing the cases. I enjoyed finding out what issues were emerging in the law and seeing how it all came together. Also, as a trial judge, you are exposed to lots of different areas of the law.

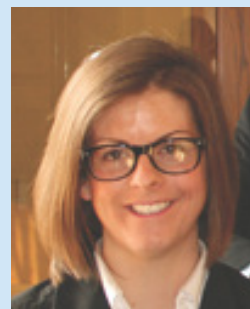
In the Appellate Court, you have the luxury of time. You can do as much research as you need and want in order to answer a question. That is a luxury not afforded to Trial Judges, where you have to make decisions and do research on an expedited basis. As an Appellate Judge, I try to not be a Monday morning quarterback. It would be very easy to be a Monday morning quarterback for the attorneys involved in litigation. No matter how well prepared the trial lawyers are, there is always inevitably something that comes up, which throws a curve ball. Trial lawyers have to deal with the facts as they have them. They cannot always make the case out to what they want it to be. No case is perfect. I try to be realistic about what the demands are on the lawyers, and to balance what should reasonably be expected of them. Especially since, as an Appellate Judge, you have the benefit of hindsight.

Q If you could recommend one book, what would it be?

A One of the books I really enjoy reading is *A Time to Kill*.

Q What do you do for fun?

A I like to cook, work out, and read. I enjoy socializing with friends and family. I have three grandchildren and I love to be with my family and my grandkids. I like to go to my grandkids' performances, programs, ball games and hockey games. It is a lot of fun. I also like to knit. 



Miranda L. Soucie

Spiros Law
msoucie@spiroslaw.com
www.spiroslaw.com

Miranda L. Soucie began her career at Spiros Law in 2010, and became a partner in 2013. The firm has offices in East Central Illinois. Miranda's practice focuses in the area of serious personal injury, medical malpractice and work injuries.



The NLD Executive Committee would like to recognize those New Lawyers who have shown their commitment to the civil justice system.

NLD Star Siddhartha H. Rathod was lead counsel in *Ortega, et al. v. The City and County of Denver, et al.*, 11-cv-02394. This high profile public interest litigation became known throughout Denver as the “Denver Diner Case.” On July 12, 2009, two Denver Police Officers brutally maced, threw to the ground, and punched four restrained female individuals outside the Denver Diner. Siddhartha H. Rathod filed a federal lawsuit on behalf of the women alleging that the officers engaged in acts of excessive force, false arrest, and malicious prosecution and that the Denver Police Department’s customs, policies, and practices contributed to the harms of the plaintiffs. Through years of hard work, Siddhartha was able to put forth substantial evidence and survive summary judgment by demonstrating that the City and County of Denver had systemic and egregious internal deficiencies within their police force, including training their officers to engage in excessive force, officers customarily failing to report excessive force by other officers, and officers often withholding exculpatory evidence. Siddhartha was also able to show that Denver’s Internal Affairs Department, which should have been remedying these problems, was actually contributing to, and inflaming them by employing a practice of whitewashing police misconduct, regularly performing poor quality internal investigations, and rejecting and often failing to investigate community complaints against DPD officers. As a result of his work, Siddhartha was able to obtain a significant settlement for his clients and, just as importantly, helped contribute to county wide policy changes concerning the discipline of Denver Police Department officers.

Siddhartha H. Rathod, a partner at Rathod Mohamedbhai LLC, is a trial attorney representing individuals in Denver and throughout Colorado and Wyoming. He passionately advocates for the rights of employees in the workplace and protects the civil rights of individuals oppressed by governmental abuses of power.

