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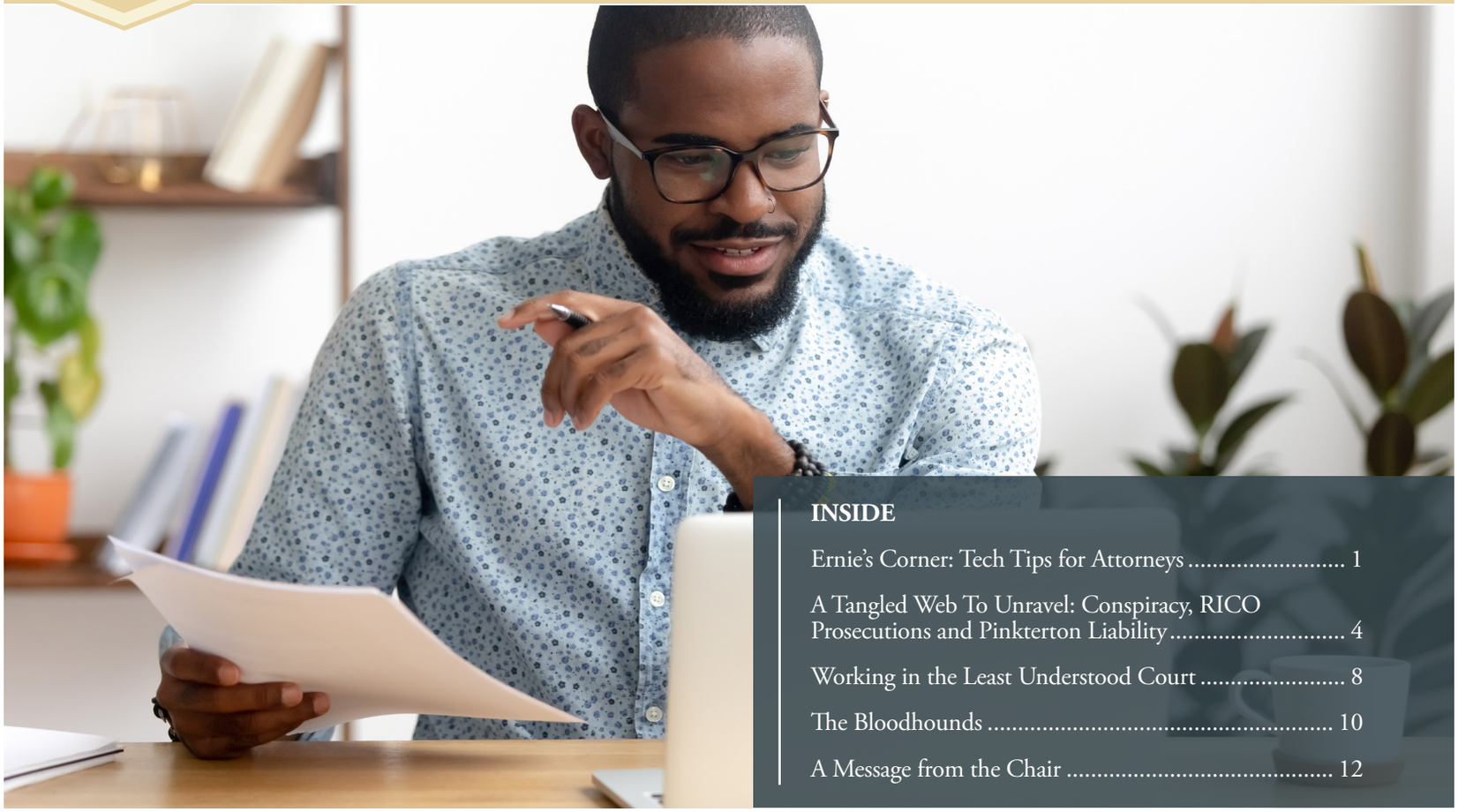

INSIDE

Ernie's Corner: Tech Tips for Attorneys

By Ernie Zore

My last submission to the Solo, Small Firm & General Practice Section Newsletter may have gone too far. It seemed I had hardly hit the "send" button when I realized I had more things to add about what I wrote. It reminded me of something I once read about oral argument. Fundamentally, oral argument falls into three categories: the one you prepared, the one you gave, and the one you wish you would have given.

So, in the spirit of the third category, two of the items in this issue's Corner are addendums. The first, however — about working from home — is new, timely, and one I think you'll find interesting.

Working From Home on a Shoestring Budget

Does a solo or small law office need to spend a lot of money on a cloud-based system to work from home? The short answer is no. A complete cloud-based system will dazzle you with what it can do, but small offices may not want to pay the price — and it's usually a pretty hefty one. All is not lost. I'll show you three low-tech ways to work from home ranging from "stupid simple" to free and easy.

The first method will cost you $5 or $10 if you don't already have a USB memory stick (aka flash drive, thumb drive, USB removable drive). It doesn't come any easier than this. Assuming there are a couple of clients you want to work on this week, you copy the client folders (or necessary files) to the stick. That's it.

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You take the stick home, plug it in your computer, and whistle while you work.

Aside from the cost, another advantage is you don't need an internet connection. It's a simple and effective way to work from home. The weak spot in this method is the lack of flexibility. That's because you can only work on files you had the foresight to bring home. If your work trail leads you to require other files, too bad. Consequently, this method may require an occasional trip to the office to replenish your supply of files. Another danger with this method is that if your back-andforth routine is interrupted (interruptions in a law office, is that possible?) you better not get confused about which file - the one on the stick or the one on the computer - is the latest, or bad things can happen.

