

Hearsay

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If you have any questions about the publication or would like to submit an article for a future issue, please contact Shanda Pearson or Andrew Loose.

MSBA



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Greetings from the Chair

Lacee Anderson

Welcome to the beginning of another great bar year! I am excited for the things we have planned so far and look forward to working with a dynamic team of new lawyers to get some of our goals accomplished.

The Annual MSBA NLS – HCBA NLS Winter Social took place on Thursday, December 3rd at Nami. The night was a big success with many new lawyers attending. As part of our Winter Social we conducted a toy and fundraising drive for Toys for Tots. We also have CLEs and various volunteer events planned for the year. We held our first free CLE about race, gender, and diversity in the courtroom on October 15th. The CLE assisted attorneys with identifying potential bias in the courtroom and developing effective strategies on how to best communicate with diverse jurors and legal counsel. Our second free CLE on November 19th was entitled, “Preparing and Presenting Persuasive Written and Oral Arguments Before the Court.” This CLE provided practical insights from the Honorable Judge Bruce Peterson and the Honorable Judge Diane Alshouse regarding the skills, tactics and communications that provide a foundation for persuasive communications.

In addition, we have a number of community service events planned for the year, as well as some ongoing endeavors to this regard. Our first event of the year was the Santa Run to Benefit Legal Aid on Saturday, December 5th. We are also doing a winter outerwear collection campaign to collect hats, coats, scarves, mittens, etc. for those in need. We’ll be collecting through December. This spring, we are planning a food-packing event and a couple other community service activities, so stay tuned.

If you’re interested in getting involved in the New Lawyers Section, the best way is to attend our monthly Council meetings. They are always the third Thursday of the month, from 5:45-6:30 p.m., at the MSBA Office. We typically have a free CLE beforehand from 4:35-5:35, so come for the CLE and stay for the meeting! We welcome you if it’s your first time, or even if it’s been years since you last attended a meeting.

I’m really looking forward to this year and all that we have planned. We hope you’ll join us in making this year great! Thanks for your involvement and I look forward to meeting you soon.



Lacee Bjork Anderson
Chair, New Lawyers Section

Drafting a Successful Fee Waiver Request

David C. Jenson

Background

The global economic recession has had at least one positive unintended consequence. Faced with declining business and excess capacity, law firms are encouraging their newest lawyers to seek out more pro bono opportunities.¹ Pro bono work not only allows firms to give back to the community, but it also increases firm visibility, and provides new lawyers with networking channels and the valuable training opportunity to manage a file and a client relationship early in their careers.² This renewed focus on pro bono efforts coincides with severe budget cuts to, and a corresponding 30% increase in the demand for the services of, legal aid societies, which depend heavily on revenues tied to the federal funds rate that has been cut again and again by the Federal Reserve.³

One way in which new lawyers can contribute pro bono hours is by helping immigrants obtain United States citizenship. Minnesota provides numerous opportunities for such work, since the state has the largest Somali community in the U.S.⁴ Many Somali immigrants have entered the U.S. as refugees and asylees, often bearing the physical and mental scars of a decades long civil war in their homeland.⁵ This article provides some practical guidance for new lawyers on avoiding pitfalls when drafting a common component of a citizenship application: the fee waiver request.

Citizenship Process

Citizenship has been called “the ultimate pathway to integration in society” and allows

immigrants to vote in elections, apply for federal jobs, and seek visa petitions on behalf of family members left behind.⁶ In some cases, citizenship may also allow immigrants to access much needed government services not available to non-citizens. In order to apply to become a citizen, an immigrant must have resided in the U.S. as a lawful permanent resident for five years. After fulfilling the residency requirement, an immigrant can become a citizen by filling out a form N-400 Application for Naturalization, getting fingerprinted, and undergoing an interview, complete with English language and civics tests, with a U.S. Citizenship and Immigration Services (CIS) officer.⁷ Although it may seem straightforward, the citizenship process is daunting for many immigrants. The application can be confusing for a non-native speaker of English, and many immigrants need assistance filing the requisite paperwork or even figuring out whether they are eligible to become citizens.⁸ Perhaps the biggest obstacle facing many immigrants who wish to become citizens is the hefty filing fee the application requires.

Fee Waivers

In the last two decades, N-400 fees have risen from \$60 a person to \$675 a person, one of the highest rates in the western world.⁹ In 2008, the number of immigrants applying for citizenship fell 62%, in large part due to the high fees and the global recession.¹⁰ And that number may fall even further as fees continue to increase. Facing a \$118 million revenue shortfall, CIS is considering further fee increases for

the coming year, putting citizenship out of reach for even more immigrants.¹¹

Fortunately, federal regulations allow officials to waive the application fees in appropriate circumstances for individuals who have an inability to pay.¹² The Department of Homeland Security is authorized to waive the N-400 application fee if an applicant can establish in an affidavit the reasons he or she is unable to pay.¹³ Establishing an inability to pay can be a frustrating and unpredictable endeavor. The CIS official reviewing the N-400 application has broad discretion regarding the grant or denial of a fee waiver and will “consider the totality of all factors, circumstances, and evidence the applicant supplies” in making a decision.¹⁴ In order to support the claims in the fee waiver affidavit, an applicant may submit additional documentation, although additional documentation is not needed if the applicant’s affidavit “is sufficiently detailed to substantiate his or her inability to pay.”¹⁵

Practitioners should devote significant time and attention to crafting the fee waiver affidavit, as a denial of the fee waiver request results in the return of the entire naturalization application. The application must then be re-filed, and exhibits and affidavits may need to be updated to reflect the current situation of the applicant. Consequently, the practical effect of a denied fee waiver request may be a delay of several months or more in processing the citizenship application. Lawyers can increase the chances that an applicant’s fee waiver request will be granted by carefully following the guidelines that CIS has provided on the subject.