NLD Star James Trujillo and **NLD Star Paul R. Hornung** tried a very difficult personal injury case in one of the most conservative counties in Texas (Smith) and secured a victory for their client. Their client brought suit against his employer when one of his co-workers drove a forklift into him; the horn on the forklift was not functioning and the co-worker failed to inspect the horn before operating it. His injuries were significant — their client suffered a Grade III annual disk tear which required a surgical disc replacement. Prior to trial, the Defense offered \$5,000.00 at mediation. At trial the Plaintiff showed company safety videos that demonstrate that a moving forklift can generate as much force as a car traveling thirty miles per hour. Overcoming several obstacles during the week-long trial, including discrediting the defense orthopedic expert who opined that surgery was not necessary, James and Paul were able to obtain a significant Plaintiff’s verdict: the jury unanimously awarded \$183,000.00 in damages (\$190,080.30 total at Final Judgment).

James Trujillo practices personal injury in the State of Texas and has tried numerous cases. Mr. Trujillo has been an active member of the AAJ-NLD for four years.

Paul Hornung is board certified and practices primarily in the field of personal injury. Mr. Hornung primarily practices in Dallas, but has tried and arbitrated numerous cases within the State of Texas.

NLD Star Jasper Ward of Jones Ward PLC in Louisville, Kentucky, was named by the Hon. Donovan W. Frank to the Plaintiffs’ Steering Committee in the Stryker Rejuvenate and ABGII Hip Implant Recall Multi-District Litigation, MDL No. 2441, pending in the District of Minnesota. The Stryker Rejuvenate was recalled in June 2012 after just a few years on the market. As part of the PSC, Ward and his firm will help manage the strategy and direction of the litigation, advance discovery from doc review to depositions, and work individual cases towards trial. Ward’s partner, Lawrence L. Jones, serves on the PSC in the Biomet MDL, Northern District of Indiana, and was named as co-chair of the Law and Briefing subcommittee.

Jasper is a founding partner of Jones Ward PLC in Louisville, Kentucky. He focuses his practice on mass tort and consumer class actions.

NLD Star Jennifer Lipinski tried a case with two partners in her firm in Orlando, Florida — home of the Mouse. Her client was a Disney bus driver who was critically injured when he drove his Disney bus into the back of Mears bus that was stopped in the middle of the road; her client fractured both of his legs and had to be airlifted out to a nearby hospital where he had metal rods implanted to both of his legs. Although her client struck the Defendant bus, the Defendant bus driver had stopped her bus in the middle of the road without a good reason, there was a parking lot just a few hundred feet up where the driver could have safely stopped,

and the driver had failed to set up any warning triangles for fellow drivers as she was on her cell phone at the time of the crash. On the eve of trial, Defendant withdrew the \$100,000.00 offer. After a difficult trial, and three days of jury deliberations — which included an Allen charge on day two regarding negligence — the jury returned a verdict of \$2.7 million and found the Defendant 35% liable. Under Florida law, this verdict entitled the Plaintiff to an award of roughly \$1 million, plus fees and costs which were significant.

Jennifer Lipinski obtained her law degree in from Michigan State University cum laude with a focus in trial practice. This was Jennifer's first jury trial and she hopes to participate in another jury trial shortly.

NLD Star Brian Malloy, along with **Thomas J. Brandi**, served as one of three lead counsel in the Retail Sales Representative (RSR) Overtime Cases (*Zulewski, et al. v. The Hershey Company*, Case 4:11-cv-05117-KAW (N.D.Cal.) and *Campanelli, et al. v. The Hershey Company*, Case 3:08-cv-01862-BZ (N.D. Cal.)). In this compendium of cases, the RSR employees of Hershey challenged their classification as exempt "outside sales" and "administrative" employees under the Fair Labor Standards Act ("FLSA") and California law — a classification which prevented them from receiving overtime compensation. Plaintiffs contended that the RSR position, which involved job duties such as packing out product and building displays, was a non-exempt merchandising position and therefore entitled to overtime. In the first case (*Campanelli*), the District Court held that the RSRs were not exempt employees under federal or California law, with their duties falling outside of classic exempt "sales" duties, and thereby entitling them to overtime. 765 F.Supp.2d 1185. After the decision, the employer failed to properly reclassify the position and therefore the Plaintiffs filed the second case. In January 2012, the employer finally reclassified the position from exempt to salaried non-exempt, in which the RSRs now receive a salary for 40 hours per week and overtime compensation. The *Zulewski* order became a bellwether decision regarding the proper calculation of FLSA overtime damages in a misclassification case. *Zulewski v. Hershey Co.*, 2013 WL 633402 (N.D.Cal. Feb. 20, 2013). Several District Courts have adopted the reasoning and holding, siding with the workers and holding that "time-and-a-half" is the proper method to calculate damages.