The second method you might try is also inexpensive and, in many cases, free. I'm referring to the cloud. Cloud is "computerese" for remote storage. That means when you save a file, it's being stored on someone else's hard drive instead of the one built into your computer. The main advantage is that files stored in the cloud are accessible to you from wherever you happen to be. So, if your office stores its files in the cloud, you can work on them from your home computer or from anywhere using your laptop. Unlike the stick method, you'll significantly reduce your trips to the office because you don't need to plan your week of work. Depending on where you are, a possible weak spot is that you need a reliable internet connection. How do you get cloud storage? You may already have it. If you have Microsoft Office, cloud storage (it's called OneDrive) comes as part of the package. It's not difficult to start using it without knowing it. If you don't own Office, don't feel cast out. There are plenty of free clouds out there. Google, Amazon and Apple are three of the biggies, and there are probably a dozen or so more.

The third method and the one I use most is remote connection software. It's the one the Jack Benny in me loves the most. I found it free on the internet by Googling "free remote connection software," and got Google Chrome Remote Desktop plug-in. How's that for irony? I've been using it for a year or more, and it works super for me. If you're not familiar, remote connection software allows you to use your office computer from home. Yes, an internet connection is required, just like the cloud, but instead of only file storage, I can actually use the office computer. One advantage is that it is not necessary to have applications you're going to use - Microsoft Word for example - installed on both machines. Anything I can do on my office computer, I can do from home. One drawback is that only one connection is allowed per computer, but it hasn't been a problem for me. There are free trials out there as well as paid versions. I've tried several and almost always been satisfied. TeamViewer and LogMeIn are two.

The One I Wish …

All-In-One. Everything I said in the last issue about laptops was accurate. As computers go, notebooks are top sellers (along with tablets) just about doubling desktop computers in sales. I included the performance rankings of laptops because they were the product of a reputable, national consumer testing organization and because they could be helpful if you're in the market. I have a 17" HP Pavilion laptop that I use when I'm not at home or in the office, and it's an excellent *second* computer. Yes, the emphasis is on the word second. Don't get too caught up in the popularity of notebook computers, especially if you intend to make it your workhorse. It looks classy in advertisements to see someone lounging on the couch with their laptop in their lap, but that's not the way law offices get work done, either at home or the office. You need to be sitting at a desk, and there's no substitute for a full-size, IBM Selectric-style keyboard, a large monitor and a standard mouse instead of a scratchpad.

That's the reason I included the laptop to desktop conversion bit with it's accompanying YouTube video, and that's also the reason for providing you with more rankings; this time of my favorite desktop computer - the all-in-one. Here are the top five:

- Apple 27" iMac 5K Display (2019, MRQY2LL/A); Score—88; $1,800
- Apple 21.5" iMac 4K Dislay (MNDY2LL/A); Score—86; $1,500
- Apple 21.5" iMac (MMQA2LL/A); Score—83; $1,100
- Asus Zen AiO (AN242GDT-08); Score—79; $1,100
- Lenovo Ideacentre (520-24ARR); Score—75; $550

As a primary law office computer, I recommend a Windows computer, and that seems to annoy Mac owners. In my defense, I have two iMacs, and they are the two best computers I have out of about a dozen. That said, if you want a primary computer for your office or home, I advise getting a Windows computer. One not insignificant reason is cost. Notice that you can buy three top-rated Lenovo Ideacentres for the price of one 27" iMac. Another reason is that some companies do not have Mac versions of their software available. Therefore, Mac owners use Windows emulation software, which turns the Mac into a Windows machine. What's the point of that?

Passwords Reexamined

When I submitted my last article, I mentioned - lawyers call it *dicta* - that over the years, I had accumulated nearly 300 passwords, and I used a spreadsheet to store them all. That's when I received an email informing me that that was not a safe way to keep track of passwords. The email was from the OSBA's Senior Manager of Public Outreach and Content Editor, Annie Yamson.

I don't know all of what content editing entails, but part of Annie's duties are keeping people like me from misleading people like you. As a result, we agreed to delete my spreadsheet recommendation.

Not being satisfied with imparting only one bit of bad advice, I went on to my second faux pas when I mentioned that long, complicated passwords were a pain to enter when all you see are dots. I related a recommendation of a technician I happened to talk to who advised typing a password in Notepad where you can see it and then copying and pasting it into the login screen (or whatever). This was also thought to be to an unsafe practice.

Shortly after the article was published, I got to thinking: What if the spreadsheet was password protected and encrypted? Would that be considered safe? And what's the objection to a quick copy and paste if no one can see you type, and there is no permanent record of the password?

Annie got back to me with these guidelines on best practices for password storage from the OSBA's Director of Information Technology and the OSBA's Chief IT Officer:

> "Excel spreadsheets should never be used for password storage. Even password-protected spreadsheets are easily hacked, so they will only slow down a novice. A third-party password app or your browser (or operating system) built-in password capabilities are more attractive because of the level of professional encryption used by the third-party apps, browsers and OSs.
>
> As a hacker, once you have access to a system, the best thing that can happen next is to locate a file containing other passwords. If that file is not encrypted, it makes it easy to hack further. If that file is encrypted, it's often a simple task to break the security of a single file that uses light encryption. There are plenty of utilities out there, for instance, that can hack the older password-protected Excel files quickly.
>
> **There are a few good options:**
>
> 1. Whenever possible, use **multi-factor authentication**. What this proves is that the user has control of at least two ways to prove their identity. For example, two factor authentication might use an email address and mobile phone for validation. If you're trying to reset your password, the site might send a text to you with a code. This proves that you have control of both your email and mobile device
>
> 2. Use a **password vault with strong encryption**. This is the best method for securing user names and passwords. That way, you can generate random passwords that are very strong, and you only have to remember one strong password."

There you have it. Thanks, Annie!

It always has been and continues to be a privilege to share my thoughts with you, and my personal thanks goes out to you readers and solo/small firm practitioners for allowing me to do so. If you have a question, comment, or idea, let me know by email.

Until next time, be happy and healthy.

A Tangled Web To Unravel: Conspiracy, RICO Prosecutions and Pinkterton Liability

By Joseph "Randy" Klammer, Esq.