Practical Pointers

The following concrete pointers, culled from CIS guidance,¹⁶ will help practitioners avoid some of the most common pitfalls of fee waiver affidavits:

Use the Magic Words. CIS advises that the envelope containing the N-400 application and fee waiver should be clearly labeled “Fee Waiver Request.” The top of each page of the fee waiver affidavit and all attachments should also be marked “Fee Waiver Request.” The affidavit itself must contain the following claim: “I declare under penalty of perjury that the foregoing is true and correct.” Keep in mind that your task is to demonstrate and substantiate the applicant’s “inability to pay,” so you should make sure to use that specific phrase when drafting the affidavit.

Do Not Include A Check. You may believe that submitting a check for the application fee along with a fee waiver request will preserve your applicant’s place in line and ensure timely processing in the event the fee waiver request is denied. In reality, if you submit a check with the application materials, CIS will cash it, disregard the fee waiver request, and process the application as usual.

Provide a Complete Financial Picture. Include enough detail in the claims of the affidavit and enough supporting documentation to give the reviewing CIS officer an accurate overall picture of your client’s financial situation. Include tax returns or paystubs to prove your client’s income, and compare that income to the federal poverty guidelines. Include documentation relating to your client’s receipt of food stamps, Supplemental Security Income, Medicaid, or other assistance, especially if it comes from a federal source. Evidence of receipt of a federal “means-tested public benefit” is particularly powerful because it shows that the federal government has previously determined that the applicant has insufficient financial resources. Document your client’s expenses by including receipts for expenditures such as mortgage, rent, and utility payments, food and clothing, transportation, and medical needs. You should also provide an overview of your client’s assets and liabilities. In some cases,

negative claims may be effective in the affidavit (e.g., “I do not own a car; I do not own a computer; I do not have a savings account”).

Tread Carefully When Proving a Disability. An applicant’s disability can be crucial to a fee waiver request, because it may show that the applicant is unable to hold a job and earn a living. You should provide copies of any disability determination made by a federal agency, such as the Social Security Administration, the Veteran’s Administration, the Department of Defense, or the Department of Health and Human Services. A word of caution, though: CIS materials only refer to disability determinations made by a federal agency. Your client may well have a disability as determined by her doctor or a state agency, but not by a federal agency. While it is still useful to submit evidence of a non-federally determined disability, you may want to include extra evidence and detail. For example, you might include additional claims in the affidavit relating to the source of the disability, such as a description of a specific injury or traumatic experience.

Tell a Compelling Story. The stories of pro bono clients, especially in the case of refugees and asylees, can be heartrending. CIS officers are specifically authorized to consider “humanitarian and compassionate reasons, either temporary or permanent, which justify a granting of the fee waiver request.” Although you are creating a legal document, it should not read like a memorandum of law. Include the personal details of your client’s situation that make her story compelling. Remember that the CIS officer who reviews your client’s fee waiver request probably reviews many such requests each day, receives more requests than he or she can adequately handle, and likely makes quick decisions. It is to your client’s advantage if her waiver request contains a personal touch that gives the CIS officer pause, and leads the officer to read the affidavit more carefully.

A Final Note

Try not to be overly discouraged if your fee waiver request is denied. Even a seemingly thorough fee waiver request can be denied without explanation, due to the broad discretion of the reviewing CIS officer. Assure your client that she has not been denied citizenship, but that CIS has considered only the fee waiver request. Remind your client that you can renew the fee waiver request with additional information and supporting documentation. Finally, if you find success with a particular tactic, please, share it with your fellow practitioners.



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Notes

¹ Erin Fuchs, *Pro Bono Boom Will Outlast Recession: Expert*, Law 360, Sept. 22, 2009, available at http://www.law360.com/print_article/113197.

² *Id.*

³ Erik Eckholm, *Interest Rate Drop Has Dire Results for Legal Aid*, The New York Times, Jan. 19, 2009, available at http://www.nytimes.com/2009/01/19/us/19legal.html?_r=1&pagewanted=print.

⁴ Lauren Yuen, *President of Somalia Making Rare Visit to Twin Cities*, Minnesota Public Radio, Oct. 1, 2009, available at <http://minnesota.publicradio.org/display/web/2009/09/30/somali-president/>.

⁵ *Id.*

⁶ Maria Sacchetti, *Fees Deter Many from Citizenship*, The Boston Globe, Sept. 28, 2009, available at

http://www.boston.com/news/local/massachusettsarticles/2009/09/28fees_deterring_many_immigrants_from_appl_ying_for_us_citizenship/.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Tara Bahrapour, *Number of Immigrants Applying for U.S. Citizenship Is Down 62%, Study Finds*, The Washington Post, Sept. 12, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/11/AR2009091103727.html>.

¹¹ Teresa Watanabe and Anna Gorma, *Immigration Officials Consider More Fee Increases*, The L.A. Times, Sept. 24, 2009, available at <http://www.latimes.com/news/local/la-me-immig24-2009sep24,0,3233237,print.story>.

¹² See 8 C.F.R. § 103.7 (2009).

¹³ *Id.*

¹⁴ Interoffice Memorandum, U.S. Citizenship and Immigration Services, Fee Waiver Guidelines as Established by the Final Rule of the Immigration and Naturalization Benefit Application and Petition Fee Schedule (July 20, 2007) (on file with author).

¹⁵ USCIS Adjudicator's Field Manual, Redacted Public Version, Chapter 10.9(a)(2) (updated through September 2009), <http://www.uscis.gov/portal/site/uscismenuitem.f6da51a2342135be7e9d7a10e0dc91a0/vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm> [hereinafter Adjudicator's Field Manual].

¹⁶ These practice pointers are summarized from the following materials, which the author suggests consulting before drafting a fee waiver request: Interoffice Memorandum, U.S. Citizenship and Immigration Services, Fee Waiver Guidelines as Established by the Final Rule of the Immigration and Naturalization Benefit Application and Petition Fee Schedule (July 20, 2007) (on file with author); Adjudicator's Field Manual, Chapter 10.9; Press Office, Department of Homeland Security, USCIS Fact Sheet: Fee Waiver Guidance, (Mar. 29, 2004), available at http://www.uscis.gov/files/pressrelease/FeeWaiver03_29_04.pdf.

