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## Features



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## Departments



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**Melodie Bellamy** is a Deputy Buffalo County Attorney practicing in both the criminal and civil divisions. She is also the sole proprietor of Bellamy Law, a firm specializing in appellate research and writing for other legal professionals. She graduated from the University of Nebraska College of Law with distinction in 1996 and clerked for the Nebraska Court of Appeals before joining the Buffalo County Attorney's Office in 2000.


M. Therese Bollerup

**M. Therese Bollerup** is the Chief Deputy Clerk of the U.S. District Court. She is a 1981 graduate of the University of Nebraska College of Law. She was formerly the law clerk for U.S. District Judge Joseph Bataillon in Omaha. She also was an adjunct professor at the UN-L Colleges of Law and Journalism and at Nebraska Wesleyan University, as well as a publications editor for NCLE.

Michael F. Kinney

# Legislative Update

*"You don't want to know how sausage or legislation are made."' – – Author Unknown*

As I write this article, the Unicameral is still in session, heading into debate and decision late into the night. Our contribution to that process came earlier. The NSBA Legislative Committee boasts more than 40 members and includes judges and practicing attorneys from across the State and from almost every field of practice. It meets once in December and twice in January each year (for about four hours each meeting). The discussion is lively, insightful and engaging. Every proposed piece of legislation is addressed and a position of support, opposition, or neutrality is taken with each Bill. As a mandatory bar, we are sensitive to the fact that many Bills may be viewed differently by plaintiff versus defense counsel, by prosecution versus defense counsel, or even within a particular area of practice (family law comes to mind). Thus, a position of neutrality is often maintained, especially when the legislation involves policy. However, even when remaining neutral, the Committee will oftentimes provide suggestions for improvement to the legislation.

Many members come just to watch the Committee Chair, **TOM MAUL**, sprinkle light and heavy doses of (Columbus) humor at just the right time. The man is a master at keeping this diverse and large group focused.

Our Legislative counsel, **WILLIAM MUELLER** and **KATIE WEICHMAN ZULKOSKI**, provide invaluable guidance on, among other things, the process, the legislative history, and the potential impact of particular pieces of legislation.

A lot of time was focused this year on LB800, Senator Brad Ashford's juvenile justice bill. On very short notice, **AMIE MARTINEZ** put together a blue ribbon committee of attorneys and judges from across the State to study the bill. As a result, the bill's current language incorporates NSBA concerns raised by many who work with juveniles. We are deeply indebted to those who participated.

We are also monitoring the budget crisis currently faced by our Supreme Court. Some of you have undoubtedly read about the travails of the Iowa courts this last year. I don't believe our situation is as dire, but we anticipate further reductions in the Supreme Court's budget. Fortunately, the Appropriations Committee is recommending a significantly smaller reduction in judicial salaries than is the Governor's office.

*Elisa Oria*

Continuing the practice of introducing you to your NSBA staff, meet **ELISA ORIA**. Elisa grew up in Plymouth, Nebraska, which is near Fairbury. She obtained her undergraduate degree in political science from Hastings College in 1997. She then decided to be all that she could be as a paralegal and joined the Army Reserve. Elisa trained at Fort Jackson in Columbia, South Carolina in 1998-99 and was then transferred to the 530th MP Battalion in Omaha where she worked as a paralegal from 1999 to 2006. At the same time, she came to the NSBA, initially starting out as Sam Clinch's assistant in 1999, working on member benefits, event planning and the pilot Barristers' Ball.

In 2005, she moved to Richmond, Virginia for one year where she worked as an executive assistant for a CFO/CCO of VCU Health Systems, a public, non-profit that supported the medical school at Virginia Commonwealth University.

This Nebraska girl was not destined to stay away long, and she returned to the NSBA as our IT Coordinator in July, 2006. Elisa is the web master for the NSBA web site and serves as an administrator for the data base. As IT Coordinator, she's not allowed to wander far from the office because she's the one who receives the frantic calls whenever something shuts down. It seems IT people are depended upon as heavily as doctors are.

It may not have actually been the NSBA that drew her back to Nebraska. It might have been sisters Kristina and Angelita Oria in Lincoln, or her parents, Joe and Bonnie Oria, in Plymouth. Elisa spends her spare time attending any sporting event that ends in "ball", plus hockey. If you ever need or want to change your personal profile on the NSBA web site (www.nebar.com) and need help, call Elisa at 402.475.7091. She would love to assist you.

*Jessica Wieland*

Another home-grown employee is **JESSICA WIELAND**, my niece. No nepotism scandal here. She got her job before I got mine.

Jessica came to us in 2006 after graduating from Creighton with a degree in Psychology (2001) and UNL Law School (2006). She trained for her NSBA job with a brief stint as a psychiatric technician at Richard Young immediately prior to joining us. Perfect.

Jessica facilitates our clinics in Omaha (the Latino Center of the Midlands, the Southern Sudan Community Association, and the Urban League of Nebraska). The focus at these centers is primarily on family law, with some limited detention immigration work (thanks also goes to **DAPHNE HYUN-JIN ARONSON** and her colleagues at **KUTAK ROCK** who have assumed responsibility for staffing the Latino Center most of the time, as well as all of the Urban League staffing).

In addition, Jessica assists with the Lincoln Self Help Desk twice a week. She is a very busy lady.

Jessica married Nick Aliano in 2005. He works for the Office of Technology and Development at UNL, n/k/a NUTECH Ventures, where he serves the investor community as a technology agent, assessing patentability and marketability. Their hobbies consist of trying new restaurants, gardening, and raising little Max (2). They travel to Omaha a lot between work and social commitments. Jessica's dad, **JOHN WIELAND**, practices with **SMITH, GARDNER, SLUSKY LAW** and her mother, Sue Kinney-Wieland, is a pediatric oncologist social worker for UNMC. Brother Joey is surviving his first year of law school at UNL and brother Matt is pursuing his MBA at Creighton and serving as a grad assistant coach with the Creighton men's soccer team where both brothers previously played, earning national academic and athletic accolades.

I can't overstate how lucky we are to have the staff we have. We are, indeed, very fortunate.

Go forth and be nice.

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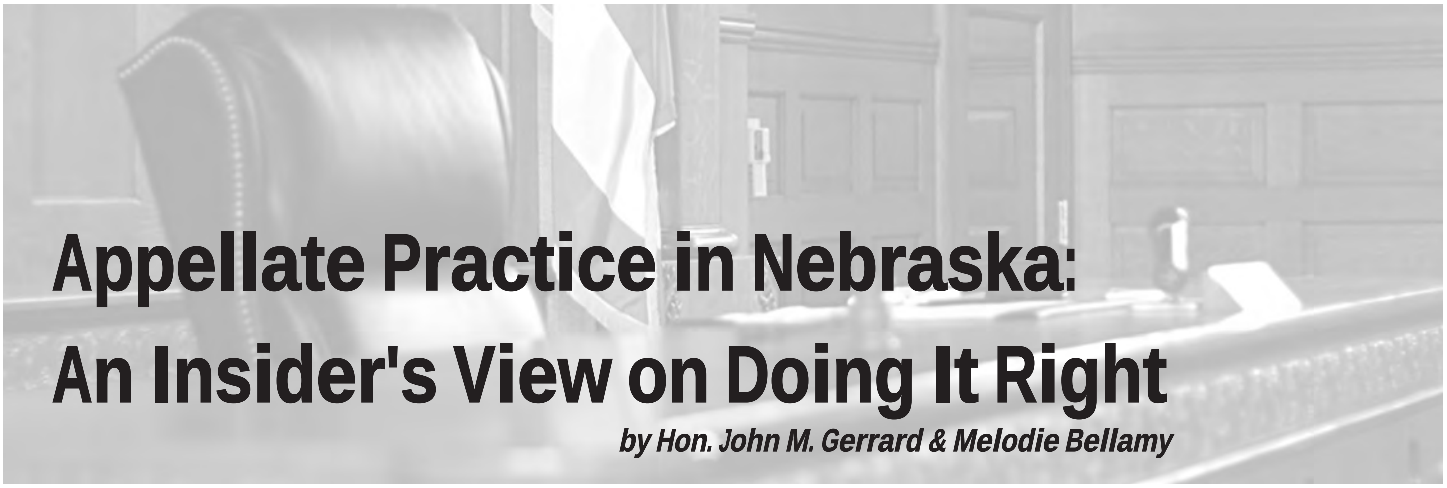

# Appellate Practice in Nebraska: An Insider's View on Doing It Right

*by Hon. John M. Gerrard & Melodie Bellamy*

How do I file an appeal? When is my brief due? What should I say at oral arguments? Unless you specialize in appellate advocacy, most of us only occasionally dabble in appellate work and probably don't know the answers to these questions off the top of our heads. In an attempt to give each of us some practical pointers on how to be a better appellate advocate, I asked Nebraska Supreme Court Justice John Gerrard to share his thoughts and insight on appellate advocacy in Nebraska with us. Here are his answers to my questions.

## Can you explain the process of what happens to a case once it is filed with the Clerk of the Court?

The first thing that happens is that the district court (or, in some cases, the county court) forwards the notice of appeal and other administrative materials to the Clerk of the Supreme Court and Court of Appeals, who dockets the case. The case will be preliminarily reviewed, primarily for jurisdiction, by staff attorneys of the Court of Appeals or Supreme Court. Then, assuming there is no problem with jurisdiction, the case will proceed with briefing.