The Racketeer Influenced and Corrupt Organization statute (RICO)[1] was enacted as part of the Organized Crime Control Act of 1970. It has been described as "a complex, powerful, and controversial law."[2]

Prosecutors and defense attorneys continue to debate whether the act is over or underused. To the defense, it is a dangerous tool of prosecution. The United States Attorney Manual explains that the RICO statutes effectively give prosecutors an end run around the elements of the substantive criminal offense "[b]y making it a crime to acquire, receive income from, or operate an enterprise through a pattern of racketeering, RICO allows prosecutors to abandon a reliance on discrete statutes. Instead, they can prosecute patterns of criminal acts committed by direct and indirect participants in criminal enterprises."[3]

The United States Department of Justice/Criminal Resource Manual § 2482 reads that:

> A defendant in a case charging a conspiracy may be liable for each of the substantive counts charged in an indictment under three separate theories:
>
> 1. Actual commission of the crime;
> 2. Participation in the crime as an aider or abettor;
> 3. Liability under a *Pinkerton* theory.
> 4. Defendants that find themselves the subject of a RICO indictment will read closely that the indictment very likely charges all three.

One will see from the outset how truly complicated it is to defend these cases. The overlapping between these approaches create a very complicated web to unravel. If simple aider and abettor and conspiracy liability were not enough, the Pinkerton doctrine is a judicially-created rule that makes each member of a conspiracy liable for crimes that other members commit to further their joint criminal design.

In *Pinkerton v. United States*,[4] the Court held that the substantive acts of one co-conspirator to advance the ends of the conspiracy "may be the act of all" in the conspiracy "**without any new agreement specifically directed to that act.**"[5] (emphasis added.) Pinkerton's focus is on the substantive offenses as opposed to merely the overt acts. The only limitation suggested in Pinkerton is where the substantive offense "did not fall with the scope of the unlawful project, or" was not reasonable foreseen as a consequence of the criminal plan.[6]

At first glance, Pinkerton seems just to be aider and abettor liability or complicity liability. Looking closer, it is important to understand it in the distinction between an overt act and the substantive offense. Remember that an overt act is an act done openly to manifest desire that the object of the conspiracy be completed. Often the substance offense is the overt act, but not always. It was well settled that a co-conspirator is responsible for the overt acts of a co-conspirator. But could a co-conspirator then be guilty of a substantive offense committed solely by a co-conspirator. Pinkerton ultimately held that a co-conspirator can be convicted of substantive offenses committed by a co-conspirator so long as it was reasonably foreseeable that the substantive offense was within the scope of the unlawful project.

Where this becomes incredibly dangerous is when the conspiracy involves multiple co-conspirators some of whom may not even know each other. For instance, "[a] hub-and-spoke conspiracy is one in which a "'key man' [or hub] directs and coordinates the activities and individual efforts of various combinations of people.'"[7] It is settled that "[i]t is irrelevant that particular conspirators may not have known other conspirators," because when a "'key man' directs and coordinates the activities and individual efforts of various combinations of people," the hub may be properly convicted of a single conspiracy.[8] Ohio Courts follow the Pinkerton rule finding a defendant "vicariously guilty of the object crimes committed in furtherance of the conspiracy by any of the other conspirators."[9]

Then add to this complex mix, the rules of evidence excepting co-conspirator statements from hearsay and allowing co-defendants to be tried together and the legal and factual battle will be like no other. A defendant might then find herself defending statements of alleged co-conspirators some of whom she may never met. Conspiracy law is rather straightforward. Take just 18 U.S.C. § 1349, which reads "[a]ny person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." To establish a charge of conspiracy, the government must prove (1) a unity of purpose (2) an intent to achieve a common illegal goal, and (3) an agreement to work towards that goal, which the defendant knowingly joined.[10]

The focus of a conspiracy prosecution will always be on the agreement. You will hear the prosecutor's refrain, "We only need to prove the agreement." There can be no conspiracy without evidence that the defendant agreed to work with someone else, but in a conspiracy, "rarely is there direct evidence of a qualifying agreement."[11]

Although an overt act is an element under the general conspiracy statute in 18 U.S.C.A. § 371, which requires as an element that one or more of the conspirators "do an[ ] act to effect the object of the conspiracy," some conspiracy statutes like 18 U.S.C.A. § 1349 and 18 U.S.C.A.§ 286 do not contain an overt-act requirement. If being charged with conspiracy was not dangerous enough, no allegation or proof of an overt act will be required at trial.[12] It is just the agreement you will hear.

Federal Rule of Evidence 801(d)(2)(E) provides that a statement is not hearsay if the statement is offered against an opposing party and was made by the party's co-conspirator during and in furtherance of the conspiracy." In *United States v. Enright*,[13] the Sixth Circuit directs that before a statement by a co-conspirator can be admitted as non-hearsay pursuant to Fed.R.Evid. 801(d)(2)(E), the party offering it must show by a preponderance of the evidence that (1) the conspiracy existed; (2) the defendant was a member of the conspiracy; and (3) the co-conspirator's statements were made in furtherance of the conspiracy.[14] In a similar manner, Ohio's Evid.R. 801(D)(2) exempts co-conspirator statements from the definition of "hearsay."