Beware the Post Bar Exam Blues

*Leora Maccabee*¹

You passed the bar and officially became a lawyer last week but you have no job. Or you have a job, but your start date has been deferred until March and your loan repayments start in November. Or maybe you blew the bar entirely this time around. And to top it all off, the holidays are just around the corner, so your whole family is going to be sitting around a table and staring you down, asking, "So, what's new?" and "Why don't you have a job yet?" and "Aren't your loans due soon?" Maybe you are crying a lot, yelling at your significant other for no apparent reason, or drinking more than you know you should. If any of this sounds familiar, you could have a common case of the post bar exam blues.

This year's class of newly minted JDs and lawyers are entering the job market during one of the worst economic periods in recent history. More than ever, members of this class

of grads are worrying about how they are going to pay their bills, whether they have to move back in with their parents, whether they can find a job at their skill level, and, if they were lucky enough to snag a job, whether it's secure in this economy.

At a time like this, it is important to realize that if you are getting anxious, stressed, sad, angry, frustrated or depressed about your economic and employment situation, (1) you are not alone, and (2) there are resources to help you out.

Vic Massaglia, one of the career advisors at the University of Minnesota Law School, emphasizes the initial importance of sitting down, formulating your questions and then determining who you need to be speaking with. Do you need a career counselor to help you work on your resume, your networking skills

and your job search? Or are you finding yourself facing a barrier emotionally or mentally that prevents you from even starting a job hunt on the right foot?

If your post bar exam blues are primarily a sense of hopelessness or fear about finding a legal job, check in with a career advisor or counselor. Call your law school's career services office and set a time to meet with someone face-to-face. If you moved away when you graduated, call one of your local law schools until you reach someone who will give you the help you need.

In the meantime, Massaglia says, "Make yourself useful. Volunteer, get involved, get active, provide and give." Doing so will do more than distract you — it will energize you and build your legal skill set. And reach out to friends, family, alumni or the members of the Minnesota State Bar Association's New Lawyers' Section to build and strengthen your existing support network.

If your post bar exam blues are more akin to mental and emotional barriers — you are having trouble getting out of bed in the morning, or controlling your drinking, or stopping yourself from crying — it may be time to contact Minnesota's Lawyers Concerned for Lawyers.

Minnesota's LCL provides free, confidential help to lawyers, judges and law students affected by alcohol and/or other drug abuse, other addictions, depression and other mental illnesses, stress and additional life-related problems. In fact, the group provides help for any condition that negatively affects the quality of one's life at work or at home. As LCL Executive Director Joan Bibelhausen explains, "We help lawyers figure out 'Where do I belong? What is the best place for me?' And if there is something that is a boundary or a block, we find a way to work that out."

Every lawyer or law student who calls LCL for

services can get a referral for four free counseling sessions with a therapist. After that, if a person needs additional services, LCL refers individuals to appropriate (and financially accessible) community resources. LCL also runs several confidential legal support groups facilitated by therapists, and makes referrals to other community organizations, such as Alcoholics Anonymous, that LCL staff has been told are good groups for lawyers.

If any of LCL's services sound like they could be valuable to you (or to someone that you love), contact LCL by e-mail at help@mnlcl.org or by phone at (651) 646-5590. And if you do not feel that you need LCL's help right now, but value their services, consider making a small donation on their website (www.mnlcl.org).

While holiday dinners may still be awkward and painful (perhaps for more reasons than your economic situation), you do not have to face the next few weeks or months of post bar exam blues alone. This week, set an appointment on your calendar to sit down, evaluate and develop an action plan for the most important client you will ever have — yourself.

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Notes

¹ This article was previously published in Minnesota Lawyer on October 30, 2009 (<http://www.mnlcl.org/>).

Plain English in Legal Writing: An Introduction

Matthew L. Phillion

Pretty much everyone—lawyers included—detests the thought of reading an incomprehensible statute, a long-winded brief, or boilerplate language in a contract. But poor legal writing is not simply an annoyance. As the saying goes, “what we have here is a failure to communicate.” In other words, poor writing leads to poor communication, which leads to poor results. Applying principles of plain English to legal writing is a way to improve the effectiveness of the documents lawyers create.

A History of Plain English

The plain English movement —also known as the plain language movement in non-English-speaking countries—seeks to make communication clear, direct, and understandable. Its initial focus was to improve government writing, but business, scientific, academic, and legal writers have also used its principles to make their communication more effective.

The plain English movement in the United States reached a high point in the late 1970s, when the U.S. government required certain federal agencies and departments to make their written materials more accessible. A leader in this effort was Rudolf Flesch, whose *How to Write Plain English* remains a useful resource. Some writers find his readability formula, based on the average number of words per sentence and the average number of syllables per word, a useful tool.

A more recent example is the SEC’s *A Plain English Handbook*, which it created in 1998 to help companies draft clearer disclosure documents. The *Handbook* is a concise and clear explanation of how plain English can improve writing. It is available online at

www.sec.gov/pdf/handbook.pdf.

In the legal realm, UCLA law professor David Mellinkoff worked early on to highlight the importance of good legal writing. *The Language of the Law*, written in 1963, remains a must-have for all legal writers. In it, Mellinkoff details both the development of the unique language of law and points out many of its problems. Also highly recommended is his *Legal Writing: Sense and Nonsense*.

Today, a number of outstanding legal writing and plain English exponents carry on Mellinkoff’s foundational work. The most well known figure today is Bryan Garner. He has authored a number of books on writing, presents a successful series of seminars on legal topics, and he had the audacity to suggest judges should put citations in footnotes, not in the body of the text. One of the best purchases a lawyer can make is Garner’s *Legal Writing in Plain English*.