### Hon. John M. Gerrard

**Hon. John M. Gerrard** has been a Justice on the Nebraska Supreme Court since 1995. Prior to being appointed, Justice Gerrard was a partner in the law firm of Gerrard, Stratton & Ptak, P.C., in Norfolk, where he was in a general litigation practice for 14 years.

## Briefing

### Where are the rules for brief submission located?

The most current versions of all of our court rules are on the Nebraska Judicial Branch web site, at http://www.supremecourt.ne.gov/rules. The rules for brief submission are, generally, in Neb. Ct. R. App. P. § 2-109.

Read the rules before you write a brief, and again before you file it. The rules are amended from time to time, so make sure you review them for every brief, and that you are looking at the most current version.

### How long does an appellant have to file a brief?

The brief is due one month from the filing of the bill of exceptions, or, if there wasn't a bill of exceptions, then two months from the filing of the appeal. A party can ask for an extension of time to file a brief, but may have to show cause, especially in advanced cases. You should not expect to be able to get more than one extension.

### Are there some rules that are more important than others?

The most important objective of a brief is to define and present the issues to be considered on appeal. If a party fails to present an issue properly, it is waived. Section 2-109(D)(1)(e) requires every appellant's brief to contain "A separate, concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error. Each assignment of error shall be separately numbered and paragraphed, bearing in mind that consideration of the case will be limited to errors assigned and discussed."

A close second is the statement of jurisdiction, which many attorneys don't take as seriously as they should. An appellant should make sure that the appeal is being taken from a final, appealable order. This is a complicated area of Nebraska jurisprudence and has undergone some changes over the years, so make sure that you are relying on the most recent authority available. If you are appealing from an order that has resolved all of the issues in an appeal--in other words, if there is nothing left to do in the trial court--then you probably have a final order. If there are still questions to be decided by the trial court--even if they are just procedural matters such as costs or attorney fees--then you will want to be sure that you have an order from which you can take an appeal. See, e.g., *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001). See, also, John P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239 (2001). Writing a careful statement of jurisdiction will help you find and address any jurisdictional questions. The purpose of the jurisdictional statement is twofold. First, it is intended to help the appellate court evaluate jurisdiction by providing easy reference to the necessary information. Second, it is intended to help you, by making sure that you have considered the relevant jurisdictional issues and included the necessary information in the record. If you find, while writing your brief, that the record does not contain all the information you need to include in your jurisdictional statement, you still have the opportunity to perfect an appeal or supplement the record with the needed documentation.

## What rules are most often broken by attorneys?

Perhaps the rule most often disregarded is that "each and every recitation of fact, whether in the statement of facts or elsewhere in the brief, shall be annotated to the record." It is not uncommon to see this rule disregarded, in the statement of facts and throughout the brief. And it is not very helpful when an attorney "cites to the record" by directing us to arguments, not evidence. When an attorney makes an assertion of fact in the brief, and then supports it by pointing out where he or she made the same assertion of fact to the trial court, we are still no closer to knowing where to find the evidence that supports that assertion.

And those annotations to the record are not just for the court's benefit. It is not hard for an attorney who has taken a case through a trial court to know the facts backward and forward, and assume that everything he or she knows about the case is reflected in the record, when it may not be. For example, sometimes objections and rulings are handled in a trial judge's chambers, or in a bench conference that is not recorded. A well-written statement of facts, with appropriate annotations to the record, helps the attorney make sure that he or she is only making arguments that are supported by the record, and perhaps to notice what is missing before the case is submitted, when there still may be time to supplement it.

## What section of a brief is the most important?

They are all important--and, in particular, the summary of the argument section allows you to clearly and succinctly define the appellate issue in a light most favorable to your client. But few parts of the brief are more important than the statement of facts; for however much the court may know about the applicable principles of law, it knows nothing of the facts of the case before the lawyers submit their briefs. The statement of facts should, in addition to giving the relevant procedural background in the case, relate to legally relevant facts in a logical order. (Chronological order is often, but not always, the best.) The brief writer should avoid giving a mere summary of the various witnesses' testimony in the order in which they appeared at trial. The purpose of the statement of facts is not to rehash indiscriminately the trial testimony, but rather to organize the facts of the case in such a way as to focus on the issues on appeal. Keep the statement of facts concise. Avoid rambling. And finally, do not misrepresent the facts. Opposing counsel is likely to call you on it, and the court will review the record in any event. You are not keeping anything secret by omitting or misstating the record. Instead, you are forfeiting your only opportunity to explain why unfavorable facts should not hurt your client, and you are sacrificing your own credibility in the process.

***Keep the statement of facts concise. Avoid rambling. And finally, do not misrepresent the facts.***

## Do I need to know the standard of review for my case?

Absolutely. You should know the standard of review before you write the brief, because the standard of review is as important to an appellate court as the burden of proof is to a trial court. Even if the standard of review works against you, you must confront that burden and try to meet it. You cannot prove what you need to prove without being aware and open about the standard you need to meet.

Do not forget that each issue on appeal has its own standard of review, determined by the question presented. Examples: An appellate court will independently decide questions of law. Questions of fact in law actions are reviewed for clear error. Equity cases are subject to de novo review. Marital dissolution cases and child custody disputes are reviewed de novo for abuse of discretion. Most evidentiary rulings are reviewed for abuse of discretion. So, you need to be aware of the standard of review for the kind of case on appeal, and the particular issue that has arisen in the case.

## What is the most common mistake made by attorneys when writing a brief?

Probably trying to do too much. The shotgun approach is not generally successful in a law school exam; it is even less successful in a brief. Hit the issue or issues right away and head on. Read, for example, *The Deep Issue; A New Approach to Framing Legal Questions* by Bryan A. Garner found in the Scribes Journal of Legal Writing, Vol. 5 (1994-95; West Publishing Co.). Expending your limited resources--pages of your brief, minutes of your oral argument, and your credibility as an advocate--on dubious assertions will not help your client. More importantly, you will divert the court's attention from the issues on which you are more likely to prevail. "Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). If you fail to clearly identify an important issue, it may be overlooked by the court.

## What suggestions would you give for correcting such mistakes or improving the brief writing process?

After you write a paragraph or a sentence, try to put yourself in the position of someone who knows nothing about your case. Would what you have written make sense to such a person? Ask someone who does not know your case to read what you have written. Does he or she understand what you wrote? It is important to make sure that your own familiarity with the case does not lead you to gloss over points that need to be explained more fully to the uninitiated. Keep things clear, use short, uncomplicated sentences where possible. Favor the active over the passive voice. Explain the law to the court. Do not merely cite cases and ask the judge to search out the law. Write in English, not legalese. "Good legal writing should not differ, without good reason, from ordinary well-written English." Richard C. Wydick, Plain English for Lawyers 5 (4th ed. 1998).

Good legal writing is mostly rewriting. Edit your work for clarity. Excise the redundant. Check the accuracy of your statements and citations. Proofread your brief before you submit it. And, to save yourself embarrassment and the court frustration, make sure the pages are all there, in order, right side up, without duplications or blanks. Always use your word-processor's spell-check, but never trust it. (As a certain county's "pubic defender" can attest.)

The best thing you can do is learn to read your own work carefully. Do not hesitate to allow anyone else who is willing to read it too, and set aside ego to listen to what they are telling you. Treating a brief as more of a collaborative work, and getting as many diverse perspectives as possible, can be very helpful.

## How can an attorney limit the issues and focus on those that are critical to the Court's decision?

The first part of the problem is choosing the issues you are going to raise on appeal. You have to objectively assess and select the issues on which you are likely to prevail. This can be difficult when you are personally invested in the case--it is a little like trying to objectively assess a referee's calls against your favorite team. But the issue on which the trial court's decision was the most frustrating to you is not the same as the issue that is the most important, or on which you're most likely to win in the appellate court. It is important to try and rationally assess the nature of the issues, the standard of review, and the prejudice resulting from the error, to pick the issues you want to emphasize on appeal.

The other part of the problem is making sure that you have carefully presented those issues to the court. "To write clearly and speak clearly, you first must think clearly." Elmer Lower, former president of ABC News. Utilize certain phrases that help you find the critical issue or issues, such as

- This case presents the question whether . . . .
- The case requires this court to decide whether . . . .
- This court is confronted with the question whether . . . .

Use separate straightforward declaratory sentences and limit the issue(s) to 75 words, if possible. E.g.:

> • Original: Can ACME Insurance deny insurance coverage on grounds of late notice when Joe claimant's insurance policy required claimant to give ACME notice of a claim "immediately," and when in May 2002, one of claimant's office's was damaged by smoke from a fire in another tenant's space, and when 10 months later, claimant gave notice, and when ACME investigated the claim for six months before denying coverage and did not raise a late notice defense until 18 months after the claim was filed? [81 words]
>
> • Revised: Claimant's insurance policy required it to give ACME insurance notice of a claim "immediately." In May 2002, one of claimant's offices was damaged by smoke from a fire in another tenant's space. Ten months later, claimant gave notice. ACME investigated the claim for six months before denying coverage and did not raise a late notice claim until 18 months after claim was filed. Can ACME now deny coverage because of late notice? [73 words]

Instead of one 81-word long sentence, you have five sentences with an average length of 15 words. The revision presents information in a way that readers can easily understand; then, the pointed question comes at the end.

