

THROUGH THE LOOKING GLASS

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
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FROM THE EDITOR

After a brief hiatus, we are pleased to present a new issue of THROUGH THE LOOKING GLASS. As the new Editor-in-Chief, and on behalf of our new Managing Editor, Brendon Levesque, I want to express our sincere thanks to Dan Krisch, who guided this effort from its inception and turned the idea of a firm newsletter into a reality. We hope to live up to the high standards Dan set, and to continue to provide an interesting and important tool for our clients, friends and associates.

In this issue, the role of roving reporter will be played by Wes Horton. As President-Elect of the American Counsel Association, Wes recently spoke as the only American representative on an appellate law panel in Luxembourg. Wes gives us an interesting report on his trip and some of the differences between the European appellate system and our own. The part of Eliot Ness will be played by Kim Knox, as she helps keep all of our reputations untouchable with an update on the 2008 amendments to the Connecticut ethics rules. Karen Dowd appears as Clarence Darrow, examining the usefulness, or lack thereof, of certain general statistical evidence and expert testimony that often is admitted at trial but perhaps should be examined a bit more closely. Finally, special guest star Dan Krisch appears as himself, offering a Homer Simpson spin on the difficult and important issue of how to defend against a claim that your appellate issue has been waived.

We hope you continue to enjoy THROUGH THE LOOKING GLASS. As always, your comments and suggestions are welcome.

Michael S. Taylor,

Editor-in-Chief

APPELLATE LAW IN THE EUROPEAN UNION

Written By: Wesley W. Horton



As President-Elect of the American Counsel Association, I was recently asked to speak at a conference in the city of Luxembourg on appellate law. The reason the conference was held in

Luxembourg is that that is where the European Union appellate courts are located. The overwhelming reaction I have to the conference is that continental and American lawyers and judges live on different planets.

First, a thumbnail sketch of the continental planet. The European Union consists of 27 countries. Some aspects of national sovereignty have been yielded to the E.U. and its two appellate courts. One is the Court of First Instance (CFI), which mostly hears administrative appeals from the Union's headquarters in Brussels. This is the court that recently decided Microsoft's appeal from the E.U.'s antitrust order. The E.U.'s highest court is the Court of Justice, which has a limited right to hear appeals from the CFI, and also gives advice to national courts when a national law may conflict with E.U. law. Both courts have 27 judges, but the President (Chief Judge) of each court assigns 3-, 5-, or 13-judge panels, usually depending on the significance of the case. Microsoft, for example, got 13 judges. The courts rarely sit en banc.

The E.U., including the judiciary, has 21 official languages. A lawyer can write the brief and argue the appeal in any of the 21 languages. That means up to 421 translators (21 x 20) who understand legalese must stand by ready to translate the Helsinki lawyer's Finnish presentation into Maltese,

and the Dublin lawyer's Gaelic presentation into Hungarian. Many of the hundreds of translators are young lawyers, so Luxembourg nightlife abounds in them.

Notwithstanding the official status of all 21 languages, the working language is French. No judge or other court official can even be appointed without speaking fluent French. That said, virtually everyone associated with the E.U. legal system in Luxembourg speaks at least some English, and the conference I attended was conducted entirely in English. Monolingual Americans like me attend continental legal programs with some sense of humility as everyone else is shifting effortlessly from English to French to German and back. Meanwhile the locals are speaking all those languages plus Luxembourgish, which they claim is a separate language on the borderline between Romance and Germanic.

So much for the context. The conference

In the Court of Justice, the lawyers are given 30 minutes each to make an uninterrupted speech, after which the judges may ask questions.

itself was organized by the American Counsel Association, which is an 80-year-old international organization of 300 or so lawyers in various disciplines, the European Circuit of
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England and Wales, which consists primarily of English and Welsh lawyers who practice at the E.U. or elsewhere on the continent, and the Luxembourg Bar, which obviously does a good bit of E.U. appellate practice. A principal focus of the conference was appellate law. Hence my appearance on the program.