Another highly regarded authority on legal writing and plain English is Professor Joseph Kimble, Chair of the Thomas M. Cooley Law School's Research and Writing Department. His book *Lifting the Fog of Legalese* is another of those must-haves for the legal writer’s library. He also contributes to a regular column on plain English for the Michigan State Bar Journal; it is a terrific resource for all writers. A list of past articles can be found at <http://www.michbar.org/generalinfo/plainenglish/columns.cfm>. Kimble was a leading figure in the recent redrafting of the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Side-by-side comparisons of the old and new versions clearly show how plain English can make a legal document clearer and easier to use.

Elements of Plain English

It is easy to ask a person to write something “in plain English.” It is another thing to actually write that way. One reason may be that the phrase “write in plain English” is broad—it covers vocabulary, grammar, sentence structure and syntax, typography, layout, and web design.

Vocabulary is probably the place legal writers should start when using plain English. The law is undeniably filled with archaic, confusing, contradictory, misleading, ambiguous, and even boring words. Plain English exponents have spent a lot of time compiling lists of overused, imprecise, useless words and their more effective replacements. A good example is the phrase “subsequent to”—probably no one uses these words in conversational speech, yet the phrase appears frequently in legal writing. What’s wrong with the word “after,” which means the same thing?

Another example of a word to look out for is “shall.” Many writers have been taught that “shall” means a person must do something, and it appears frequently in contracts and in statutes with that meaning. Yet writers like Garner and Kimble have highlighted the word’s imprecision and ambiguity. Garner even recommends deleting every “shall” and avoiding the word altogether.

Indeed, there are so many ineffective, bloated, and bad words and phrases in the language of the law that it is impossible to remember all the ones to avoid. A good idea is to have a list of offending words at hand when writing: it then becomes easy to see what to leave in, and what to cut out.

Plain English is not just about words, though. Other important elements are sentence length and sentence structure. These aspects of one’s writing habits are perhaps the hardest to “fix,” in that major changes require study, careful

editing, revision, and patience. The best place to start is by reviewing grammar and the construction of sentences. An invaluable tool is Martha Kolln’s *Rhetorical Grammar*. In this book she explains the sentence patterns (actually, verb patterns) that make up the English language and how they can be used more effectively. Many plain English writers pay special attention to sentence length in their writing; generally, the shorter the sentence, the better. The same rule is probably true for paragraph length as well.

The look of a document is also important, and attorneys have many options concerning typeface selection, line spacing, graphics, use of color, and other essential layout elements. Plain English writers and designers use these components to create documents that are easier to read, understand, and use. Again, a good source for plain English layout and design basics is the SEC’s *A Plain English Handbook*.

Ultimately, everyone benefits when attorneys write more clearly and simply: judges can understand and respond to legal arguments more effectively; opponents can recognize strong and weak positions more quickly; consumers can make better sense of the contracts they read; and citizens can comprehend the laws they are supposed to follow. Though it takes some time and effort, using plain English is an important way for legal writers to become better communicators and, therefore, better attorneys.

Matthew Phillion is an attorney, teacher, and writer.



His areas of interest include technical and business communication, legal writing, rhetoric and composition, and American literature. He has written about and given presentations on the collaborations between Aaron Copland and John Steinbeck. He also serves as a guardian ad litem in Washington

County.

Hearsay: Who Really Learned The Learned Treatise Exception In Law School?

Alicia Sieben Ploeger

Evolution of the Learned Treatise Rule

The last thirty years have seen learned treatises become vital tools in the presentation of testimony. Initially, practitioners used learned treatises solely to impeach an opponent's expert witness or to rehabilitate one's own expert.¹ Trial attorneys used this approach because the author of the learned treatise was not available to give sworn testimony regarding the treatise and such evidence could not be used as substantive evidence.² In 1980, amendments to the Federal Rules of Evidence made the use of learned treatise evidence much broader and permitted practitioners to use the learned treatise to present direct substantive evidence.³ Fortunately, Minnesota adopted the substance of the amendments to the Federal Rules.⁴

While learned treatises ordinarily would be inadmissible under Rule 801 of the Federal Rules of Evidence, we cannot forget Rule 803 (18)'s exceptions:

to the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.⁵

Why Is This Important?

This exception means that, while the person

who published the treatise is not available to be cross-examined, the information contained within the treatise can nevertheless be introduced at trial.⁶ Because expert witness testimony is essential in many complex medical, scientific and product liability cases, the Rule 803(18) exceptions are of the utmost practical importance to the trial attorney. When learned treatises come into evidence courts and juries understand complicated issues more easily.⁷

How Do I Use a Learned Treatise?

Take these three simple steps to introduce this persuasive evidence.

1. Lay Proper Foundation

Lay proper foundation by having your expert witness testify or agree that the publication you intend to submit is reliable on the particular subject matter.⁸ It is important that you have your own expert witness acknowledge the treatise's reliability before you cross-examine the opposing witness because the burden of establishing the treatise's authority is on the party offering it.⁹ This is significant because if your opponent's witness does not acknowledge such authority, you can make an offer of proof to the court.¹⁰ An offer of proof allows you to inform the court about the nature and substance of the evidence should it be admitted. By so informing the court, the court can change its ruling if it chooses, or provide a record for an appellate court to determine if the exclusion of evidence was proper.¹¹

2. Procedure

The treatise itself is not introduced into evidence

as a marked exhibit. However, the evidence will be introduced through the attorney as she reads the relevant passages aloud after laying proper foundation.¹² Make sure your expert has read the entire treatise so he or she is not misled on cross examination.¹³

3. Use Visuals

Visuals help simplify and explain complex concepts to a jury.¹⁴ But how do we use visuals if the evidence is not submitted to the jury? There are a couple of different ways this can be done. First, while the expert is on the stand, you can show a photo or diagram to a jury, or even draw conclusions from a chart by calling the image to the attention of the expert.¹⁵ In order to use a visual in an opening statement or closing argument, you must obtain permission from the court prior to the trial unless the parties have already agreed to its admission by stipulation.¹⁶ In this situation, you should always explain to the jury that the court allows it to see this evidence and that the information is relied upon by experts in the field.¹⁷

Give It a Try

Using these three steps, the introduction of a learned treatise into evidence will add credibility, simplicity, clarification, and persuasion to complex cases.