Brian J. Malloy is with The Brandi Law Firm in San Francisco where he represents plaintiffs in mass torts, class/collective actions, products liability, personal injury, wrongful death and elder abuse matters. He is admitted to the bars of California, Nevada, Arizona, and Washington, D.C., along with numerous federal courts, including the United States Supreme Court.

NLD Stars Marc Harden and **Kurt Zaner** secured two trial verdicts against State Farm in a three week span this fall. In the first trial, their client was driving his motorcycle when a woman turned left in front of him, causing a collision and ejecting him from his bike; the client suffered a concussion and some soft tissue neck injuries. After four different neurologists concluded their client's concussion had resolved, the Defense offered \$40,000.00 — the total amount of the client's medical bills. At trial, Kurt and Marc put on a "Trial by Groaner" case, calling a variety of folks from the client's life to testify how the client's brain injury had changed his life forever; they did not call a single treating doctor. The jury returned a verdict with interest of \$1,150,000.00.

In the second trial ten days later, Marc and Kurt represented a woman who was rear ended and suffered an annular disc tear in her neck. The client had two prior accidents — a fall down the stairs where she injured her neck and a rear end auto collision where she suffered a brain injury — eighteen months prior the accident in the law suit. After waiting four years to obtain treatment, she underwent a neck fusion. The offer before trial was \$24,000. After a hard fought five day trial, the jury returned a verdict with interest of \$91,000.00. Under Colorado law, State Farm was also responsible for all of Plaintiff's costs.

Marc Harden and Kurt Zaner are the principals in Zaner Harden Law — a boutique personal injury trial law firm located in Denver, Colorado, specializing in catastrophic injuries, brain and spinal cord injuries, and auto accidents.

The Legal Intelligencer recognized **NLD star Adrienne Walvoord Webb** by designating her as a Fast Track 2013 Lawyer. This is a prestigious designation that singles out the most impressive lawyers under the age of 40 in Pennsylvania. Nominations and letters of recommendation for Lawyers on the Fast Track were sent to an eight-member judging panel composed of evaluators from all corners of the legal profession and the state. After reviewing every nomination, only 38 attorneys were named Lawyers on the Fast Track for 2013.

Adrienne Walvoord Webb is an associate at Anapol Schwartz in Philadelphia, Pennsylvania and focuses her practice on pharmaceutical and medical device mass tort litigation involving complex medical, scientific and legal issues



**NLD
STARS**

Invitation to Submit

By Kurt Zaner

I just wanted to remind everyone that we are always accepting submissions for upcoming issues of the Side Bar. We strive to create an educational, interesting, and helpful Side Bar, while giving New Lawyers a voice and a platform to reach out to the trial lawyer community. As you can see by this edition, we are looking for several things for each issue.

1. NLD Stars—nominate any NLD lawyer (even yourself) for any kind of accomplishment. Let us decide if it is significant enough. We want as many AAJ NLD members receiving recognition as possible.
2. Articles dealing with either a relevant legal issue or some kind of practical information for new lawyers. I think the two articles in this edition perfectly exemplify this dichotomy.
3. An interview with a judge—an interview with any judicial officer wherein the Judge can dispense helpful advice to New Lawyers
4. Finally, we are starting two new sections:
 - a The Book Review. Let me know if you want to review a book that may be of interest to young trial lawyers. John Sauter does an excellent job in this edition of reviewing Rick Friedman's new book and letting New Lawyers know whether it is worth the investment of their limited time to read.
 - b) Feedback. Please give us feedback on the current articles and book reviews in the Side Bar. This can be in the form of a short paragraph or a few sentences (think mailbox in a magazine). Feel free to write a general comment or perhaps a counterpoint response to one of the articles or the book reviews (e.g. "lawyers should take cases with them when they leave firm," "Rick Friedman just penned his most helpful book").