The appellate speakers were the President of the CFI, a high court justice from London, a top appellate lawyer from Luxembourg, and me. There is nothing remarkable about E.U. briefing practice, but wait. After all briefs are filed but before oral argument, the President of the Court assigns the judges who will hear the appeal (unremarkable), but in addition assigns one of those judges to sit down with the lawyers in private before the oral argument. That judge may suggest problems with the briefs or the record to straighten out before or at the oral argument. The judge then prepares a report for the other judges who will hear the oral argument, briefly discussing the facts and the issues and explaining what was discussed at the private meeting. A copy is sent to the lawyers. The judge also prepares a second report for only the other judges containing the judge's views on the merits of the appeal. This process strikes me as very interesting and perhaps worth a test in Connecticut.

More remarkable than this interesting private meeting is the oral argument itself. In the Court of Justice, the lawyers are

given 30 minutes each to make an uninterrupted speech, after which the judges may ask questions. Often lawyers for amici curiae are allowed the same 30 minutes, which means that in major cases oral argument can go on for days. The highest court of Luxembourg has no time limits at all!

My impression is that the judges are dissatisfied with all this time spent on oral argument, but everyone at the conference still seemed to marvel at my remark that I usually get interrupted after about 60 seconds. (Isn't that impolite to the lawyer, Mr. Horton?) I don't think the continentals have any ideas to offer us on allowing lawyers to make speeches.

The CFI does have an interesting idea about oral argument. In his speech to the conference, the President indicated that he lets the lawyers yield some of their oral argument to a non-lawyer expert, such as an economist. The President said he sometimes finds the experts to be more helpful than the lawyers in deciding the appeal. While interesting, this idea probably is unworkable in the U.S. where we have a more fixed notion of the appellate record than the continentals seem to have.

After the oral argument comes the decision. All opinions of the E.U. courts are per curiam. Not only that, individual opinions, whether concurring or dissenting, are prohibited. The courts go out of their way to avoid political influences, and this is one way to do it. If no one can tell how

individual judges voted, they are supposedly less vulnerable to influence in their native countries. The per curiam opinions reinforce the decision of the judges to blend into the woodwork. As I leafed through the Microsoft decision, it had numbered paragraphs and was totally devoid of literary style or personality. It was the ultimate bureaucratic style typical of long-term staffers. Justice Scalia would last about one month on the E.U. courts.

Even the placement of the courts in Luxembourg rather than in Brussels, where the legislators, administrative agencies and lobbyists are found, is deliberate: the judges won't accidentally bump into anyone at dinner (except possibly the lawyers) who might influence them improperly. In Luxembourg they can blend into the woodwork.

The most important conclusion I have come to after attending the Luxembourg conference is that lawyers and judges from different legal cultures need to talk to each other more than just once in a while. Lawyers, like everyone else in society, tend to stay with ideas they are comfortable with. If lawyers regularly expose themselves to strange ideas that others have used successfully, they may not be so strange after all. They might occasionally even be good ideas.

ETHICS RULES CHANGES IN 2008

Written By : Kimberly A. Knox



The volume of changes in the ethics rules is less than those which swept through in 2007, but the 2008 changes are still significant. This year marks a new landscape for the profession with the advent of multi-jurisdictional practice, house counsel and a never before seen definition of the "practice of law." Minor changes also provide clarification of existing rules.

Rule 5.5 entitled the Unauthorized Practice of Law is a misnomer as it effectively creates several new types of authorized practice of law. The most significant is the new multi-jurisdictional practice provision.

What began as a need by predominantly transactional attorneys to cross state lines with their global clients has evolved into the eradication of the state line limits on the practice of law. But it took some doing. At the national level, the ABA Ethics Commission 2000, which overhauled the

entire Rules of Professional Conduct, proposed MJP language in Rule 5.5 which was never debated. Rather the Ethics Commission 2000 recommended the report of the Multi-jurisdictional Practice Commission. That report was submitted and approved with minor changes at the ABA 2002 Annual meeting. This is now the ABA Model Rule 5.5.

Back in Connecticut, an MJP rule struggled for viability. The CBA Task Force on Multi-jurisdictional Practice

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ETHICS RULES CHANGES IN 2008

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was constituted in 2000, but its recommendation for a MJP rule failed before the House of Delegates in 2004. In 2005, the Task Force was reconstituted, a new MJP was proposed which is similar to the ABA Model Rule, which was accepted at the CBA 2006 Annual meeting and submitted for consideration to the superior court judges. That proposal is the new Rule 5.5.