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Notes

¹ 9 Phillip A. Cole, *The Learned Treatise Exception to the Hearsay Rule*, Trial Handbook: Part of a Series (1987).

² *Id.*

³ Patricia R. Recupero, *Clinical Practice Guidelines as Learned Treatises: Understanding Their Use as Evidence in the Courtroom*, J. of the Am. Acad. of Psych. & the Law 36, 290-301 (2008); Michael Graham, *Handbook of Federal Evidence* § 803 (6th ed. 2006).

⁴ Minn. R. Evid. 803(18) (1992).

⁵ Fed. R. Evid. 803(18).

⁶ Recupero, *supra*, note 3.

⁷ *Id.*

⁸ *Id.*

⁹ Graham, *supra*, note 3.

¹⁰ Cole, *supra*, note 1.

¹¹ *Id.*

¹² *Id.*

¹³ Ronald H. Schneider, *The Value of Learned Treatises and How To Convert Them Into Graphic Aids* 74 (1989).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

Earmuffs, Barbie Dolls and The Bourne Identity

Laurie Young

At least once a week I get the following question posed to me by a potential client: “I have an intellectual property issue but I don’t know whether I need to patent, trademark or copyright it. What do I do?” Normally, at this point I have to respond with the “lawyer answer” (you know, the one everyone hates to

give): “Well, it depends.” I then have to ask the potential client what he or she thinks is in need of protection. Typically, within a few words I am able to determine what needs protection. “I have an invention...” or “I have an idea for...” typically relates to a patent. “I have a business...” or “I am selling...”

typically relates to a trademark. “I have written...” or “I have created...” typically relates to a copyright. This article expands on these brief statements, illustrating the differences between the three main forms of intellectual property as well as giving you a primer on what is involved in each, so that you will be able to give a basic explanation to an inquiring client before sending him or her to an intellectual property (IP) law attorney.¹

Earmuffs

The words “I have invented...” or “I have an idea for...” should key you in that the answer is probably within the realm of patent law. A patent is a government grant that gives an individual the right to prevent someone other than the patent owner or a licensee from making, using, or selling the patented invention. The United States Patent and Trademark Office only grants patents based upon specific patentable subject matter: “a new and useful process, machine, article of manufacture, or composition of matter.”²

The rule deliberately excludes the words “concept” and “idea” as patentable subject matter because, in the United States, a patent application must include a description of the “best mode for performing the invention.” A person must not only have an idea for an invention, but that person must also possess knowledge about how to make the invention, and tell others how to make and use the invention. An inventor must also consider (1) whether the invention has already been patented or disclosed to the public, and (2) whether the invention is an obvious improvement of something already in the public domain. If the invention has already been patented or disclosed to the public or is an obvious improvement, then it is not patentable subject matter.

Let’s take Mr. Greenwood’s invention of earmuffs as an example of the topics

discussed above. Assume Mr. Greenwood approaches you and says, “I have an idea I want to protect.” You will first think to yourself, “He is most likely in need of a patent.” If he explains, “I have created covers to keep people’s ears warm in the winter. I am going to use fabric to make the covers and then use a flexible metal rod to attach the fabric pieces to each other,” then Mr. Greenwood has probably complied with the “best mode” requirement. However, if Mr. Greenwood then tells you that he knows this product was around in the 1800s (or anytime prior to the date he talked to you), you may want to tell him to relay this information to a patent attorney because it could prevent Mr. Greenwood from receiving a patent. Assume Mr. Greenwood then goes on to say, “I know there was a product like mine made with only red fabric, and I would like to change the color of the fabric to blue because I think more people will wear this if it is made from blue fabric.” You should tell him that this may be an obvious improvement and he should mention this to a patent attorney because it may affect the patentability of his invention.

In summary, a patent is a grant from the government that gives its owner the right, for a period of years, to prevent others from making, using, or selling the invention as claimed in the patent. However, in order for a patent to be valid, it must relate to an invention that has not been previously disclosed to the public and is not an obvious improvement to something already in the public domain.

Barbie Dolls

Trademarks are a source identifier. Trademarks are words, pictures, or other such symbols or identifiers placed on goods or in connection with services that indicate to consumers the source of the goods or services. You do not, however, need to know

the exact name of the source for the source identifier to serve as a trademark - just that it came from a single source.

Trademarks are protected, to a certain extent, with common law rights. Once a person places a word, image, or other feature on a particular good or service that indicates a single source, and that good or service enters into the stream of commerce, that person has common law trademark rights in that word, image, or other feature. Common law trademark rights are limited; they are available to the user of the mark only in the geographic areas where the goods or services are being offered. If an individual wishes to secure nationwide rights to a trademark he or she should apply for a federal trademark registration; however, the trademark must be in use in interstate commerce (since trademark rights are granted under the Commerce Clause of the Constitution). Under either common law or the federal trademark laws, to acquire a valid trademark, the mark must not be confusingly similar to another's earlier used trademark. Also, in both common law and federal law, the mark must be in actual use on the goods or in connection with the services before the trademark rights will be considered valid. This means that for a federal registration, the goods must have been shipped across state lines, or the services actually offered in more than one state.

For example, if Mattel was a Minneapolis business that made dolls sold under the name "Barbie," and sold them only in Minneapolis and St. Paul, then Mattel would have trademark rights to the word "Barbie" only for dolls sold in Minneapolis and St. Paul. Even if Mattel, in this example, wanted to try to register the word Barbie as a trademark, it would only be able to do so in Minnesota.