Pursuant to Fed.R.Evid. 104, the Court should make a finding regarding the admissibility of party admissions. This is colloquially referred to as an Enright hearing. In making an Enright finding, "a mere conclusory statement will not always suffice."[15] The reason these co-conspirator statements are dangerous is that "out-of-court statements are presumed unreliable." As such, the amount of independent evidence required to support an Enright finding "is not merely a scintilla, but rather, enough to rebut the presumed unreliability of the hearsay."[16] Independent evidence to support the finding requires some evidence other than the proffered co-conspirator statements. The government though still bears the burden of proving these three factors but only by a preponderance of the evidence.[17]

Moreover, although the rule does not require that both parties be co-conspirators; it does require that "the statement to be 'offered against a party' and be made by 'a co-conspirator of a party during the course and in furtherance of the conspiracy.'"[18] Culberson is an example of the dangers of extended conspiracies. During his trial, the government introduced a recorded statement between his co-defendant and an unindicted cooperating former co-conspirator. Those statements were admitted against Culberson.
A statement is in furtherance of a conspiracy if it is intended to promote the "objectives of the conspiracy."[19] The Sixth Circuit, in Warman, described the "in furtherance of" requirement as "[w]e have found statements to be in furtherance of a conspiracy where they "identify other co-conspirators and their roles, 'apprise other co-conspirators of the status of the conspiracy, or indicate 'the source or purchaser of controlled substances.'"[20]

Look closely first at the language in the statement. Mere "narrative declarations" by a co-conspirator concerning conspiracy activities or culpability are not considered to be in furtherance of the conspiracy.[21] Moreover, "mere idle conversation" and merely "retrospective statements" are not admissible."[22] Statements which simply describe the events that occurred are not made in furtherance of the conspiracy.[23]

Remember too that it is not so easy to leave a conspiracy. A conspiracy is only terminated when its "central criminal purposes" have been accomplished.[24] Statements designed to conceal an ongoing conspiracy are made in furtherance of the conspiracy for purposes of Rule 801(d)(2)(E).[25] A statement made by a co-conspirator after the crime may be admissible under Evid.R. 801(D)(2)(e) if it was made in an effort to conceal the crime.[26] It is the same under Ohio law: "A conspiracy does not necessarily end with the commission of the crime. A statement made by a co-conspirator after the crime may be admissible under Evid.R. 801(D)(2)(e) if it was made in an effort to conceal the crime."[27]

The Sixth Amendment confrontation right provides little comfort either. The Supreme Court held the right to confrontation applies to all "testimonial statements."[28] To determine whether a statement is testimonial in nature, the proper inquiry is "whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime."[29] In Crawford, the Supreme Court noted that a statement made in furtherance of a conspiracy is an example of an inherently non-testimonial statement.[30]

A testimonial statement by a co-defendant is something different; although *Bruton v. United* States,[31] provides a path for the government to nonetheless admit these statements. In Bruton, a postal inspector testified at trial that one of two co-defendants charged with armed postal robbery had confessed that he and Bruton had committed the crime. The United States Supreme Court found the admission of this confession "posed a substantial threat to petitioner's right to confront the witnesses against him[.]" The Supreme Court also held this problem could not be cured by limiting instructions to the jury, stating that "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination."

A Bruton problem can be "remedied" by: "(1) exclusion of the confession, (2) severance of the trial, or (3) redaction of the confession to avoid mention or obvious implication of the non-confessing defendant."[32] Redaction of the statement, however, may still result in a Bruton violation if "the circumstances of the case and other evidence admitted virtually compel the inference that 'blank' is [the defendant]."[33] Nonetheless, Courts seem generally inclined to redact as opposed to severing trials which brings with it additional burden on the judiciary.

Whenever a defendant raises the Bruton issue, the government will likely first assert that joinder of defendant is proper per Fed.R.Crim.P. 8(b). The rule provides that two or more defendants may be charged "in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count."

The government will also argue that "[t]he general rule in conspiracy cases is that persons indicted together should be tried together."[34] The government will argue that redaction is enough and that "[w]here a jury must look to other trial evidence to link a defendant to a redacted confession, the Confrontation Clause 'calculus changes' sufficiently to remove the statement from Bruton's protective rule."[35] In essence, the government will argue that it will redact and then let the jury figure out who's name was redacted. With that, although Bruton purports to protect a defendant's Sixth Amendment Right of Confrontation, it provides the government a roadmap to end run around that fundamental right.

With the case law generally supporting the government with all these issues, an appeal is often inevitable. There remains a very real issue of preserving a Bruton issue for appeal as there is still a split among circuits. As far as the Sixth Circuit state of the law, in *United States v. Ford*,[36] the Court did little more than to acknowledge the existence of a circuit split on this question and declined to "wade into this circuit split."

In 2016 in *United States v. Al-Din*, the Sixth Circuit cited Ford and again refused to consider the issue. It wrote:
We review preserved evidentiary challenges based on the Confrontation Clause de novo. *United States v. Vasilakos*, 508 F.3d 401, 406 (6th Cir.2007). When unpreserved, we review for plain error. *United States v. Ford*, 761 F.3d 641, 652 (6th Cir.2014). Generally, a defendant must contemporaneously object to the introduction of disputed evidence or forfeit his claim on appeal. Id. at 653. In this case, Walee and Lewis moved with their codefendants to sever Mustafa's case on the ground that admission of his statements violated *Bruton*, but failed to object when Kranich and Gill used the redacted statements to testify at trial. "Our circuit has not decided whether a motion to sever [alone] preserves a *Bruton* objection. The circuits to consider this question have split on the answer." *Id.* (collecting cases). We do not resolve that question here, because even under de novo review, admission of Mustafa's statements did not violate Walee's and Lewis's confrontation rights. *Id.* at 654.[37]

Not knowing how the Court might rule on preserving the Bruton issue is instructive enough. It should go without saying at this point, that the issue should be preserved both by a pretrial motion to sever as well as an objection at trial. That trial objection should of course be presented to even redacted statements. In fact, the Eighth District Court of Appeals also questioned whether merely objecting without identifying Bruton as the basis was sufficient to preserve the issue for appeal.[38]

Remember to appropriately "federalize" an objection. For instance, in *Duncan v. Henry*,[39] the defense objected to certain "other acts" evidence during a criminal trial by referencing the relevant California Rule of Evidence. The objection was overruled. Ultimately, Henry petitioned the federal court for a writ of *habeas* corpus and alleged that the evidentiary ruling denied him due process as provided by the United States Constitution.