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## Oral Argument

### What is the purpose of oral arguments?

Oral argument is a crucial stage in the decision-making process. Counsel should not brush it off as simply a pro forma statement to be made before judges who already have made up their minds. Oral argument is important to me because it is the only time that all of the members and all of the lawyers are together to discuss the case. That is really the direct answer to this question: the purpose of oral argument is for us to discuss the case with you. And it is your last opportunity to participate in this discussion before the judges deliberate in their post-argument conference.

### Have you generally made a decision about a case before oral arguments?

When I come into the courtroom for argument, I usually have at least an inclination as to how the case should be decided. This is based on reading of the briefs and, in those cases when time permits, additional research or reflection. But this is only an inclination: it still must be tested against statements that counsel or other judges will make in open court.

### How can an attorney change your mind?

Listen to the questions posed by me or my fellow judges. In close cases and in cases in which the facts and law are not completely clear, we try to give counsel some hint of our tentative decision. I often will address a question to counsel for the side that seems likely to lose. (Winners, do not be afraid if we ask you questions.) The question will go something like this: "This is the problem with your case, as I see it. What can you say that will help me solve this problem in favor of your client?" That question is not simply a debating point. It is a genuine request for help. Occasionally--not often, but often enough so that the question continues to be worthwhile--a lawyer will come up with an answer that really shakes my tentative convictions. The questions that any of us ask from the bench tend to reflect what we are likely to say in the conference. We try to give the lawyers somewhat of a preview of the conference so they can participate fully in the decision-making process and perform best in the interest of their clients.

> ***Listen to the questions posed by me or my fellow judges. In close cases and in cases in which the facts and law are not completely clear, we try to give counsel some hint of our tentative decision.***

### How should an attorney prepare for oral argument?

Know your court. To the extent possible, know as much as you can about the appellate judge's philosophy, prior rulings, prior experience in the law, and a little of its members' personal background. Obviously, know the cases this court has written, particularly recent cases that may be on point. A case may have been decided, since you filed your brief, that affects your argument. The Nebraska Supreme Court and Court of Appeals release slip opinions at http://www.supremecourt.ne.gov. A quick pre-argument review of the court's recent decisions can, on some occasions, be very helpful to you.

Be thoroughly prepared on the record and law. The record should contain the pleadings, rulings, and evidence on which the appeal is based. That does not mean come down to a hotel the night before and review the briefs. Be familiar with the pleadings, lower court rulings, and evidence in this particular appeal. And please, do not tell us that you are not the one that tried the case.

### Should I iterate what I said in my brief?

It can be a starting point, especially if you carefully thought about and prepared your brief. But be flexible: adapt your argument to the course and issues set by judges' questions. Do not be afraid to get away from your text. Really listen to the judges' questions and, oftentimes, let the judges' questions guide your argument. It is very common for judges to raise issues out of the order you planned to address them, and it is very common for you to run out of time without addressing everything. Do not get thrown by this. You want the judges to ask questions, because you want to be able to address the issues about which the judges are concerned. Think of it this way: there are a lot of issues in a case, and some are more important than others, but it can be difficult for you to know what issues the court thinks are the most significant. Questions are the court's way of guiding you to the important issues.

Lawyers who find that most of their time is spent dealing with questions from the bench should not be disappointed because they have not been able to deliver a prepared statement. The judges have read the briefs and know the facts and the applicable law. We do not need a set speech beginning with the statement of facts and going point by point through the briefs. We do need pointed and cogent observations going to the heart of the dispositive issues in the case. We can read your brief--we do not need to waste your time and ours to have you read it to us. Instead, we need you to help us understand your argument, by addressing the questions we have after reading your brief.

### How can an attorney best respond to your questions during oral argument?

Lawyers should listen carefully to questions from the bench, because the minds that produce the questions are going to be preliminarily voting on their case not too much later in the same day. The oral argument is often a lawyer's last fair chance to have some influence on the outcome.

Also, listen to a question, but do not read too much into it. A judge might make a point or ask a question that illustrates one of your arguments or tends to agree with it. For instance, one of us might believe a particular argument is persuasive, and will lead you to that argument so that the rest of the judges can hear it. You want to recognize and hit the softballs out of the park. Anticipate whether the question is a softball or one that you will need to answer to succeed on appeal.

## How can an attorney tell if you are tossing me a softball or are really interested in a particular issue?

Just take a moment to think about the question and answer it candidly, as best you can. As long as you are giving honest, thoughtful answers, you are doing what you need to do to respond to the question.

## How can I establish credibility with you and the Court?

Be honest: do not misstate the facts of the case in the brief or argument, do not recite events outside of the record. Concede where necessary; take every opportunity to establish your credibility for this case (and the next). If you do not know the answer to a question, admit it. Do not try to make something up. This usually occurs with a request for a fact, or a reference to a case. Being able to answer questions is obviously best, but admitting you do not know the answer is far better than bluffing.

## What is the best way for an attorney to counter opposing counsel's arguments?

To begin with, treat opposing counsel with respect. There are two definitions of the word "argument" that could apply to oral argument: "an exchange of diverging or opposite views, typically a heated or angry one," and "a reason or set of reasons given with the aim of persuading others that an action or idea is right or wrong." *New Oxford American Dictionary*. You want to be sure that your argument is the second kind, not the first one.

Second, do not just listen to the questions you are asked--listen to what we ask opposing counsel too. Listening to the questions and answers during opposing counsel's argument can tell you what about opposing counsel's arguments concerns the court.

## Should I bring co-counsel to help argue my case?

Usually not to help argue, although bringing co-counsel to sit at counsel table and offer advice can sometimes be helpful. Generally, one lawyer is better than two. Oftentimes, lawyers make a mistake and divide an argument. All too often, one of the two encroaches on the other's time or the court addresses a crucial question to the wrong lawyer. The "wrong" lawyer often gives a poor answer. I recognize that there are times when multiple parties having different interests must and do divide the time for one side, but it is generally not the best arrangement.

If there is so much going on in an appeal that one lawyer cannot handle it all, then you can mitigate some of these risks by moving the court--in advance--for extra time. You need to make that request within 10 days of the mailing of the proposed call, and show cause for the request. § 2-111(E)(2).

## What is the most common mistake made by attorneys during oral argument?

Be confident of what you need to tell the court. We are sometimes amazed that lawyers come to the podium, mumble something like "I am Jack Jones and um represent um the appellant." Please look up and speak up. Do not swallow your words, speak with confidence. Know the issues. State them clearly. And again, do not misrepresent either the record or the law. That type of mistake can have long-term consequences on your reputation with the court.

## What are more important: oral arguments or briefs?

Argument is fleeting, but the brief is forever; however, oral argument does change minds and shape opinions. But inevitably, there will be things that you think are clear that the appellate court does not get from the brief. Oral argument is the place to clarify the case. There is an immediacy to the give-and-take of oral argument that simply cannot be recreated on paper, and the effect of an argument for which counsel and the court are well prepared cannot be overestimated. A good oral argument--in which the court asks incisive questions, and counsel provides persuasive answers--will leave "light bulbs" over the heads of everyone involved.

## Do you find arguments that appeal to your emotions to be persuasive?

Persuasion does not occur when excessively strong rhetoric is used. Always be respectful of opposing counsel and the court below, even if you have feelings to the contrary. Appropriate: "The court erred in its application of the Restatement (Second) of Torts." Inappropriate: "The court's ineptitude was exceeded only by its ignorance." The appellate court will be making a legal (and therefore logical) decision, not an emotional one. Overt attempts to emotionally influence the court are not likely to work, and the manipulation is likely to offend the court.

Even if the members of the court are emotionally moved by your client's position, we still have to write an opinion justifying a legal conclusion in your client's favor. Your time is better

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spent showing us how to write that opinion rather than trying to make us feel guilty when we cannot.

### What is your greatest pet peeve or frustration with attorneys at oral arguments?

Any time that counsel does not observe general rules of appellate courtroom etiquette:

- Manners and respect.
- No theatrics (judges are not jurors).
- Be natural.

Treat opposing counsel and the bench with respect. We are not "you guys" or "gentlemen," since the bench consists of both men and women. (Remember Lindsey Miller-Lerman and Frankie Moore?) We do not want to hear closing arguments made to jurors. Above all, be natural and have your own style.

## Disposition and Beyond

### After a case has been argued, what happens with it next?

Before the case was argued, one judge was assigned to (with the help of his or her clerks) to review the record thoroughly and research the relevant law. After argument, the court confers and, led by the assigned judge, tries to reach a preliminary consensus about how the appeal should be disposed of. The assigned judge then prepares and circulates a memo, reviews any memos or suggestions from the other judges, and eventually a draft opinion is placed on the agenda for consultation. The opinion is either approved, or it is sent back for more work. After an opinion is adopted, other judges may circulate concurrences or dissents. Assuming that no one changes his or her mind, the adopted opinion and any separate opinions are prepared for publication by the Reporter of Decisions, then filed.