Kurt Zaner

Zaner Harden Law
Denver, CO

kz@zanerhardenlaw.com
www.zanerhardenlaw.com

Kurt is a founding partner in Zaner Harden Law. His firm focuses on catastrophic injury and wrongful death cases, both in Colorado and across the country. He is an active member of the Colorado Trial Lawyers' Association, serving as a Co-Chair for Membership. He also is on the Board of Governors for the New Lawyers Division in the AAJ.

Looking forward to hearing from you soon!

With Fidelity,

Kurt Zaner,
NLD Publications Chair
Zaner Harden Law
kz@zanerhardenlaw.com

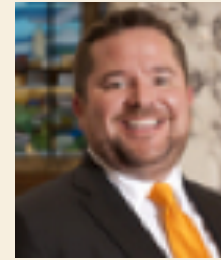
2013–2014 NLD Executive Committee



Jessica Klarer Pride
Chair
The Pride Law Firm
2534 State St., Ste. 411
San Diego, CA 92101
619-516-8166
jpride@pridelawfirm.com
www.pridelawfirm.com



M. Brandon Smith
Chair-Elect
Childers Schlueter & Smith, LLC
1932 N. Druid Hills Rd., #100
Atlanta, GA 30319
800-641-0098
bsmith@cssfirm.com
www.cssfirm.com



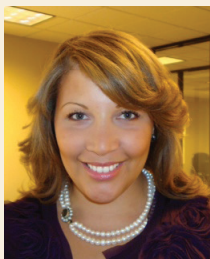
D. Mitchell Garrett, Jr.
Treasurer
Garrett Law Center, PLLC
401 South Boston Street, Suite 2201
Tulsa, OK 74103
918-895-7216
mitchell@garrettlawcenter.com
www.garrettlawcenter.com



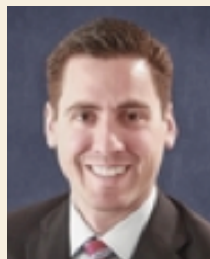
Melissa Hague
Secretary
Anapol, Schwartz, Weiss, Cohan,
Feldman & Smalley, PC
1710 Spruce Street
Philadelphia, PA 19103
215-735-0330
mhague@anapolschwartz.com
www.anapolschwartz.com



Christopher T. Nace
Immediate Past Chair and
Representative to the AAJ Board of Governors
Paulson & Nace, PLLC
1615 New Hampshire Ave., NW
Washington, DC 20009
202-463-1999
ctnace@paulsonandnace.com
www.paulsonandnace.com



Jackie Olinger
Representative to AAJ Board of Governors
Maune Raichle Hartley French & Mudd, LLC
One Metropolitan Sq.
211 N. Broadway, Ste 2940
Saint Louis, MO 63102
314-244-1397
jolinger@mrhfmllaw.com
www.mesotheliomabook.com



Matthew Rosenberg
Representative to AAJ Board of Governors
Handler, Henning & Rosenberg, LLP
1300 Linglestown Rd., Ste. 2
Harrisburg, PA 17110
717-238-2000
mrosenberg@hhrlaw.com
www.hhrlaw.com



Nelson Boyle
Representative to the AAJ Board of Governors
Burg Simpson Eldredge Hersh & Jardine, P.C.
40 Inverness Drive East
Englewood, CO 80112
303-792-5595
Nboyle@burgsimpson.com
www.burgsimpson.com

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