The United States Supreme Court held that Henry's failure to state each and every state and federal constitutional, statutory and evidentiary rule basis had the effect of a waiver of the due process claims.[40] The arguable effect of this ruling requires a litigant to now state *ad nauseam* the "book and verse of the federal constitution" when making evidentiary objections. The trial court of the Eastern District of Michigan though suggests that the rule need not be so strict, "[r]ather, all that is required is that the federal constitutional issue be fairly identified and presented to the state court in such a way that the state court has an opportunity to be alerted to the existence of a federal constitutional question and

have the opportunity to pass on the question."[41] It serves to support that the question of preserving appellate rights though requires the utmost caution.

Some Courts understand this problem. In those instances, a pretrial motion we caption Motion for Inclusive Objections will certainly streamline matters and protect a defendant's appellate and habeas rights. The motion simply states the problem presented by *Duncan v. Henry* and motions the court to rule that every objection inherently states every state and federal constitutional basis.

Even at the appellate stage, these cases have so many moving and overlapping parts. The webbing created by complicity, Pinkerton, co-conspirator statements and RICO is incredibly tight. From the outset defense counsel should try to unwind and separate these issues whereever possible. Know though that this will be no easy task.

Endnotes

[1]18 U.S.C. 1961-1965
[2]Morgan, Virginia, Civil RICO: The Legal Galaxy's Black Hole, University of Akron Law Revie, Vol. 22:2, (Fall 1988), https://www.uakron.edu/dotAsset/ea46cfff-07b0-417e-974f-2da7f12ffb0e.pdf
[3]U.S. Department of Justice, Local Prosecution of Organized Crime: the Use of State RICO Statutes, October 1993, NCJ-143502, https://www.bjs.gov/content/pub/pdf/lpocusricos.pdf
[4]328 U.S. 640 (1946)
[5]*Id*. at 646-647
[6]*Id*. 648.
[7]*United States v. Barsoum*, 763 F.3d 1321, 1330 (11th Cir. 2014), citing *United States v. Richardson*, 532 F.3d 1279, 1284-1285 (11th Cir.2008); *United States v. Edouard*, 485 F.3d 1324, 1347 (11th Cir.2007).
[8]*Barsoum* at 1330, citing *Richardson*, 532 F.3d at 1284–85, 1286.
[9]*State v. McFarland*, 2018-Ohio-2067, ¶ 33, appeal allowed in part, 2018-Ohio-4495, ¶ 33, 154 Ohio St. 3d 1421, 111 N.E.3d 19 (Proposition of Law No. 1 accepted regarding conspiracy liability.)
[10]*United States v. Boria*, 592 F.3d 476, 481 (3d Cir.2010); *United States v. Pressler*, 256 F.3d 144, 149 (3d Cir.2001).
[11]*Pressler*, 256 F.3d at 149.
[12]*United States v. Chinasa*, 789 F. Supp. 2d 691, 695–97 (E.D. Va. 2011), aff'd, 489 F. App'x 682 (4th Cir. 2012).
[13]579 F.2d 980, 983-984 (6th Cir. 1978)
[14]See *United States v. Wilson*, 168 F.3d 916, 920 (6th Cir.1999).
[15]*United States v. Curro*, 847 F.2d 325, 329 (6 Cir. 1988).
[16]*United States v. Clark*, 18 F.3d 1337, 1342 (6 Cir. 1994).
[17]*Wilson* citing *Bourjaily v. United States*, 483 U.S. 171, 176, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987).
[18]*United States v. Culberson*, Nos. 07–2390, 07–2425, 2009 U.S.App. LEXIS 6384, 2009 WL 776106, at *4 (6th Cir. Mar.24, 2009) (unpublished).
[19]*United States v. Warman*, 578 F3d 320, 338 (6th Cir. 2009) (discussing the "in furtherance of" requirement and citing Clark, 18 F3d at 1342.
[20]*Id*.
[21]*United States v. Fielding*, 645 F.2d 719, 726 (9th Cir. 1981) (per curiam).
[22]*United States v. Phillips*, 664 F.2d 971, 1027 (5th Cir. 1981) cert. denied, 457 U.S. 1136 (1982); *United States v. Lieberman*, 637 F.2d 95, 102-03 (2d Cir. 1980).
[23]*State v. Weimer*, 2016-Ohio-3116, ¶ 45, 66 N.E.3d 50, 60, citing *State v. Braun*, 8th Dist. Cuyahoga No. 91131, 2009-Ohio-4875, 2009 WL 2963759, ¶ 109.
[24]*Grunewald v. United States*, 353 U.S. 391, 401-02 (1957); accord *United States v. Papia*, 560 F.2d 827, 835 (7th Cir. 1977).
[25]*United States v. Payne*, 437 F.3d 540, 546 (6th Cir. 2006).
[26]*Braun v. Morgan*, No. 1:11 CV 00886, 2014 WL 814918, at *38 (N.D. Ohio Feb. 25, 2014), citing *State v. Siller, Cuyahoga App. No. 80219, 2003–Ohio–1948*.
[27]*State v. Weimer*, 2016-Ohio-3116, ¶ 44, 66 N.E.3d 50, 60, citing *State v. Braun*, 8th Dist. Cuyahoga No. 91131, 2009-Ohio-4875, 2009 WL 2963759, ¶ 109.
[28]C*rawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)*, at syllabus.
[29]*State v. Metter*, 11th Dist. Lake No. 2012–L–029, 2013-Ohio-2039, 2013 WL 2153953, ¶ 35, quoting *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir.2004).
[30]*Id*. at 56, 124 S.Ct. 1354.
[31]391 U.S. 123, 137 (1968)
[32]*Stanford v. Parker*, 266 F.3d 442, 456 (6th Cir. 2001).
[33]*Stanford*, 266 F.3d at 456 (citations omitted).
[34]*United States v. Flannery*, No. 3:09-CR-92, 2010 WL 3283024, at *2 (E.D. Tenn. Aug. 18, 2010), citing *United States v. Smith*, 197 F.3d 225, 230 (6th Cir.1999).
[35]*United States v. Jass*, 569 F.3d 47, 64 (2d Cir. 2009).
[36]761 F.3d 641, 654 (6th Cir. 2014)
[37]*United States v. Al-Din*, 631 F. App'x 313, 321 (6th Cir. 2015)
[38]*State of Ohio vs. Mack*., No. 42284, 1980 WL 355479, at *2 (Ohio Ct. App. Dec. 24, 1980)
[39](1995), 513 U.S. 364.
[40]*Id*. at 366.
[41]*Barker v. Yukins*, 993 F. Supp. 592, 597 (E.D. Mich. 1998), reversed on other grounds in 199 F.3d 867, 870 (6th Cir. 1999).