Barbie is a perfect example of a trademark.

When I mentioned the word "Barbie" you probably immediately thought of a plastic, anatomically incorrect doll that is always on pointed toes. You also probably had the word Mattel floating around in your head as the manufacturer of the Barbie doll. You, therefore, associated one trademark with a single source. Barbie is sold in every state and internationally, thereby meeting the interstate commerce requirement.

In conclusion, a trademark is a source identifier which may be protected by common law rights if the trademark is being used in only one state, or may be protected by federal law if the mark is being used in relation to a good or service offered in interstate commerce.

The Bourne Identity

Copyrights are rights, which exist in any work that displays a minimal degree of creativity. A person may obtain a copyright for any creative work published in a tangible medium, for example, a piece of paper, an audio or video recording, or a machine-readable computer code. While the degree of creativity required to obtain a copyright is not substantial, this element does not allow a person to take an existing work, change it slightly, and call it their own. A person must be independently creative. Changing a copyrighted work slightly creates a derivative work, which still infringes upon the owner of the underlying copyright. The final limitation to copyright relates to useful works, since copyrights cannot cover any item that has a function or utility, such as clothing.

Copyrights, like trademarks, also exist in common law. The moment something creative is placed in a tangible medium it has copyright protection. To have the maximum protection against infringement, however, attorneys should federally register their client's works. Federal Copyright protection offers the

artist certain rights not otherwise available, including the right to bring an action for infringement in federal courts.

Copyrights protect only a creative form of expression, not an idea or concept. Therefore, if someone writes about one subject or paints a picture of something, it is not infringement for another to write a book about the same subject or paint a picture of the same thing.

Let's take *The Bourne Identity* as an example of a copyrighted work because it exists in many different mediums. First, it was a book written by Robert Ludlum. This book as a whole would have copyright protection. Mr. Ludlum would not need to file a copyright application for each page in the book, just for the book as a whole. A person could infringe Mr. Ludlum's copyright by copying what was written in the book and taking it for their own. *The Bourne Identity* also exists as a movie. This movie has at least two different copyrights. First, the script for the movie is a copyrighted work and then the film itself is copyrighted. Further, copyrights exist for the musical score, the performance of the music, and for any songs used in the movie. Therefore, even if a person were to show the film without the sound (thereby eliminating the soundtrack and hence, the script) there would still be copyright infringement.

In conclusion, a copyrightable work must be minimally creative, original (to some extent), be captured in a tangible medium, and have no useful purpose.

Earmuffs, Barbie Dolls and *The Bourne Identity*

Three seemingly unrelated topics: earmuffs, Barbie dolls and *The Bourne Identity* have been addressed in conjunction with three related topics: patents, trademarks and copyrights. The purpose of this article is

merely to inform you of the differences between the three main forms of intellectual property and to give you a primer on what is involved in each. There are many nuances related to the specific intellectual property rights that cannot be covered in a short article. While you could attempt to advise your client about the topics discussed above, it is most beneficial for your client (and prudent for you) to send your client to an IP attorney to discuss the details of patents, trademarks, and copyrights.

Laurie Young practices at Nikolai & Mersereau, P.A., a law firm in Minneapolis which concentrates in intellectual property law. Laurie is a registered patent attorney who also practices in the areas of trademark law, copyright law and intellectual property transactions. For questions or comments Laurie can be reached at laurie.young@nm-iplaw.com or (612) 339-7461.



Notes

¹ There are many significant intricacies in each of the areas of IP law, so please do not try to advise a client unless you are completely aware of all the laws and regulations for each subject.

² 35 U.S.C. § 101 (2007).

³ Inventors should be aware that there are many other intricacies in U.S. patent law that could prevent a person from receiving a patent. Further, only registered patent attorneys and agents are able to file and prosecute patent applications before the United States Patent and Trademark Office.

⁴ The earmuffs were patented by Mr. C. Greenwood. The patent was issued on March 13, 1877 and is U.S. Patent No. 188,292.

Operators Are Standing By

Michael Fahy

*“Writing is the act of saying I, of imposing oneself upon other people
of saying listen to me, see it my way, change your mind.”*

—Joan Didion¹

When my first-year legal writing instructor took umbrage at my Demand Letter as “inflammatory” because I used the words “umbrage” and “impugn” on the same page, I tried to explain (oh, ever so deferentially) that one person’s “inflammatory” could very well be another person’s “emphatic.” She didn’t think so. And I never even got a shot at trying to two-step my way around “impugn.” So, almost by instinct, I assumed the 1L fetal position, like the school kids in the Cold War file footage hiding under their wooden desks to escape thermonuclear fallout, and crafted a letter that was about as rhetorically demanding as that guy hawking those Video Professor CD’s with his closing plea of “PLEASE TRY MY PRODUCT.” That didn’t cut it either.

After the demand debacle, and armed with the newfound notion that I was not capable of asking another human being, using the English language, the language of my birth, for a swift resolution to the problem at hand, it was now time for writing *The Theory of the Case*. By now, legal writing had become more of an out of body experience. Every grade was less than the class average. Ten hours or ten days on an assignment made no difference in my grade. Now, thoroughly existentially neurotic, I felt as if I was ambling about in some sort of parallel universe.

Then, late one night, while working on the mystical *Theory of the Case*, I had the TV on. While half-heartedly listening to one inane infomercial after another for waterproof mascara, weight loss breakthroughs, and self-mopping mops, I was making my way from one tortured contrivance to another on *The Theory of the Case*. Then, it hit me.

Suddenly, the fog lifted—somewhere between the smokeless ashtrays, and the textured spray paint that fully camouflages male pattern baldness. It hit me like a rapid fire “*HERE’S HOW TO ORDER*” deal closer. You know the ones, where they promise to slash the price even further if you act “. . . *IN THE NEXT TWENTY MINUTES.*” It was then I began to think of my theory of the case as a sort of legalmercial. Why?