### What are the Court's options for summary disposition?

Under § 2-107, a Nebraska appellate court can summarily reverse a decision, summarily affirm it, or summarily dismiss it on jurisdictional grounds. Before a summary reversal, the court must issue an order to show cause and give the parties an opportunity to respond.

### How does an attorney ask the Court to consider a case for summary disposition?

A motion for summary dismissal pursuant to § 2-107(B) can be filed at any time after the appeal is docketed. A motion for summary affirmance can only be filed after the appellant's brief has been filed, or after the time for filing a brief has expired.

Remember that summary dismissal or affirmance will only happen when the appellate court is persuaded that a published opinion would not be useful for precedential value. In other words, to be successful, a motion must not only be right on the merits, but explain why a published disposition would have no value. Which is also why the denial of a motion for summary disposition should not be regarded as a judgment on the merits of the jurisdictional issue or appeal.

### Can you explain the difference between a Motion for Rehearing and Petition for Further Review?

A motion for rehearing of an appellate court's decision is filed when a litigant wants to ask the appellate court--either the Court of Appeals or the Supreme Court--to reconsider its own decision. The brief in support of a motion for rehearing must contain assignments of error pointing out specifically any claimed mistakes or inaccuracies in statements of fact or law in the opinion, and any questions involved which the court is claimed to have failed to consider on the appeal. § 2-113(D). A motion for rehearing will not succeed if it simply repeats the arguments already asserted and rejected by the appellate court.

A petition for further review is filed when a litigant wants to appeal to the Supreme Court from a decision of the Court of Appeals. It must be accompanied by a memorandum brief no longer than 10 pages. The petition for further review and supporting memorandum brief must set forth a separate, concise statement of each error alleged to have been made by the Court of Appeals. § 2-102(F).

### Is one of these more successful than the other?

Petitions for further review tend to be granted more often, although you might not consider them "successful" if the Court of Appeals is affirmed. The real difference is that unlike a motion for rehearing, a petition for further review can raise the same issues before the Supreme Court that were decided by the Court of Appeals, in the hope that the Supreme Court may take a different view.

### How can an attorney be most successful in a petition to bypass?

The criteria for a successful petition to bypass are statutory: litigants may petition to bypass the Court of Appeals whenever their case involves a question of first impression or presents a novel legal question, involves a question of state or federal constitutional interpretation, raises a question of law regarding the validity of a statute, involves issues upon which there is an inconsistency in the decisions of the Court of Appeals or of the Supreme Court, or is one of significant public interest. Neb. Rev. Stat. § 24-1106(2) (Reissue 2008). The brief in support of a petition to bypass should not exceed 5 pages, and must forth the basis for the petition, including one or more of the factors set out in Neb. Rev. Stat. § 24-1106(2).

### What issues does the Supreme Court like to take up?

Stated a little more directly, we are looking for opportunities to leave the law better than we found it. A case that only involves the application of well-settled principles of law is unlikely to be moved from the Court of Appeals unless the facts are really unique. But we take those statutory criteria very seriously. It is less about what kind of cases we might "like" to decide than it is about taking the cases that it is our responsibility to decide as a doctrinal court.

### How can I get the Court to adopt a new rule of law?

This goes back to identifying the deep issue in the case. Tell the court what rule of law you want adopted and provide a solid rationale. If we were to adopt your opponent's rule of law, tell us why that would not be sound public policy, etc. Tell us about the practical problems this rule is causing in everyday practice--we were all trial lawyers; we remain concerned. Remember that the appellate court must be concerned not only with your appeal, but how its holding in your case will be applied in other circumstances. Be prepared to discuss the practicality of the rule you are proposing.

### How does an appellant get the Court to consider a constitutional question?

That depends on what kind of constitutional question is at issue. Parties are required to give separate notice when an appeal involves the constitutionality of a statute. Nebraska law requires that appeals involving a real and substantial challenge to the constitutionality of a statute be heard by the Supreme Court. See, § 24-1106(1); State v. Nelson, 274 Neb. 304, 739 N.W.2d 199 (2007). The concurrence of at least five judges of the Supreme Court is required to hold a statute unconstitutional. Neb. Const. art. V, § 2. In order for these procedural requirements to be met, court rules require parties to notify the court of constitutional questions. § 2-109(E). The Attorney General must also be made a party to any appeal involving the constitutionality of a statute. § 2-109(E).

Constitutional questions that do not present facial challenges to the constitutionality of a statute can still be moved to the Supreme Court docket by a petition to bypass, assuming that the question meets the criteria for bypassing the Court of Appeals.

## On the More Personal Side

### What do you enjoy most about being a Justice on the Nebraska Supreme Court?

Being able to deal with and solve gnarly, complex legal issues. My primary interest is seeing a system that works well for lawyers and their clients. The best judges, not unlike referees in athletic contests, make sure the playing field is even--then an honest assessment of the facts and the law should correctly determine the outcome of most cases.

## What do you miss most about private practice?

The give and take, and strategic adjustments, in trial. And the deep satisfaction of direct service to actual clients.

## If you could change one thing about the Nebraska appellate system, what would it be?

Chief Justice Mike Heavican and the appellate courts are diligently working toward implementing an electronic filing system in both the trial and appellate courts in Nebraska. This is a rather major undertaking and will take some time to complete. But other state appellate courts that utilize an electronic filing system have found the process to be user-friendly and much more efficient and cost-effective in the long run.

## Do you have any suggested reading to make me more effective on appeal?

There are a number of good books and articles that can assist you in the art of persuading appellate judges. The main thing I would urge is to read something--anything--every few months, about how to write better or persuade better, as a lawyer. But if you want a good start, read *Legal Writing in Plain English* and *The Winning Oral Argument*, both written by Bryan A. Garner. Or, read Professor Karl Llewellyn's timeless lecture on appellate advocacy delivered to a meeting of the Indiana Bar Association on February 8, 1962, just a few days before his death. The lecture was originally published at 29 U. Chi. L. Rev. 627 (1962) and is reproduced in the Spring 2005 edition of the Journal of Appellate Practice and Process.

## Do you have any last words of wisdom for appellate advocates?

Do not snatch defeat from the jaws of victory. This admonition does not happen frequently. Yet, I have seen lawyers give away the case at oral argument. If you have made your main appellate points, and it is apparent that you are winning the argument--sit down. Your client will thank you for your discernment.

I would like to thank Justice Gerrard for taking the time to share his insight with the Nebraska Bar. Justice Gerrard acknowledges the valuable research assistance of David Dirgo, Creighton Law '98, with respect to this article.

# Appellate Advocacy: A Short Follow-Up Discussion

*by Kirk S. Blecha & Kenneth W. Hartman*

When last we met, the Young Eager Lawyer ("*YEL*") and the Seasoned Cynical Lawyer ("*SCL*") were discussing how to win a case on appeal.[1] They discussed some general principles of appellate advocacy and SCL wondered what some Nebraska judges would think about those principles. After YEL was able to meet with a trial judge and appellate judge,[2] YEL and SCL discussed the feedback from those judges and from attorneys that had been kind enough to provide feedback about the appellate advocacy article. The following discussion ensued.

*SCL:* So, what did the judges say?

*YEL:* Well, as I expected, the judges - for the most part - agreed with my point of view.

*SCL:* Really, like what?

*YEL:* Well, they agreed with me that although oral arguments matter, the briefs are far more important to the outcome of the appeal. They thought that perhaps our article put too much importance on oral argument, and not enough on the critical nature that briefing plays in appellate advocacy.

*SCL:* I agree. In rereading our first article, I probably focused too much on oral argument because that is the really fun part of an appeal. But we must emphasize that appeals are won in the law library.

*YEL:* They also agreed with you on several other points. The trial judge asked why practicing lawyers feel the necessity to choose what we called, in our prior discussion, the "kitchen sink" approach. The trial judge made a point to tell me that lawyers should direct their attention to the issues that truly matter, and the way they argue those issues at oral argument can matter. For example, if the lawyer makes seven arguments and one of those arguments seems strong to the judges sitting on the panel but the lawyer does not press that point at argument, then it tells the judges that that issue is not as strong as it seemed in the brief.

➡


### Kirk S. Blecha

**Kirk S. Blecha** is a partner in Baird Holm's Litigation Section and is the chair of the Firm's Appellate Practice Group. He is a fellow of the American College of Trial Lawyers, is listed in the Best Lawyers in America 2008 for his work in Commercial Litigation, and is also listed in Chambers USA, America's Leading Lawyers for Business. He received his J. D. from the University of Nebraska College of Law in 1974, with distinction.

### Kenneth W. Hartman

**Kenneth W. Hartman** is a partner in Baird Holm's Litigation Section and a member of the Firm's Appellate Practice Group. Ken received his J. D., *magna cum laude*, from the Creighton University School of Law in 2000. After law school, he was a judicial law clerk to Hon. Kenneth C. Stephan and Hon. Lyle E. Strom. He is a member of the Nebraska Bar, the Bar of the U.S. Supreme Court and of the U.S. Court of Appeals for the Eighth Circuit.

*SCL:* Yeah. The trick is figuring out which are the issues that will matter to the appellate court and which ones won't. Sometimes listening during oral argument is more important than talking.