Working in the Least Understood Court

By Magistrate Shibani Sheth-Massacci

I have the unique role of serving the Eleventh District Court of Appeals in three positions: magistrate, court administrator and mediator. The Eleventh District Court of Appeals is one of twelve appellate districts in the state of Ohio. Our jurisdiction consists of Ashtabula, Geauga, Lake, Portage and Trumbull Counties.

What Cases Does the Court of Appeals Hear and How Are Cases Decided?
Article IV, Section 3 of the Ohio Constitution provides the authority for courts of appeal to review appeals from county courts, municipal courts and common pleas courts, as well as original actions in habeas corpus, mandamus, prohibition, procedendo and quo warranto. Each case on appeal is reviewed by a panel of three judges. One judge on the panel is randomly assigned to write a decision after reviewing the record and the briefs filed in the case. The decision, once released, may be appealed to the Supreme Court of Ohio.

Most cases begin in the trial courts. In the trial court, both sides present evidence to show their version of what happened. In the appellate court, there are no witnesses, no evidence is presented and there is no jury. The lawyers or parties argue legal and policy issues before a panel of three judges, who determine the outcome of all appeals.

A big misunderstanding about appellate courts is that they simply rehear the case. But the truth is that appellate courts do not rehear the facts of the case. Appellate courts focus on questions of law,

NOT on questions of facts like the trial courts. It is an "error" court. The appellate judges want to know what error occurred at the trial court level, whether the law was applied accurately. The appellate court overrules a trial court decision only if a very important legal error was made in the trial court. In some cases, the appellate court judges might believe that the outcome of the trial court should have been different, but if no legal errors were made, they will not overrule the lower court. The appellate judges make their decisions based only on legal arguments of how the law should be applied and interpreted.

Supporting the Work of the Court of Appeals

I am an appellate court magistrate. Magistrates are judicial officers who, rather than being elected like judges, are appointed by the judges. A magistrate must be an attorney with a minimum of four years of experience practicing law and in good standing with the Supreme Court of Ohio. Magistrates have become vital to an efficient justice system in Ohio courts. As of August 2018, the state of Ohio had 820 Magistrates and 14 of them were appellate court magistrates.

I was appointed as a magistrate by my judges in 2007. In my role as a magistrate, I conduct an initial review of all pre-briefing motions. I prepare opinions, as needed, for the judges in civil matters and I am responsible for the disposition of routine procedural motions for all appellate matters. I handle many of the motions prior to cases being assigned to judges, including issuing the scheduling orders. I also conduct evidentiary hearings or other hearings as requested by the judges and issue magistrate's decisions. Magistrate rulings are subject to review by the judge assigned to the case.

As the court administrator, a role I have had since 2009, I am responsible for the day-to-day background tasks necessary to keep the court running efficiently. I plan and oversee the court's administrative operations, facilities, budget,and case management procedures and act as a liaison between the court and the public or private sector, as well as the state and local government.

For the Eleventh District Court of Appeals, I manage an administrative staff of five people for the court and often work closely with our five judges. I review procedures and local rules with the judges and receive their approval regarding budget and finance matters. I monitor lawsuits involving the court or individual judges. I am also responsible for preparing any grant requests made to the Supreme Court of Ohio for any technological and security upgrades that are needed for our court.

In addition to my roles as magistrate and court administrator, I also serve as the court's mediator. I was trained and selected by the court in 2005 to serve as the mediator and have been serving in that capacity since that time. Although several of the court administrators in the state of Ohio are also magistrates, no other court administrator is their respective court's mediator.

The mediation process at the court of appeals is an informal, confidential process in which the parties to an appeal work with an impartial mediator to assist them in reaching a negotiated resolution of their case. As the mediator for the Eleventh District Court of Appeals, my goal is to provide the parties a fair and speedy resolution of their dispute without unnecessary delay and additional expense.

I conduct the conferences either in-person or by telephone. In a mediation conference, the parties have increased control over the process and the outcome. The parties have direct contact with the other parties and can hear and understand the other side's point of view. The process is less adversarial and hostile and allows the parties to assess the strengths and weaknesses of both sides of the case. Creative resolutions can be reached during a mediation conference and the agreements reached usually conclude the parties' disputes.

Over the last 15 years, I have had a successful appellate mediation program for the court. I select which civil cases to mediate. These include general civil, domestic, probate, administrative and municipal court cases. In 2019, I reviewed a total of 207 civil cases. Of those, 89 were selected for mediation. After conducting anywhere from one to several conferences on those 89 cases, an agreement was reached in 57 of them.

When compared to the adjudication process of an appellate decision at the Eleventh District Court of Appeals, which takes on average nine to twelve months from the time an appeal is filed to final decision, a case that goes through our court's mediation program can be resolved and dismissed within a few months. Currently, nine of 12 appellate districts, along with the Supreme Court of Ohio, have a mediation program.

In addition to reducing the caseload, appellate mediation can also potentially prevent conflicts from going back down to the trial courts and going up to the Supreme Court of Ohio. At times, there are other related matters to the appeal before our court that may be pending at other levels, and appellate mediation can allow for a global resolution. This results in saving parties thousands of dollars and months, or even years, of litigation.

Although my three roles keep me extremely busy at the court, every day brings new excitement and challenges.