First, a good legalmercial, like a good infomercial, has to do a lot in a little. Both, ultimately, have to sell. Both must illustrate. Both must adequately describe the conflict at hand. The infomercial—why you as a homeowner need to be rid of unsightly mold around your basement windows, and why it is just plain wrong for this condition to exist. It’s a short story, right? Similarly, you will advocate your belief to the jury, using the law to prove that your theory is the correct theory. Second, like an infomercial, a good legalmercial uses evidence. Just like an infomercial, there is that marshalling hierarchy of evidence from the best to the least persuasive to make one’s case.

You will need a good script to do it, not only explaining what is wrong, but what it is going to take to make it right for your client, by offering up ways to prove your theory. So, if you have to throw black dirt on a white Alpaca carpet to illustrate—so be it. More importantly, remember that every successful oral argument or piece of persuasive writing should leave the decision-maker with one provocative thought that he or she did not have before. Sticking to one

major issue will not only give you a better idea of what route you ought to follow and what destination you hope to reach, it will affect your decision about tone and attitude as well.² You need to make sure that every argument and fact that you present supports the theory you are trying to get across, or ain't nobody going to buy it. So, how do you get them to buy it? Paint pictures.

Since we're a highly visual society, we're used to getting our stories, in large part, through short visual narratives. This is why poets strive for the mentally conjured "controlling image." Attorneys, in comparison, rely on tangible visual exhibits. Yet, even though the value of exhibits in the courtroom is significant in that they focus juror attention, like the poet, attorneys also have the ability to create images through words by their strategic placement—collocation. When words collocate, when they occur together in expected ways around a particular topic, they help to form a recognizable network of meaning for readers.³ The poet, T.S. Eliot, used the term the "objective correlative"—"a set of objects, a situation, a chain of events which shall be the formula of that particular emotion; such that when the external facts, which must terminate in sensory experience, are given, the emotion is immediately evoked."⁴ Advertisers still use the concept when they attempt to measure how well their message is getting across. In writing, as in infomercial advertising, objective correlation is often associated with a "psychological approach, because its insistence on objectivity implies the existence of an ingrained human nature."⁵ So, by carefully choosing the words we use in our legalmercial, and presenting them in a clear, concise, and expected way around a topic or theory, we strive to have the triers of fact objectively correlate, and affirm our theory of the case. This is no different than a well-crafted infomercial inspiring someone to leave the embryonic warmth of their LAY-Z-BOY recliner and order a self-mopping mop, or discuss payment plans, over the phone at two in the morning.

It's no secret. We live in a mass-mediated,

electronically addled age. We all know that when we hear that hollow sounding computer music blurb "DUNN—DUNN" on Law & Order that it's time to get out of the refrigerator and back to couch. For good or ill, the narratives we weave have been queued up before, "seen" before, and "heard" before, as "the law is routinely produced, reproduced, and reconstructed through the complex circuitry of the media."⁶ So, what to do? How do you compete with that? Get creative.

Although it might sound a little off-putting and a little out of kilter, the literary genre of "creative nonfiction" precisely describes the titular implications of its title. The word "creative" refers simply to the use of literary craft in presenting nonfiction—that is, factually accurate prose about real people and events—in a compelling, vivid manner. You may know the law, your facts, and your theory of the case, but you don't want to lose the jury (longing to check junk e-mail and "tweet" the entire known universe that they're presently bored to death) because you're boring them back to the age of hunting and gathering, do you? Creative nonfiction writers do not make things up; they make ideas and information that already exist more interesting and accessible.⁷ As the teller of an effective factual story, a good storyteller must make the reader care about one of three things: a character, the situation, or just instill the simple desire in the reader or listener to know more about the situation at hand. Ideally, the well-told story will shed light on what it means to be human, as great storytelling is rooted in life.⁸

A good case theory needs to be rooted in real life so people can relate to it, as a good case theory is "based on strong facts and inferences which can be fairly drawn from these facts . . . built on facts not subject to much, if any, dispute."⁹ Is that not the essence of an infomercial? To articulate the positive attributes of a product and convince buyers to do what they may not be inclined to do in the first place? A good infomercial is essentially, about binaries; competing paradigms—clean v. dirty, fat v. skinny, good v. evil. Infomercials sell the good, clean, and

skinny while explaining how the bad, dirty, and evil thing necessitates the good thing in the first place. Our job, as lawyers, is that we have to sell our theory over the competitors' and, quite likely, to those not fully inclined to buy it.

“The primary purpose of advertising is the creation of a certain way of life. The object offered for sale by the advertiser is naturally indispensable to the realization of this way of life.”¹⁰ It's little wonder, then, that when confronted by uninvited basement mildew, unsightly blemishes, and rock hard abs merely being hidden under those last ten pounds of unwanted belly fat (as opposed to ten pounds of wanted belly fat) that infomercials are the proven trend of the future of advertising.

Infomercial advertising is a booming industry. “With the opportunity to boost margins by selling directly to consumers, name-brand firms like Land Rover and Disney are creating their own infomercials. Last year 2,036 infomercials ran in the United States, and of those, 714 were new shows. Fortune 1,000 firms now produce an estimated 20 percent of all new infomercials.”¹¹

The advertiser must identify their audience, identify what they hope to achieve, and explain the product clearly and concisely, while emphasizing the superiority of their product over rival products. Just as one lawyer sees things differently than opposing counsel, similarly, an advertiser needs to see the world in a slightly different theoretical framework than its competitor. The lawyer also needs to articulate his or her theoretical construct as meaningful, believable, and indispensable to those hearing it.¹²

The perfect legalmercial should be an exercise of factual inevitability, a narrative woven so as to connect to culture and create a dominant impression, in a vivid and compelling way. The way you describe your theory of the case describes how you want the trier of fact to view it. Your creativity, the pictures you paint, combine your theory of the law and a theory of the facts, in such a way as to appeal to the trier of fact's beliefs

about what is right and what is fair. Make the most of it.