*YEL:* Exactly. And the appellate judge picked up on our theme of civility. He noted that one thing you should not do in briefing is snipe at opposing counsel or the opposing party. And, you most definitely should not make inappropriate comments about the district court judge, or the rulings made by that judge. Sniping at the district court judge or opposing counsel does nothing but distract the reader from the issues you are trying to address. You want the judges thinking about the issues that matter, not about the harsh tone of the brief.

*SCL:* I also bet that the appellate judge said that oral arguments matter today because the Circuit only gives you argument if they have questions for you.

*YEL:* You bet he did. He made it clear that attorneys appearing before the Circuit better be prepared to address those questions.

*SCL:* I thought so.

*YEL:* I came away from my discussion with the trial judge and the appellate judge with two important points. One point is that the lawyer must know the case, and must argue the issues that matter. You should tackle those issues head on, and not just make a plethora of arguments in hopes that the court will find one to its liking.

The other important point that I took from the discussion was the necessity for lawyers to write better. We should write briefs that address the issues that matter, do so in a civil manner, and do it in a concise way. We should strive not to be verbose, but also not to be bland. Lawyers should - shudder the thought - write in a way that is more entertaining (i.e. interesting and readable).

*SCL:* You are learning. My mentor, Jerry Laughlin, always told me it's easy to write a 50-page brief, but much harder to write a well-reasoned and persuasive 25-page brief. And never forget the first page of your argument - it is important to hit immediately with a strong and interesting lead. You will never guess the topic I got the most questions about.

*YEL:* The preparation for oral argument?

*SCL:* No.

*YEL:* Your "Universal Rules"?

*SCL:* Strike two.

*YEL:* Making the proper record before the trial court.

*SCL:* I am glad you did not strike out. That is exactly what most of the questions were about.

*YEL:* Any particular area?

*SCL:* More like areas. The questions really fell into four general areas: making sure you have the record you need to appeal from a summary judgment ruling; the importance of making an appropriate offer of proof, in particular when the court has granted a pretrial motion in limine; making sure you make the proper objections to jury instructions to preserve your objections for appeal; and how to deal with issues of juror misconduct.

*YEL:* What was the concern about the record that is needed on a motion for summary judgment?

*SCL:* Just a point that seems to trip up you young guys who practice in federal court so much that you don't pay enough attention when you are practicing in state court. In state court, you must, on a motion for summary judgment, make sure that you create the record of what evidentiary materials are offered and received by the district court. If you do not make that record, you run the risk of the appellate court not having the necessary record to review the motion.

*YEL:* I understand that point, but I can also see how the problem develops. On a motion for summary judgment in federal court, we file everything electronically and rarely have a hearing on the motion, while in state court we will always have a hearing on our motion. So at that hearing on the motion, counsel must make sure that the record demonstrates what evidence was offered and received by the district court - sounds simple enough.

*SCL:* Yes it is, but failing to make that record can cause all kinds of problems for you in the appellate court. If you lose, do it on the merits. It is truly embarrassing to lose because you did not make a proper record.

*YEL:* So, that was the summary judgment issue directed to you, what about the offer of proof - what was the question there?

*SCL:* Offer of proof issues can come up in any number of circumstances, but this question came up in the context of making the proper record to be able to appeal a ruling on a motion in limine.

*YEL:* Do you mean that if you do not like the trial court's ruling on a motion in limine you should bring that issue to the court's attention outside the presence of the jury during trial and make your offer of proof and preserve the record necessary for an appeal?

*SCL:* In most instances, yes, otherwise the error is not preserved for appeal. This is similar to the issue regarding jury instructions. If you disagree with the jury instructions the trial court is going to enter, you must make your objection on the record to preserve that issue for appeal.

*YEL:* Some recent case law seems to suggest that counsel need not object specifically as long as the issue is extensively discussed at the instruction conference.

*SCL:* I know the situation[3] you are speaking of, but you are always better off to take the simple path, and state your objection to the proposed instruction on the record to the instruction you believe is insufficient or otherwise objectionable. That way you are not just counting on the appellate court bailing you out based upon an extensive discussion you may or may not have had with the court about a particular instruction. My advice is to slow down, take a deep breath, and address each erroneous instruction. Then there will be no confusion on appeal.

*YEL:* You also mentioned how to deal with juror misconduct, and I would love to hear your comments on that one. I seem to be reading much more these days about juror misconduct, in particular with regard to a juror's use of technology to access information not presented to the jury by counsel during the trial or by the court through instructions.

*SCL:* The first thing to remember is that the party asserting juror misconduct must prove it in order to be entitled to a new trial, and that is really difficult. Both trial and appellate courts are loathe to set aside a jury verdict based on alleged juror misconduct. They particularly dislike one juror's testimony as to misconduct without any objective support. Even if a juror reports misconduct, you should dig deeper. Interview the bailiff and other court personnel. I have talked with colleagues who have discovered prior misconduct by using social media. People reveal the strangest things on Facebook. In short, give the court something solid and objective.

*YEL:* Those are good points. So make the record, do it professionally and with the utmost civility to preserve your record for any potential appeal.

*SCL:* You've got it kid.

*YEL:* Maybe next time we can discuss your universal rules.

*SCL:* Anytime.

## Endnotes

1 See the September 2008 issue of *The Nebraska Lawyer*.

2 Thanks go to the Honorable Lyle E. Strom and the Honorable William J. Riley for taking the time to discuss appellate advocacy with the authors of this article.

3 *Wilkins v. Bergstrom*, 17 Neb.App. 615, 767 N.W.2d 136 (2009).

NEBRASKA
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# Multimedia Ethics Presentation: The Intersection Between Hollywood and Lawyers' Ethics & Professionalism

## Dressed for Excess: How Hollywood Affects the Professional Behavior of Lawyers

***featuring Professor Nancy B. Rapoport***

## Thursday, May 13, 2010 • 8:30 am - 11:15 am

## Embassy Suites - Downtown Omaha • 555 S. 10th St. • Omaha, NE 68102

***CLE Accreditation Pending**

**8:30 - 8:55 a.m.** **Registration & Continental Breakfast**

**8:55 - 9:00 a.m.** **Introduction of Professor Rapoport**

**9:00 - 10:00 a.m.** **I. Socialization Through the Discourse of Films**

*A. What Does Hollywood "Know" About Lawyers?*
*1. Trial by "Trial"*
*2. Atticus the Icon and Milton the Devil*
*3. Are Lawyers as a Group Really Lawyers "as a Group"?*

*B. What Does Hollywood "Teach" About Lawyers?*
*1. General Lessons*
*2. Lessons About Legal Ethics*

**10:00 - 10:15 a.m.** **Break**

**10:15 - 11:15 a.m.** **II. Socialization Through the Particular Culture of Lawyers**

**III. Conclusion: The Cognitive Dissonance of Movies and Life**

***About the Speaker:*** **Professor Nancy B. Rapoport** - Former Dean and Professor of Law at the University of Nebraska College of Law. She is the Gordon Silver Professor at the William S. Boyd School of Law, University of Nevada, Las Vegas. She served as Dean of the University of Nebraska College of Law from 1998-2000. She then served as Dean and Professor of Law at the University of Houston Law Center from July 2000-May 2006 and as Professor of Law from June 2006-June 2007, when she left to join the faculty at Boyd. Her specialties are bankruptcy ethics, ethics in governance, and the depiction of lawyers in popular culture.

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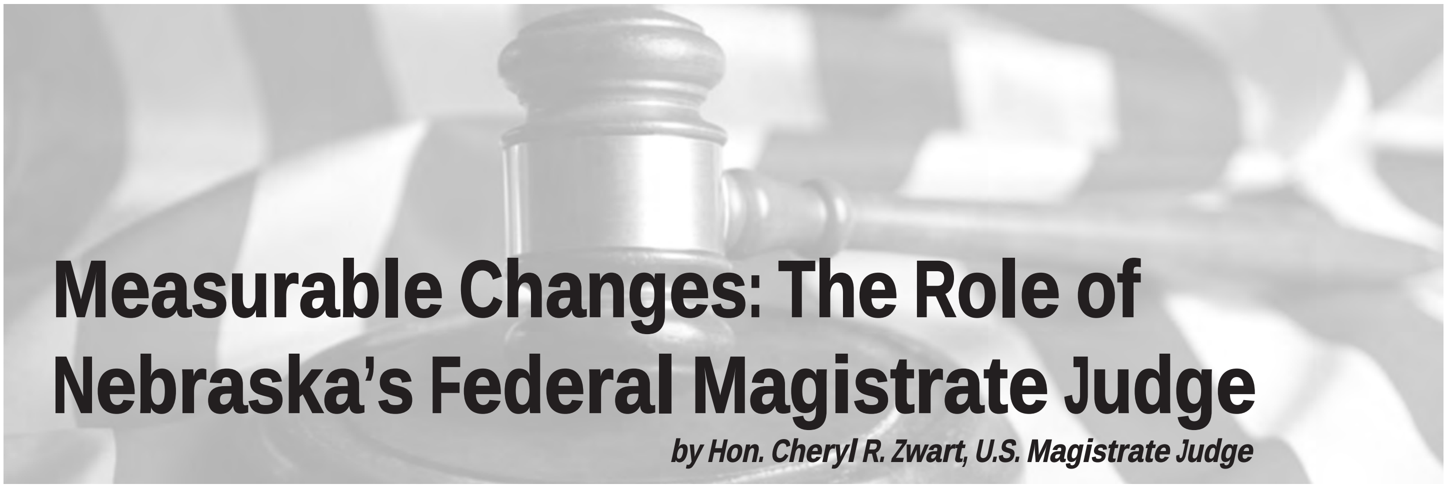