Helpful Tips

The court of appeals is often referred to as the court of last resort because most appeals to the Supreme Court of Ohio are discretionary. Most attorneys hope they do not have to find themselves in the court of appeals, but if they do, here are a few tips: Read the Ohio Rules of Appellate Practice AND the local rules of court before filing a notice of appeal, motions and briefs; encourage your clients to consider mediation; and court administrators are happy to assist.

Out of the Office
Learn about the hobbies and talents of your fellow practitioners.

The Bloodhounds

By Bradley Le Boeuf
An original work of short fiction

Darwin Blunderbuss saw a get-rich-quick idea knock him in the head harder than when he played a drunken game of "pin the tail on the donkey" with a live donkey. Darwin claimed his kennel of bloodhounds could sniff out a case of coronavirus with test results quicker, cheaper, and more accurately than a room full of clinicians at the Centers for Disease Control and an entire zip code of private laboratories headquartered in Palo Alto.

The dog trainer had already made himself president, CEO, and majority owner in his new enterprise, Bloodhound Detection Unlimited, Ltd., and was soliciting some much needed extra capital from prospective business partners. So far, Darwin had burned through six hazmat suits training his bloodhounds to detect coronavirus before announcing the dogs' touted "99.9 percent accuracy" for quickly identifying a live coronavirus carrier. He had found it difficult to find any uninfected COVID-19 volunteers for his initial rounds of testing, particularly males who were understandably reluctant to stand too near an already contagious control sample and be sniffed uncomfortably close in the crotch by a barking dog with widely-known violent propensities. Desperate for representative samplings that could withstand scrutiny by his fellow dog-breeding peers, Darwin was forced to use paid subjects to complete his hasty experiments. The unanticipated start-up costs had already put him in the red.

Satisfied with their near-infallible accuracy in getting quick test results, Darwin was ready to advertise on the internet.

The potential investors witnessing Darwin's live webcast investment pitch were quick to argue about the choice of dog breed for the virus detection plan.

"Mr. Blunderbuss, why don't you just use a pointer dog, like an English Setter, instead of a bloodhound?" confronted a dubious banker. "A pointer dog can just point at the COVID-19 carrier, instead of using a bloodhound that will wake up the entire neighborhood. A barking bloodhound will make everyone the dog identifies positive seem like they're an escaped prisoner." The banker had overlooked the fact that many criminals had already obtained an early release from prison and the jails, the government leery of being stuck with astronomical medical bills for COVID-19 afflicted convicts.

"I agree," said another hollow-voiced potential investor, the legal representative member for a consortium of physicians. The three-piece pinstriped suited lawyer was smoking a cigar and obviously ensconced in a brick-walled home basement instead of the attorney's usual 38th floor corner office, despite the monitor screen showing an array of turgid, out-of-print books lining the bookshelves in the background. "HIPPA violations would be rampant. There could be false positives, resulting in slander and libel lawsuits. We don't want to invest buying a lawsuit." Darwin scoffed at the notion of someone suing a dog for defamation. Dogs usually had fixed addresses, but they rarely lived past eighteen years of age, had trouble signing their name, didn't necessarily comprehend the poll worker's request to prove their identification aside of displaying a current dog tag license printed only with first names as if the dogs were as famous as Lassie or Snoopy, and consequently, couldn't vote.

"The real limitation is to use only female dogs for the testing. Male dogs, if they sense a female dog in heat, will get too distracted and won't finish their job." explained Darwin, leery of being too more specific about the details to alert his potential competitors about the trade secrets of his aspiring business.

The rude rhetorical question numbed the audience into a moment of perplexed silence.

"I suggest that we convert all of the E-check stations into COVID-19 detection centers," chimed an otherwise bored realtor, already dreading an inventory of vacant commercial properties, a slew of evictions at closed courthouses, uncollectable receivables, and involuntary bankruptcies following record unemployment statistics.

A retired farmer from Wayne County balked at the realtor's suggestion. Ohio had 88 counties, and only seven counties had E-Check stations. Wayne County didn't have any emission testing facilities. Constructing new coronavirus testing centers throughout the state for the bloodhounds wasn't exactly an overnight barn-raising exercise.

Another uncertain investor, aware that one of her distant relatives lived in public housing and didn't have a car, protested about the testing limitations at drive-thru emission testing stations. In her opinion, coronavirus molecules floating in the air nearby were more lethal than inhaling auto exhaust fumes. "If poor people can't even go to the drive-in movies, how can they expect to travel to the drive-thru centers?" asked the gray-haired social worker from Zanesville, wondering if she should dip into her savings account to improve her retirement portfolio.

"Poor people can't get carryout at the drive-thru lines at Wendy's and McDonald's," observed the social worker. "Those restaurants don't allow walk-up service for customers. Patrons can't even use the hotspots for Wi-Fi connections. The libraries are closed, and not all schoolchildren have access to the internet at home to complete their homework. What are the alternatives?"