What does the MJP rule permit? It allows a non-admitted lawyer to practice law in Connecticut on a temporary basis under four scenarios. The first two are not a big step from the traditional concept of a pro hac vice attorney. First, a non-admitted lawyer may perform legal work provided a Connecticut lawyer is active on the file. A non-admitted lawyer may also work on potential litigation with a reasonable expectation of future authorization by a tribunal, i.e. court approval on a pro hac vice. These safe harbors have a built-in protection for the public from unfettered improprieties; either by holding the Connecticut lawyer responsible, or by the eventuality that the non-licensed lawyer will submit to the disciplinary rules of Connecticut¹.

The other two safe harbors are more radical. These permit a non-admitted lawyer to practice in the state: in an ADR matter which is "substantially related to, or arises in," the lawyer's jurisdiction of admission, subsection (c) (3); or on behalf of a client which "arises out of or are substantially related to the legal services provided to an existing client," subsection (c) (4)². A non-admitted lawyer practicing under these provisions is subject to the disciplinary rules of Connecticut³. The non-admitted lawyer must notify the Statewide Bar Counsel as to each matter prior to any representation and of the termination of the representation⁴. There is a fee of \$100 for the on-line notification. Each new client representation requires a new notification, but multiple tasks in the performance of a single representation may not. So a client with a mediation in Connecticut involving multiple days of client meetings and hearings would only require a single notification. A series of corporate transactions for a single client which include a

real estate purchase, a corporate merger, and a stock transfer would require separate notifications.

What is not permitted by non-admitted lawyers? A non-admitted lawyer may not open an office or advertise or be held out as admitted in Connecticut. A non-admitted lawyer will not be excused for incompetence⁵.

What is not required of non-admitted lawyers? The non-admitted lawyers are exempt from the admission process, the client security fund fee, and the professional tax. It was considered imprudent to require temporary lawyers to pay a professional tax which might later be the basis for their clients to seek access to the client

Whether a person is engaging in the unauthorized practice of law or under a safe harbor provision will depend on whether the work being performed constitutes the practice of law.

security fund in the event of attorney misconduct. Arguably, these clients will seek compensation from the lawyer's home jurisdiction.

What remains unknown? Obviously, there is no check on whether non-admitted lawyers, practicing here, are providing the on-line notification to the SGC, although a non-admitted lawyer does so at the peril of violating the unauthorized practice of law mandates⁶. What are the Rule 8.3 obligations of the Connecticut lawyer in dealing with a non-admitted lawyer to confirm compliance with Rule 5.5?⁷ Additionally the "substantially related to" or "arises in or from" test is an unknown, case specific issue. Finally, if a lawyer is denied authorization under Rule

5.5, may the lawyer then seek a statutory commission to take a deposition?

How is "temporary" practice defined? The Commentary states that there is no single test to determine whether a lawyer's services are provided on a temporary basis⁸. Perhaps, the most objective criteria will arise from the mandatory notifications which will be the only indicia of what the spectrum and length of the non-admitted lawyers practice in the state is and whether it has become systematic.

New Rule 5.5 (d)(1) provides for a "house counsel" safe harbor, which complies with Conn. Gen. Stat. § 51-88. A non-admitted lawyer employed by an organization as house counsel may provide legal services to the organization or its affiliates in Connecticut. The house counsel must comply with rules and regulations of the Connecticut Bar Examining Committee under Practice Book Section 2-15A⁹. While house counsel have been permitted to practice in state for many years under state law¹⁰, the new judicial oversight will provide for regulation of those attorneys. House counsel are subject to the client security fund fee and professional tax.

Also noteworthy is the new definition of the practice of law in Practice Book Section 2-44A. Whether a person is engaging in the unauthorized practice of law or under a safe harbor provision will depend on whether the work being performed constitutes the practice of law. This phrase escaped definition until now. The courts had studiously avoided each invitation to give a definition¹¹. While the new definition of the practice of law is consistent with prior case law, it is the twelve enumerated exceptions in Section 2-44A (b) which bear some consideration. For example, certain activities which may constitute the practice of law are permissible by non-lawyers, such as selling approved legal documents, participating in negotiation or conciliation of collective bargaining agreements, or acting as a lay representative of clients in a forum which permits such representation.