# Measurable Changes: The Role of Nebraska's Federal Magistrate Judge

*by Hon. Cheryl R. Zwart, U.S. Magistrate Judge*

The year was 1980. The population of Nebraska was approximately 1,570, 000.[1] The United States Attorney's office in Lincoln, Nebraska had only two attorneys: Sally Johnson and David L. Piester, and Dorothy Hald ("Dotty") was David Piester's legal secretary. The U. S. Attorney's office in Lincoln, like the chambers of the district judges, was located on the fifth floor of the Denney Federal Building.[2] There was no Federal Public Defender for the District of Nebraska. The United State District Court for the District of Nebraska had three full-time district judges, Robert V. Denney, Albert G. Schatz, and Warren K. Urbom; two senior judges, Richard E. Robinson and Robert Van Pelt; one full-time magistrate judge,[3] Richard Peck, located in Omaha, Nebraska; and three part-time magistrate judges located in Lincoln, North Platte, and Gering, Nebraska. The court was in the process of hiring a new federal magistrate judge - a full-time position in Lincoln, Nebraska.

A merit selection panel was formed to screen the applicants for selection of the new magistrate judge. David L. Piester was among the applicants. The panel forwarded his name, along with others, to the district court judges for a final determination. Ultimately, David Piester was selected as the first full-time federal magistrate judge located in Lincoln, Nebraska. Magistrate Judge Piester was sworn into office on January 20, 1981, "one hour before Ronald Reagan."

Judge Piester, along with Dotty, created a new judge's chambers, complete with new paprika-colored carpeting (also known as "orange"), which perfectly matched their new paprika-colored chairs. The chairs were recently fully retired by Magistrate Judge Zwart; the carpet was replaced years ago.

During Magistrate Judge Piester's first years of service as a magistrate judge, the vast majority of the court's caseload was composed of civil cases. There were 1,115 civil cases compared to only 38 criminal cases pending in Nebraska's federal court as of December 31, 1981. During the course of 1981, 338 new civil cases and 24 new criminal cases were assigned to each active district judge. The total weighted caseload per active district judge was 370.[4]

In 1981, Nebraska ranked 82 out of the 95 federal districts in the number of criminal cases assigned per active district judge.[5] Of those criminal cases, most were for white collar crimes. Only seven officers and three clerks worked in the district's two probation offices, with two officers and one clerk assigned to Lincoln. The Probation Office, which also performed pretrial supervision of defendants, was supervising 186 people as of July 1, 1981.[6] Probation and pretrial reports were typed on onion skin paper, and carbon paper was used to create copies. Judge Piester's only responsibility in criminal cases was to perform initial appearance proceedings; all other criminal proceedings were handled by the assigned district judge. The average time for completion of a criminal cases was approxi-

## Hon. Cheryl R. Zwart

**Hon. Cheryl R. Zwart** is a 1988 graduate of the University of Nebraska College of Law. She was in private practice at a Lincoln law firm before taking a position as judicial clerk for Magistrate Judge David Piester in 2001. Judge Zwart was appointed as Magistrate Judge in November 2009.

mately four and a half months.[7]

In contrast, as reported in 1981, the average time for final disposition of a civil case was over eleven months. The median length of time for disposition by trial was fourteen months, and as of December 31, 1981, fifty-three civil cases had been pending for over three years.[8] During the initial years of Judge Piester's service as magistrate judge, he handled the pretrial motion practice in civil cases, and presided over approximately thirty pretrial conferences in civil cases every month. He also handled the pro se prisoner filings. Before the Prison Litigation Reform Act was enacted in 1996, at least one new prisoner case was filed every day and at the height of prisoner filings, an average of two and one-half to three new cases were filed each day.

The federal court's criminal docket began a slow growth in the mid-1980s, with criminal charges being lodged against tax protesters, members of Posse Comitatus organizations, and a sprinkling of drug dealers.

The federal sentencing guidelines were ushered in by the Sentencing Reform Act of 1984,[9] which was enacted on October 14, 1984. Within a year thereafter, the Nebraska federal court's criminal docket began rising dramatically, with criminal felony filings reaching a high point in 2004. In 1992, the Nebraska federal court created a Pretrial Services Office, separate from the Probation Office, to assist the court in evaluating the risk of flight and the danger to the community if a defendant is released pending trial, and as appropriate, the conditions to impose during pretrial release.

As the criminal filings increased over the last three decades, there has been a gradual decline in civil case civil case filings. During the year prior to September 30, 2009, 241 civil cases were filed per active district judge, compared to 338 in 1981.[10] As was the case in 1981, Nebraska's magistrate judges continue to handle pretrial case management responsibilities for civil cases, and full management through disposition of civil consent cases. Except to accommodate changes in the federal rules of civil procedure, the role of magistrate judges in civil cases has not changed much since Magistrate Judge Piester began his work for the court. However, Nebraska's magistrate judges now have a very limited role in handling pro se filings. With the exception of the final pretrial conference, the pretrial management of cases filed or pursued by pro se plaintiffs is conducted by a separate pro se division within the court.

The most notable change in the role of magistrate judges over Judge Piester's tenure was prompted by the substantial change in the court's criminal docket. During the twelve months prior to September 30, 2009, 184 new felony criminal cases were filed and assigned in the Nebraska federal court per active district judge, compared to only 24 such cases in 1981.[11] Nebraska now ranks sixth in the nation for number of criminal filings per active district judge, and the average length of time to disposition is now 8.3 months.[12] For the twelve month period prior to September 30, 2009, Nebraska's federal probation office, which now employs 55 people, supervised 1300 persons subject to post-conviction supervision.[13] Nebraska ranks first in the nation in the number of supervised release hearings conducted per active district judge.[14]

Rather than conducting only initial appearances, Nebraska federal

## Then and Now

| | 1981 | 2009 |
|---|---|---|
| **Number of Judges** | | |
| Active full-time | 3 | 3 |
| Senior judges | 2 | 2 |
| Full-time magistrate judges | 2 | 3 |
| Part-time magistrate judge | 2 | 0 |
| | | |
| **Number of civil cases per active district judge** | 338 | 241 |
| Length of time from filing to disposition | 11 months | 8.2 months |
| Length of time to trial | 14 months | 16.7 months |
| National ranking (among the 95 federal districts) | 66th | 74th |
| | | |
| **Total civil cases pending over three years** | 53 | 12 |
| | | |
| **Number of criminal cases filed per active district judge** | 24 | 184 |
| Length of time to final disposition | 4.4 months | 8.3 months |
| National ranking (among the 95 federal districts) | 82nd | 6th |
| | | |
| Total weighted filings per active district judge | 370 | 497 |
| | | |
| **Probation and Pretrial Services** | | |
| Number of employees | 10 | 66[17] |
| Number of defendants under pretrail supervision | N/A | 675 |
| Number under post-trial supervision | 186[18] | 1300 |

magistrate judges are now responsible for all pretrial management and scheduling of criminal proceedings up to and including plea proceedings, with findings and recommendations prepared on motions to dismiss, motions to suppress, and petitions to enter a plea of guilty, and orders filed on all other criminal pretrial matters. The magistrate judges work extensively with the court's Pretrial Services Office, which itself employs eleven people and activated 675 pretrial supervision cases over the twelve months prior to September 30, 2009.[15]

The year is now 2010, and the population of Nebraska has grown approximately 13.5% since 1980.[16] The court now has three full-time magistrate judges, Thomas D. Thalken, F. A. Gossett, and Cheryl R. Zwart; but it still has three active district judges, Joseph F. Bataillon, Richard G. Kopf, and Laurie Smith Camp; and two senior district judges, Warren K. Urbom and Lyle E. Strom. Although the court's criminal caseload per active district judge has increased over six-fold, with an overall per judge caseload increase of 34% since 1980, the court's on-going attempts to obtain an additional authorized judgeship have stalled. The court has responded by increasing the number, role, and responsibilities of magistrate judges.

## Endnotes

1 United States Courts Eighth Circuit Report, 1980 and 1981, Donald P. Lay, Chief Judge, Lester C. Goodchild, Circuit Executive, at pp. 205-06.

2 The U.S. Attorneys Office was located in the southwest corner of the fifth floor, where Judge Urbom's chambers and courtroom are currently located.

3 Prior to December 1, 1990, federal magistrate judges were known as federal magistrates. Section 321 of Pub. L. No.101-650 provided: After the enactment of this Act [Dec. 1, 1990], each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge, and any reference to any United States magistrate or magistrate that is contained in title 28, United States Code, in any other Federal statute, or in any regulation of any department or agency of the United States in the executive branch that was issued before the enactment of this Act, shall be deemed to refer to a United States magistrate judge appointed under section 631 of title 28, United States Code.