After all, you might just be trying to persuade someone to do something they probably have no inclination of doing. Think of it as trying to persuade someone to get up out of the confines of their well-worn LAY-Z-BOY recliner, get out their credit card, and order a self-mopping mop, over the phone at two in the morning.



Michael Fahy is a third-year law student at William Mitchell College of Law.

Notes

¹ Rise B. Axelrod & Charles R. Cooper, *Concise Guide to Writing 3* (6th ed. 2002).

² William Zinsser, *On Writing Well: An Informal Guide to Writing Nonfiction* 63 (4th ed. 1990).

³ Axelrod & Cooper, *supra*, at 282.

⁴ T.S. Eliot, *Hamlet and His Problems In Selected Essays* 121–26 (1950).

⁵ Sarah Scott, *The Objective Correlative: T.S. Eliot's Advice for Writers*, available at http://writingfiction.suite101.com/article.cfm/the_objective_correlative (last visited Oct. 27, 2009).

⁶ William Haltom & Michael McCann, *Distorting the Law* 11 (2004).

⁷ Lee Gutkind, *What is Creative Nonfiction?*, available at http://www.creativenonfiction.org/cnf_foundation.html.

⁸ 34 Stephanie Kane, *Narrative, the Essential Strategy, in Litigation No. 4* 56 (Summer 2008).

⁹ Benchmark Institute, *Legal Services Practice Manual: Skills 7/8* (2001), available at http://www.benchmarkinstitute.org/our_training/coa/CasePlanning.pdf (last visited Oct. 27, 2009).

¹⁰ Jacques Ellul, *The Technological Society*, reprinted in *Classics of Western Thought: The Twentieth Century* 131, 133 (Donald E. Gochberg ed., 1980).

¹¹ CNN Money.com. *Stronger Sales in 28 Minutes*, available at http://money.cnn.com/magazines/business2/business2_archive/2005/06/01/8263460/index.htm (last visited Oct. 27, 2009).

¹² Nicholas Capaldi, *The Art of Deception* 63–66 (1971).

Hennepin County Affiliate News

Greetings from the Hennepin County New Lawyer's Section! We first want to congratulate all the new bar admittees and welcome all members back to what will be a fantastic bar year. The HCBA NLS is already in full swing this fall and hope you will join us in our upcoming events.

The HCBA NLS was present at the Minnesota Bar swearing in, greeting all new lawyers and their families. We also arranged to have a photographer present to take pictures of new admittees and their friends and family. It was a great success! We were also present at the November 10, 2009 Naturalization Ceremony, greeting and congratulating all the new citizens.

The HCBA NLS has also been busy preparing CLEs for new lawyers. We have had a CLE this year focused on marketing for new lawyers. We also attended the Judges' social and had a pre-social for new lawyers to meet and speak with judges prior to the full Judges social. Both the judges and the new lawyers in attendance loved this event.

The HCBA NLS also participated in the Tri-Bar social on December 3, 2009 at Nami with the MSBA New Lawyer's Section and the RCBA New Lawyer's Section. It was a fun event that provided an opportunity to connect with classmates and other new lawyers from the metro area.

Laurie Young and Sarah Rohne are Co-Chairs of the Hennepin County Bar Association New Lawyers Section. Laurie Young can be reached at laurie.young@nm-iplaw.com or 612-339-7461. Sarah Rohne can be reached at sarah.rohne@gmail.com or 651-343-2803.

Ramsey County Affiliate News

Greetings from the Ramsey County New Lawyers Section and welcome to the 2009-2010 Bar year! The RCBA NLS is in full swing and invites you to not only join us in our upcoming events, but also to become a more active member in our section!

The first Thursday of each month the RCBA NLS will be hosting happy hours at various St. Paul locations for new lawyers to meet, mingle and network with colleagues. November's happy hour was well attended by many new and experienced lawyers, including former RCBA president Charlie Clippert and current RCBA president Juan Hoyos. The December happy hour was combined with the MSBA NLS and HCBA NLS for the Tri-Bar Social and Toys for Tots drive. Please check the Barrister and watch for e-mail alerts as to locations for upcoming happy hours.

The RCBA NLS will also be participating in a variety of community service events throughout the year. Please stay tuned for any announcements or contact us to volunteer for our upcoming events.

Andrew Gifford and Lesley Adam are the Co-Chairs of the Ramsey County Bar Association New Lawyers Section. Andrew can be reached at andrew.gifford@northstarfinancial.com. Lesley can be reached at ladam@murnane.com. Also, please check us out on our webpage: www.ramseybar.org/newlawyers.html.

To Members of the New Lawyers Section of the MSBA:

My name is Jennifer Wright. I am a professor at the University of St. Thomas School of Law. I am currently engaged in research into professional identity formation of law students, and how that professional identity shapes career choices and law practice. The question of how law schools shape the professional formation and identity of their students is currently the subject of hot debate. Recent national studies are drawing many law professors to question the fundamentals of what law schools need to teach and how law students learn.

The University of St. Thomas School of Law in particular has based its identity on educating attorneys who will integrate “faith and reason in the search for truth, through a focus on morality and social justice.” I seek to examine whether and how UST Law graduates differ from their graduation cohort from other law schools in their: 1) understanding of their professional identity; 2) choice of work; 3) conduct of their legal career; 4) integration of faith into their professional work; and 5) balance of life and work. I will compare my results to the goals of UST Law, as outlined in an earlier article, “The St. Thomas Effect.” The report of this study will be made available to all interested participants.

I invite you to be a part of this research by completing a brief survey. It should only take you about ten minutes. If you are willing to participate, just click on the following link: <http://www.questionpro.com/akira/TakeSurvey?id=1402967>

If you have questions about the study, please contact me, via phone call, email, fax, or regular mail.

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