Very minor changes in 2008 clarified some matters and include revisions to

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Rules 1.2 and 1.8 governing the duties of insurance defense counsel where the insured is missing. A new Commentary to Rule 1.5 creates a presumption of reasonableness when a contingent fee agreement complies with Conn. Gen. Stats. § 52-251c; and a new Commentary to Rule 1.15, defines what constitutes a legal "interest" when a dispute arises with regard to client property.

Connecticut lawyers will meet new faces in the upcoming years. The inherent authority of the courts to determine who is fit to enjoy the privilege of practicing law in Connecticut has broadened exponentially. Will an already strained and under-budgeted branch of government be able to meet these new challenges? The efforts made to date by both the bar examining committee and the statewide grievance committee are laudable. Only time will tell what Connecticut's new legal landscape will look like in the future. We can only hope that our "temporary" guests enhance our profession, serve the pub-

lic and provide each client with capable representation.

¹ Practice Book Section 2-16, Attorneys Appearing Pro Hac Vice, requires out-of-state attorneys appearing pro hac vice to designate the chief clerk for the court as an agent for service of process and agree to register with the Statewide Grievance Committee while appearing in this state.

² Rules of Professional Conduct, Rule 5.5 (c).

³ Rules of Professional Conduct, Rules 5.5 (e) and 8.5(a).

⁴ The Statewide Grievance Committee has an electronic registration form which must be completed for each client and/or representation and subsequently edited to show the conclusion of the in-state legal services. <http://www.jud.state.ct.us/CBEC/index.htm>.

⁵ Report of the CBA Task Force on Multijurisdictional Practice and General Agreement on Trade-Services, May 12, 2006 available on the CBA website at www.ctcba.org.

⁶ Rules of Professional Conduct, Rule 5.5 (b); Conn. Gen. Stat. § 51-80.

⁷ Rules of Professional Conduct, Rule 8.3 requires Connecticut lawyers to report another lawyer, without limitation as to jurisdiction of admission, who has violated the Rules under certain circumstances.

⁸ The Commentary to Rule 5.5 goes so far as to state that "temporary" may include services over an "extended period of time."

⁹ The application and forms which must be completed are available on the Connecticut judicial website at <http://www.jud.state.ct.us/CBEC/housecounsel.htm>.

¹⁰ Public Act 95-137.

¹¹ *Grievance Committee v. Payne*, 128 Conn. 325, 330 (1941) (acts "commonly understood to be the practice of law"); *Application of Hunt*, 155 Conn. 186, 192 (1967) (legal work performed on a full-time basis, at a fixed salary for a single client); *State Bar Ass'n v. Conn. Bank & Trust Co.*, 145 Conn. 222, 234-35 (1958) ("the giving of legal advice on a large variety of subjects and the preparation of legal instruments covering an extensive field")

GENERAL STATISTICS AND EXPERT TESTIMONY

Written By: Karen L. Dowd



One of the most accepted practices in trial litigation today is the use of life expectancy charts. Their data is regularly included without issue in pretrial memos, and most often the data is stipulated to at trial. Such use is contested only in the rare cases where a party has a significant medical condition such that the general statistical data cannot apply. However, the use of general statistical evidence is not as sturdy a legal basis as we would like to think. Indeed, it is largely ease of practice, and a fair amount of head-in-the-sand thinking, that keeps the practice unchallenged.

Use of general statistical evidence was implicitly recognized in *Petriello v. Kalman*, 215 Conn. 377 (1990). The Supreme Court permitted recovery for the increased risk of future medical difficulties despite the fact that the risk was lower than fifty percent. (In that case it was an eight to sixteen percent chance of a future bowel obstruction). The court noted that future damages are of necessity uncertain but likened them to awards for permanent injuries based upon the actuarial life expectancy tables. "With respect to awards for permanent injuries, actuarial tables of average life expectancy are commonly used to assist the trier in measuring the loss a plaintiff is likely to sustain from the future effects of an injury." *Id.* at 397. Similar

evidence based upon "medical statistics of the average incidence of a particular future consequence" would provide a basis for assessing the increased risk. *Id.* Thus, once the jury determines that the defendant's negligence caused the present injury, the plaintiff can recover for future risk based upon statistical evidence even if the risk was lower than fifty percent.