104 Stat 5089, 5117.

4 United States Courts Eighth Circuit Report, 1980 and 1981, Donald P. Lay, Chief Judge, Lester C. Goodchild, Circuit Executive, at p. 207.

5 Id. at pp. 207-209.

6 Annual Report of the Director of the Administrative Office of the United States Courts, 1982, at pp. 360. The Nebraska federal court did not have a separate Pretrial Services Office until 1992.

7 United States Courts Eighth Circuit Report, 1980 and 1981, Donald P. Lay, Chief Judge, Lester C. Goodchild, Circuit Executive, at p. 207.

8 United States Courts Eighth Circuit Report, 1980 and 1981, Donald P. Lay, Chief Judge, Lester C. Goodchild, Circuit Executive, at p. 207.

9 PL 98-473, 98 Stat 1837 (October 12, 1984).

10 Federal Court Management Statistics-2009, U.S. District Court-Judicial Caseload Profile, September 30, 2009.

11 Id.

12 Id.

13 Probation and Pretrial Services-Caseload Tables, Probation Table E-3, September 30, 200

14 Federal Court Management Statistics-2009, U.S. District Court-Judicial Caseload Profile, September 30, 2009.

15 Probation and Pretrial Services-Caseload Tables, Pretrial Services Table H-1, September 30, 2009.

16 David Drozd and Jerry Deichert, 2008 Nebraska Population Report, July 2009, at www.unomaha.edu/cpar/documents/nebpopulation_08.pdf.

17 The total number of Pretrial Services and Probation employees combined.

18 This number includes those under pretrial supervision.

# Mark Your Calendar

## June 4, 2010

***American College of Trial Lawyers in collaboration with the Public Interest Law Section of the NSBA presents***

## Leveling the Playing Field in Pretrial Proceedings:

### A Guide to Effective and Ethical Trial Preparation Against a Well-Funded Opponent

***Friday, June 4, 2010 • 9:00 am - 4:30 pm***

***Creighton University School of Law • 2500 California Plaza • Omaha, NE 68178***

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***Watch the NSBA Calendar at www.nebar.com for more information and registration options.***

**9:00 a.m.** **Welcome**

**9:05 a.m.** **Practicing in the Digital Age**

(9:05 - 9:20 a.m.) A Practical Guide to E-Filings in State and Federal Court - *Robert D. Mullin, Jr., McGrath North Mullin & Kratz, PC LLO*

(9:20 - 10:00 a.m.) E-Discovery: What Every Public Interest Lawyer Needs to Know - *Kirk S. Blecha, Baird Holm LLP*

**10:00 a.m.** **Deposing the Corporate Rep: How to Use the 30(b)(6) Deposition to Make Your Case**

*Clarence E. Mock, III, Johnson & Mock*

**10:45 a.m.** **Break**

**11:00 a.m.** **A Nuts and Bolts Approach to Working Up the 1983 Case**

*Bruce G. Mason, Mason Law Office*

**11:45 a.m.** **Question & Answer Session**

**12:00 p.m.** **Lunch**

**1:00 p.m.** **Successfully Resisting Dispositive Motions and Dealing With Affirmative Defenses**

*Robert F. Rossiter, Jr., Fraser Stryker PC LLO*

**1:50 p.m.** **Cost Effective Management of Discovery and Pretrial Proceedings**

*Robert W. Mullin, Lieben, Whitted, Houghton, et al, PC LLO*

**2:30 p.m.** **Break**

**2:50 p.m.** **Litigation Ethics Workshop**

Doing it the Right Way: ACTL Code of Pretrial and Trial Conduct - *Gail S. Perry, Baylor, Evnen, et aI., LLP*

Ethical Issues in 1983 Cases - *Steven E. Achelpohl, Law Offices of Steven Achelpohl*

**4:15 p.m.** **Question & Answer Session**

**4:30 p.m.** **Adjourn**

## Agricultural Law Seminar

***Co-Sponsored by NCLE, The University of Nebraska College of Law, NSBA Agricultural Law Section and NSBA Natural Resources and Environmental Law Section***

***Friday, June 4, 2010 • 11:00 am - 2:00 pm***

***University of Nebraska - Kearney***

***CLE Accreditation Pending**

***Watch the NSBA Calendar at www.nebar.com for more information and registration options.***

***Featuring:***

**Brian C. Buescher, Esq.** - Partner, Kutak Rock and head of the firm's litigation team. He is also chair of the Agricultural Law Section and the NSBA Natural Resources and Environmental Law Section.

**Michael J. Linder, Esq.** - Director of the Department of Environmental Quality

**Anthony Schutz** - Professor of Law, University of Nebraska College of Law

# Using Court Interpreters: A Trial Court Perspective

by Therese Bollerup, Laura Garcia Hein and Gabriel Acosta

The use of competent court interpreters is critical to ensuring that justice is carried out fairly for defendants and other stakeholders. However, attorneys who have represented speakers of languages other than English know how difficult it can be to find a competent court interpreter, particularly when no certified interpreter is available. Fortunately, federal lawmakers have developed a thorough set of rules regarding the use of interpreters in the federal courts by way of the Court Interpreters Act, 28 U.S.C. §1827 ("act").

In this article, we provide a brief overview of the act and what its provisions mean for attorneys who represent non-English speaking clients in the federal courts. We also address important questions that both federal and state court practitioners should consider when working with court interpreters, such as: How does one know if an interpreter is competent? Will any bilingual person suffice as an interpreter? Finally, we discuss the practical implications for judges and attorneys given the role and scope of practice of court interpreters.

**Laura Garcia-Hein**

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## I. The Court Interpreters Act

The Court Interpreters Act governs the use of interpreters in federal courts. The act applies to all civil or criminal judicial proceedings instituted by the United States. If a party or a defense witness speaks only or primarily a language other than English or has a hearing impairment,[1] the district court judge will direct the clerk of the court to secure and pay for the services of either a certified interpreter or "otherwise qualified" interpreter.[2] As discussed below, a certified interpreter has demonstrated a higher level of expertise than an "otherwise qualified" interpreter, and is required whenever one is reasonably available.[3]

### A. Certified Interpreters

A certified interpreter has successfully passed the Federal Court Interpreter Certification Examination, a rigorous criterion-referenced performance examination developed and administered under the supervision of the Administrative Office of the United

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States Courts ("AO"). Certification examinations are currently available only for Spanish, Navaho, and Haitian Creole.[4] All staff interpreters in federal courts are certified. As discussed below, federal certification is not equivalent to state certification or certification from some other accrediting institution.

Nebraska is fortunate to have a certified interpreter on staff, currently the only one in the Eighth Circuit.[5] In most districts, interpreting services are provided by contract (free-lance) interpreters. However, in some districts with large Hispanic populations, like Nebraska, using a staff interpreter is more cost-effective and efficient than using contract services. To justify the need for a permanent staff interpreter position, Nebraska had to compile data demonstrating that a significant cost benefit would be realized in employing a staff court interpreter and present that data to the Judicial Conference Committee on Judicial Resources, which closely scrutinized the district's request. Nebraska's request for a full-time staff interpreter was approved in June 2005.

### B. "Otherwise Qualified" Interpreters

Interpreters in non-certified languages are considered "otherwise qualified" and are classified as either "professionally qualified" or "language skilled." To be professionally qualified, an interpreter must establish one of the following to the court's satisfaction: a) successful completion of the U.S. State Department conference or seminar interpreter test in a language pair that includes English and the target language; b) successful completion of the United Nations' interpreter test in a language pair that includes English and the target language; c) current good standing in either the Association Internationale des Interprètes de Conférence or the American Association of Language Specialists, with the membership qualification based on a language pair of English and the target language; or, d) for sign interpreters, a "Specialist Certificate: Legal" from the Registry of Interpreters for the Deaf.

An interpreter who is not certified and does not qualify as a professionally qualified interpreter, but who can demonstrate to the court's satisfaction the ability to interpret court proceedings from English to a designated language and from that language to English, is designated a "language skilled" or "ad hoc" interpreter. The interpreter must be sufficiently proficient in both languages to handle simultaneous and consecutive interpretation as well as sight translations.[6]

These requirements mean that finding a language skilled interpreter can sometimes be difficult, especially for languages for which there are few interpreters. Moreover, assessing the competency and credentials of language skilled interpreters can be problematic. Some ad hoc interpreters may be certified by a state court; others may present a certificate from some accrediting agency, organization, or institution;[7] still others may have no credentials or formal training at all. Particularly in the latter two instances, a careful voir dire by the trial judge would be necessary to establish that the person is sufficiently proficient to serve as a language skilled interpreter in federal court.

Some state certified interpreters may well qualify as federal language skilled interpreters. For example, a certified Nebraska court interpreter will have a) attended a two-day interpreter orientation; b) passed a written English comprehension examination; and c) passed an oral examination of the interpreter's sight, consecutive, and simultaneous interpreting skills.[8] However, the state certification examination is not as rigorous as the federal examination, so judges and counsel cannot fairly expect state certified interpreters to be as proficient as federally certified interpreters.