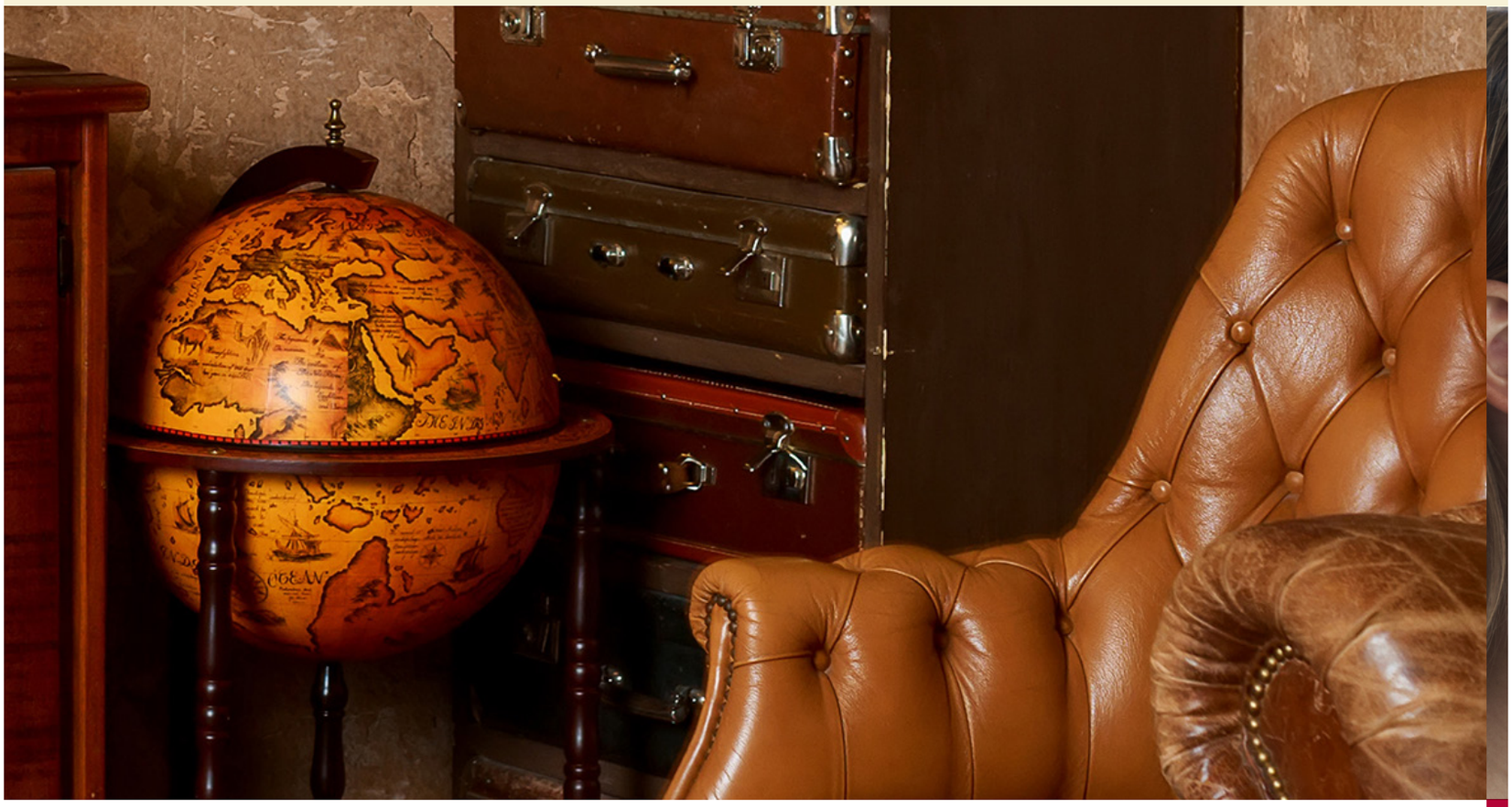
Darwin deflected his answer by combining it with addressing a previous question. "Just use a car wash. Every county in Ohio has at least one car wash. The car wash -- it's a covered space -- has drive-thru capability. My specially-trained teams of bloodhounds could take a whiff of every passenger, without anyone ever having to leave the comfort of their car. And if you really needed more space for testing, just open up the doors to one of those shuttered indoor malls, before they're torn down. Lord knows those shopping malls could use the business these days."

Darwin switched the webcast screen to a live feed of his bloodhounds, the dogs leaping at the camera and straining at their tethers as if they were waiting for the command to get to work. Sled dogs in Alaska waiting for the start of the Iditarod couldn't have been more excited.

"Who's ready to be a partner?" asked the dog trainer. "You've got to act fast!"

**This work is an original work of fiction and does not in any way reflect the views, opinions or artistic judgement of the Ohio State Bar Association.*

Bradley S. Le Boeuf is an Akron attorney and a frequent writer. His essays and commentaries have appeared in a variety of publications, including "The Washington Post," "The Plain Dealer," and the OSBA's own "Ohio Lawyer" magazine. He is a member of the Hudson Writer's Group in Hudson, Ohio.



A Message from the Chair

These are especially unique and trying times in the world. The novel coronavirus is running rampant, people are losing their jobs (hopefully only temporarily), whole industries are being shut down, entire sectors of the economy are being ground to a halt and then turned upside down. The full fallout of this global pandemic is yet to be seen.

But closer to home, the novel coronavirus also is wreaking havoc, especially for the Solo, Small Firm and General Practitioner. Clients are sheltering in place and are completely focused on staying safe and taking care of basic needs, let alone their legal issues. Not only that, some (most?) have lost their job or have had their hours and pay greatly reduced. They are just trying to make it. Entire court systems have come to a halt, severely limiting the ability of litigators to make a living. All of these factors and more directly affect the small firm practitioner to its core. The phones in our respective offices have stopped ring, the clients are not allowed to enter the office due to the contagiousness of the disease, and so on. It is a truly unique and trying time.

But there is hope. We can have hope in our leaders and the decisions they have to make to keep us safe and to protect the economy. We can have hope in friends and family and employees who care for us and love us as we love them. We also have hope that no matter what, we have been through hard times before. We have never let those hard times get the best of us, and we will not let the hard times get the best of us now. We are fortunate to live in one of the greatest countries in our time and in history. We are born and raised to weather these storms and we will.

On another note, I want to bring everyone's attention to the fact that we are still planning to have a Solo Institute on June 12, 2020. Originally, the institute was to be a full day with a partial day institute. However, due to the novel coronavirus, we are limiting the institute to just a full day on Friday and only by live webcast. We will have two national speakers: Cynthia Short and Nicole Black. Further, as an additional member benefit, the section will be offering a $150 discount for the first 100 section members who sign up for this institute! In order to capitalize on this offer, you must call in to the OSBA member services line and specifically request this discount be applied to your registration. I look forward to seeing you all there, virtually!

I hope this message finds you well. And above all my thoughts and prayers go out to all of you and your kin.

Robert Meyer IV
Solo, Small Firm and General Practice Section Chair

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