The use of general statistical evidence went undisturbed until *Drew v. Backus Hospital*, 77 Conn. App. 645, cert. denied, 265 Conn. 909 (2003). In *Drew*, the Appellate Court upheld summary judgment on the basis that the plaintiff parents failed to establish causation in a loss of chance case for the death of their daughter. The

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GENERAL STATISTICS AND EXPERT TESTIMONY

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Drew court held that, in order to recover for the defendant's negligence in a loss of chance case, the plaintiffs had to prove that the child had a survival rate of at least fifty-one percent. Their expert testified at deposition and through his affidavit that children with the child's disease fell into three categories: one third would die, one third would recover without health complications, and one third would survive but with long term complications. The expert then testified that it was "impossible to predict" as to which of the three categories a patient would fall. *Id.* at 657. The expert later testified that the chance of survival with complete recovery was seventy-five percent, but again stated that there was no way to know whether a particular child would fall into that category.

The Appellate Court was critical of the use of the statistical data because the expert expressly stated that his opinion as to the chance of survival did not relate to the particular child, but was only general statistical evidence. He then stated that he could not state whether the child in this case would have survived or not, and that he was unable to assign the child a chance of survival. The Appellate Court noted that expert testimony based on general facts or doctrines but which did not relate specifically to the facts of the case was not proper. *Id.* at 666. The Court then distinguished *Petriello*, which in fact permitted the use of exactly that kind of evidence for future harm. The court reasoned that *Petriello* first required proof that increased risk of future harm was more likely than not, and so had in fact set a bar of fifty-one percent, with the increased risk of whatever percentage following thereafter. The Court also distinguished between risk of future harm cases and lost chance of survival cases, which require a traditional standard of causation. That is the plaintiff is still obligated in both types of cases to prove the causal link between negligence and harm by a preponderance of the evidence.

Then, in response to plaintiffs' argument that *Petriello* "implicitly recognizes the propriety of using general statistical

evidence. . .", the court stated that "we need not address the specific issue concerning statistical evidence in proving that a chance of survival existed because that issue is not before us." *Drew*, 77 Conn. App. at 669, n. 8. The court relied rather on the fact that the expert stated that he found it impossible to assess the child's chance of survival. This holding fails to satisfy though, as the expert had been able to state unequivocally the general statistical chances for success, either a two-thirds

the use of general statistical evidence is not as sturdy a legal basis as we would like to think. Indeed, it is largely ease of practice, and a fair amount of head-in-the-sand thinking, that keeps the practice unchallenged.

chance of survival, with or without complications or a seventy-five percent chance of survival. Either testimony necessarily was over the fifty-one percent threshold. If in fact, general statistical evidence, of the type used in actuarial life expectancy tables, was sufficient, then there was sufficient evidence to withstand summary judgment in the *Drew* case. Indeed, Judge Dupont, in her dissent, specifically referred to the use of statistical evidence, such as life expectancy charts. She stated

the question most directly: "whether the plaintiff's statistical probability evidence alone, in a medical malpractice action, based on the doctrine of a lost chance of survival, would prevent the defendants from obtaining summary judgment." *Id.* at 670. Judge Dupont would have held the statistical evidence sufficient on its own, especially in light of the young age of the child, and the largely blank medical slate, which would often prevent any direct assessment of the child's specific chances of survival. In fact, Judge Dupont tied together the use of statistics "to evaluate the future effects of an injury to gauge the length of time over which the effects may last, without regard to the particular life expectancy of a claimant" with the use of such analysis for lost chance cases. *Id.* at 674.

Judge Dupont's point is well taken. If general statistical evidence is not satisfactory to demonstrate chances of survival, then how could it be so to do the same assessment into the future? In essence, life expectancy tables are in fact assessments of our chances of survival into the future, based upon scientific data and actuarial analysis. Instead of the *Drew* expert stating that a child had a seventy-five percent chance of surviving a particular event, the tables give us our chances of reaching certain ages based upon particular demographics. The tables, and their pronouncements on the plaintiff's future, are no more specific to the plaintiff than the *Drew* expert's testimony. That is not to say that they are not scientifically based or extremely useful in curtailing the issues at trial. Indeed, the quiet acquiescence to their use by both sides admits the benefits of such general statistical evidence. A contest as to their use would have to be broached early and overtly in a court fight, and most of us are unwilling to give up the simplicity of the life expectancy tables. However, that does not change the fact that there still lurks out there a decision that tacitly, and a footnote that more overtly, questions the propriety of such general statistical evidence absent specific expert testimony tying that evidence to the particular parties at issue.

WAIVE-ING GOODBYE TO REVERSAL: HOW TO AVOID A COMMON TRAP IN CRIMINAL APPEALS

Written By: Daniel J. Krisch



In a certain sense (and with apologies to Homer Simpson), handling a criminal appeal is a lot like being initiated into the Stonecutters:

You have to survive an extremely painful

gauntlet before being admitted into the inner, substantive sanctum. And while the procedural roadblocks set up by the State in the path of a criminal appellant may not be as formidable as The Unblinking Eye, or The Wreck of the Hesperus (d'oh!), avoiding those traps is crucial for any successful criminal appeal.

One of the most common procedural obstacles raised by the State is the waiver doctrine. Waiver is one of the first things every prosecutor at the Appellate Bureau of the Chief State's Attorney's Office looks for (and, likely, hopes for) when reviewing a new file. (For the purposes of this article, waiver refers only to waiver of a potential appellate issue at trial; the adequacy of a defendant's waiver of one of his constitutional rights is another (lengthy) subject altogether.) If an appellant claims error with respect to an issue that he waived at trial, that gives the prosecutor an easy shortcut to affirmance – and, for prosecutors who brief dozens of appeals a year, shortcuts of that nature are like manna from heaven. (Of course, a ounce of prevention is worth a pound of cure; so the surest way to avoid having to run the gauntlet is to make sure that – at the trial level – you don't waive a potential appellate issue. If only we were always that foresighted!)

Waiver is certainly an attractive doctrine for the State (indeed, for any appellee); but if the State raises waiver in its brief, don't despair – the test for waiver itself provides a road map for a focused response in your reply brief. It is well-settled that “[w]aiver is an intentional relinquishment or abandonment of a known right or privilege.” *State v. McDaniel*, 104 Conn. App. 627, 633 (2007). Thus, to prove that a defendant

waived a claim at trial, the State first must establish that he knew “of the existence of the claim and of its reasonably possible efficacy.” *Id.* Although this does not mean that a defendant has to be certain that he would prevail on an issue in order to waive it, a defendant must be aware of the nature and scope of the claim in order to waive it. See, e.g., *State v. Brewer*, 283 Conn. 352, 356-58 (2007) (defendant waived

So when responding to a waiver claim, focus on every indication in the record that the defendant was not aware of, and/or did not understand the potential of, an appellate claim.

constitutional challenge to “acquittal first” portion of lesser included offense instruction because defendant had requested that precise language); *State v. Fabricatore*, 281 Conn. 469 (2007) (defendant waived claimed impropriety of charging on duty to retreat without threat of deadly physical force because record showed defendant understood nature and scope claim); *State v. Barile*, 267 Conn. 576, 580-81 (2004) (defendant waived constitutional challenge to polygraph examination when he “specifically agreed with the [trial] court that he did not have a fifth amendment right to silence about the crime of which he already had been convicted”); *McDaniel*, 104 Conn. App. at 631-33 (defendant

waived challenge to search of curtilage by twice telling trial court he was not contesting its constitutional validity); *State v. Taylor*, 101 Conn. App. 160, 165-66, cert. denied, 283 Conn. 903 (2007) (defendant waived challenge to replaying of cross-examination by informing court that juror had fallen asleep, which induced court to take that action); *State v. Ruffin*, 48 Conn. App. 504, 510, cert. denied, 245 Conn. 910 (1998) (defendant waived challenge by expressly assenting to instruction).

In each of those decisions, the defendant clearly knew the nature and scope of the claim that he was waiving. So when responding to a waiver claim, focus on every indication in the record that the defendant was not aware of, and/or did not understand the potential of, an appellate claim. See *Reinke v. Greenwich Hospital Assoc.*, 175 Conn. 24, 27-28 (1978) (plaintiff did not waive appellate claim due to lack of awareness of statute that supported his legal position). The same goes for the intent element: Sift through the trial transcripts and play up every indication in the record that casts doubt on whether there was an affirmative “act done designedly or knowingly to relinquish” the claim. *State v. Santiago*, 245 Conn. 301, 310 (1998). For example, if trial counsel agreed to an alternate/lesser remedy to a claim of error – e.g., a belated curative instruction – an appellate tribunal might not view that agreement, especially if it was couched in reluctant terms, as an “intentional” waiver. In many waiver cases – e.g., *Fabricatore*, *Brewer* and *Ruffin* – the propriety of the instruction itself was the issue. As such, while the defendants ultimately did agree to the instruction given by the trial court, it was clear that they had intended to waive any claim of error because they had affirmatively assented to the very thing – the instruction – that they afterwards claimed as error on appeal.

So when faced with a claim of waiver, focus carefully on the those two elements – knowledge and intent – and you may fare better than Homer did at his Stonecutter initiation.

FIRM NEWS & NOTES

Partner Wesley W. Horton, as President-Elect of the American Counsel Association, presided at the mid-year dinner meeting on February 8, 2008 held in conjunction with the mid-year meeting of the American Bar Association in Los Angeles.

Partner Kimberly A. Knox is continuing in her second year as Co-Chair of the CBA Appellate Advocacy Committee.

Partner Michael S. Taylor and Associate Brendon P. Levesque taught Moot Court at the University of Connecticut Law School during the January Inter-term Session.

Partner Daniel J. Krisch is the new Chair of the CBA Young Lawyers Section.

Partner Kimberly A. Knox will be attending the Fifth International Meeting of the Association of Professional Responsibility Lawyers in Amsterdam in May, 2008.

Partner Michael S. Taylor will be arguing two significant insurance coverage cases before the Connecticut Supreme Court during the Court's March Term. The cases, which will be argued consecutively, concern the interpretation of the term "arising out of" with respect to additional insured coverage under commercial general liability policies. **Partner Wesley W. Horton** argued the underlying tort case before the Supreme Court in the October 2007 Term.

ON THE DOCKET

Associate Brendon P. Levesque and **Partner Kimberly A. Knox** successfully represented attorney Martha A. Dean on appeal before Hartford Superior Court Judge Grant Miller. Attorney Martha A. Dean began representing her clients in late 1999. They retained her to represent them before the Connecticut Underground Storage Tank Petroleum Clean-Up Account based on a fuel spill at a Dairy Mart. One facet of her representation involved preparing and submitting applications to the Trust Fund for reimbursement of costs, including attorney's fees, incurred by her clients due to the gasoline release. Attorney Dean sought reimbursement for her client's legal fees for four years. Her efforts were plagued by state budget concerns and a new approach to reviewing Trust Fund claims.

Because the Trust Fund was not paying claims, Attorney Dean commenced litigation against her clients in order to protect the parties' rights from a statute of limitations claim. Her decision to file suit led to the underlying grievance. Attorney Dean was reprimanded by the Statewide Grievance Committee (SGC) for violating Rules of Professional Conduct §1.5(a) because the SGC concluded that any recovery of fees was speculative in nature." Even though the statistical probability of success based on a review of the last three years of appeals was only ten percent, Attorney Dean appealed from the reprimand, claiming that speculative nature was an improper legal standard and that in any event there was no evidence that her efforts were speculative. The court agreed on both points.

ETHICS CORNER

Advertising Advisory Opinions. Tombstone ads were approved, but ads which state the lawyer "focuses on" or is "uniquely" qualified in a field of practice violated the advertising rules in SGC Advisory Opinions under P.B. § 2-28B. Lawyers were also admonished to include the name of at least one attorney admitted to practice on all ads. The advisory opinions are available on the judicial website: [HYPERLINK "http://www.jud.state.ct.us"](http://www.jud.state.ct.us) www.jud.state.ct.us.

Review of Advisory Opinions. Effective January 1, 2008, the SGC regulations were amended to allow for a request in writing for review of an adverse advisory opinion. The request for review must be filed within 30 days of the issuance of the opinion, it does not stay the

publication of the opinion and review is limited. SGC Regulation 14

MJP is not free. Lawyers admitted in another jurisdiction may practice in CT under Rule 5.5(c) (3) or (4) upon written notice to the Statewide Bar Counsel and paying the \$100 fee. Notice and payment must be made online on the judicial website – no other form of notification complies.

Random Audits Regulations. Read all correspondence from the SGC. Upon receipt of notice of a random audit, read new SGC Regulation 13.

Mandatory CLE. The CBA in 2006 endorsed the principle and in 2007 approved Proposed Rules for Minimum CLE which is before the Judicial Rules Committee at this time.

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