### C. How Clerk's Offices Locate Interpreters

The district court clerk's office is responsible for locating certified or otherwise qualified interpreters for proceedings instituted by the United States. If the act does not require the court to appoint an interpreter for in-court proceedings, the clerk's office can assist the parties in locating an interpreter. The principal source of leads comes from the AO's master list of all certified and otherwise qualified interpreters, known as the National Court Interpreter Database. The interpreters in this list have appeared, at least in theory, in a federal court proceeding somewhere in the country. Some clerk's offices may also maintain a local directory of interpreters. These local directories will generally state that the interpreters have not been tested or certified to interpret in the federal courts and that neither the AO nor the clerk's office can attest to the interpreters' skill levels.

When a certified or otherwise qualified interpreter is not reasonably available locally, the AO's Telephone Interpreting Program ("TIP") may help, provided the local courtroom is properly equipped. TIP is used in relatively simple proceedings lasting less than one hour (e.g., pretrial hearings; initial appearances; arraignments; probation or pretrial services interviews; etc.). It allows an interpreter at a remote location to deliver simultaneous interpretation of federal court proceedings for defendants and consecutive interpreting for the court record by means of a two-line telephone system. Certified interpreters, usually staff interpreters, will provide the TIP interpretation in most cases; contract interpreters properly trained in the use of TIP equipment are used for other languages. The system saves time and travel costs, especially because TIP interpreters can be used for multiple assignments on the same day.[9]

## II. Questions Both Federal and State Court Practitioners Should Consider When Working With Interpreters

### A. Will a bilingual person suffice if no certified interpreter is available?

Being bilingual, even a highly educated bilingual, does not necessarily mean that a person can function as an interpreter. Not everyone who speaks, reads, and writes a second language possesses the cognitive and motor skills required for legal interpretation. Court interpretation is a very specialized field that requires constant training, education, experience, and knowledge. Interpreters must possess a thoroughly integrated combination of highly developed performance skills inherent to the profession (sight translation, consecutive, and simultaneous interpretation), and extensive and varied linguistic, cultural, legal, general, and technical information and terminologies. It is axiomatic that the court interpreter must understand a wide array of concepts, terms, slang, and idiomatic expressions and must possess a rapid native or near-native ability to communicate in English and the foreign language.

Court interpreting demands an extensive vocabulary, an "internalized dictionary" of sorts. Court interpreting also demands a clear understanding of court procedures, laws, ethical precepts and protocols, as well as awareness of cultural differences. These skills and abilities are critical because the interpreter must be able to receive, digest, decode, and recode a received message instantaneously. From an extensive list of terms, interpreters choose those which will best serve to convey the message accurately and completely in another language while maintaining the level of discourse of the speaker, i.e., the street slang of the uneducated witness; the highly sophisticated, technical testimony of experts; and the dense, convoluted language of legal precedent that attorneys cite in court. The role of the interpreter is to place the non-English speaker in the same level as an English speaker.

## B. What about a translator?

Training and professional experience as a translator do not guarantee that a person can interpret. Translation and interpretation are frequently confused, but they are not the same. Translation, in its narrow sense, refers to the conversion of written material from the source language to the target language, while interpreting refers to the oral conversion of a spoken message from one language to another. It cannot be assumed that a translator can work as an interpreter or vice versa. Their working methods and skills are quite different. Translators have more time to do their job. Sometimes they do extensive research and they often consult reference material. They can go back and review and edit their texts. Interpreters, on the other hand, work in the moment. They have access to dictionaries, but they are limited in terms of how and when they can consult them. They are true multi-taskers. For example, in simultaneous interpretation, they have to listen and speak at the same time, without losing the meaning and the continuity of the uninterrupted inflow of words. This requires extreme levels of concentration and is very exhausting, which is why interpreters work in teams and take turns interpreting during long proceedings.

While some interpreters do translation work and some translators have experience and training as interpreters, one cannot assume that all translators can interpret and all interpreters can translate at the level of proficiency required in the legal context.

## C. What are the ethical responsibilities of a professional court interpreter?

Court interpreters must adhere to strict codes of professional ethics as well as to court rules, protocols, and procedures. Legal interpretation must be an accurate, faithful, and complete rendition of everything that is said. Interpreters are not allowed to summarize, add, omit, embellish, or change anything from the original message, be it written or oral. In this sense, the role of the interpreter is often misconstrued because there is the expectation that, as a conduit for communication, the interpreter has to make sure that the parties understand each other. However, court interpreters are sworn to maintain complete accuracy; their oath says nothing about explaining anything or adding comments of their own. If the parties do not understand each other, it is up to them to make the necessary adjustments to achieve communication and explain any unclear concepts.

In the context of the three modes of interpreting (sight translation, consecutive interpretation, and simultaneous interpretation), accuracy and completeness are extremely important. In the consecutive interpretation of a witness's testimony, for example, it is the interpreter's rendition that will be heard and will become part of the record. Consequently, the interpreter has to interpret in direct voice, maintaining the meaning of the message, as well as the form and style of the speaker. Memory and note taking are two essential skills in this mode. Interpreters must be able to remember everything that is said in full detail, since they must render the exact content in the other language, not missing or changing anything. Omissions, additions, or misinterpretations can have serious and often adverse consequences.

In sight translation, interpreters cannot 'summarize' or 'explain' documents to the non-English speaking person. Interpreters limit themselves to reading the document out loud in the other language. They are not licensed to practice law or give advice or determine which parts of a document are relevant or not in order to give a summary or explanation. And even if interpreters are licensed attorneys, when they are working as interpreters, they must limit themselves to this role.

Interpreters are neutral and impartial; they must abstain from commenting on matters in which they serve. If there is a real or potential conflict of interest, the interpreter has the obligation to disclose it to the court and recuse himself or herself if necessary. Interpreters cannot give advice, legal or otherwise, and must abstain from advocating for one party. In this sense, an interpreter's role is similar to that of the court

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reporter. Interpreters are also prohibited from disclosing any privileged or confidential information acquired in the course of interpreting or preparing for a case. Their duty is, therefore, to the integrity of the judicial process, not to any of the parties in the adversarial system.

### D. What practical guidance is there for judges and attorneys, given the role and scope of practice of court interpreters?

Use credentialed court interpreters, preferably certified, for in-court and out-of-court events. Verify the interpreter's credentials by consulting the federal or state rosters or calling the clerk or the interpreters' office. Ask the interpreter the questions you would ask a potential expert witness to ascertain his or her qualifications and experience. Do not use untrained bilinguals, family members, children, foreign language students or teachers, court staff, or law enforcement officers as interpreters. They are not trained interpreters and are not likely to be neutral and impartial. Do not allow the non-English speaking person to bring his own "interpreter" because that person might not have adequate training.

Speak clearly and at a moderate speed. When addressing the non-English speaker, speak directly to him or her, as if he or she understood perfect English. Remember, a professional interpreter will interpret everything that is said, exactly as it is said. Do not ask the interpreter not to interpret something. If the non-English speaking person spoke English, that person would have heard and understood what was said in front of him or her.

If the non-English speaking person does not understand what is being said, do not assume that it is because of the interpreter. The use of convoluted language, abbreviations, acronyms, and legal terminology may be difficult to understand. Interpreters are merely conduits; they do not simplify the terminology for the benefit of any of the parties. Interpreters will not provide explanations, but will gladly interpret them.

Do not ask the interpreter's opinion on the case or on the non-English speaker's mental capacity or ability to understand. Interpreters are not experts in this field. Interpreters must remain neutral and they should never add comments or opinions into the interpretation.

Provide interpreters with information about the case beforehand. The more information interpreters have, the better they can prepare for and interpret during an assignment. Allow them access to documents: indictments, complaints and supporting documents, investigative reports, witness lists, etc.

For lengthy or complex proceedings, use a team of two interpreters. This will ensure an accurate record, since the interpreters will be able to take turns, preventing mental fatigue.

Court interpreters, because of their neutral and impartial role, can work for either or both of the parties in a case and for the proceedings. There is no conflict of interest. Interpreters should disclose to the judge and parties any prior contact with the case. The only prohibition is that the interpreter cannot interpret for the proceedings and be a witness for one of the parties at the same time.

Video and audio recordings introduced as evidence cannot be interpreted on-the-spot. Transcription and translation of recorded material requires adequate knowledge of the process, technology, sufficient time, and sufficient research tools. Interpreters cannot perform this task in a courtroom where the quality of the recording is often poor and other conditions are not present.

Do not be taken aback or insist when an interpreter says he or she cannot do something that goes against the code of ethics. Understand their position and show them the respect and consideration they deserve as an important element of due access to justice.

## III. Conclusion

Court interpreters, like judges and lawyers, do not operate in a void. They must abide by various rules, procedures, and codes of ethics. Practitioners' awareness of these rules and procedures is an important part of working with court interpreters. Additionally, there are comprehensive laws, like the Court Interpreters Act, that govern a court's use of interpreters.

Clients and other stakeholders rely on the court and practitioners to protect their rights, and this includes their right to be "present" in court, both physically and legally. Use of competent court interpreters is an important part of this protection.

## Endnotes

1. The Judicial Conference of the United States Courts has expanded the services available to participants who are deaf, hearing-impaired, or have communication disabilities. Under this policy, a federal court *must* provide sign language interpreters or other auxiliary aids and services (including real-time reporting) to participants in court proceedings and may provide these services to spectators (e.g., a criminal defendant's spouse) when deemed appropriate. The court will give primary consideration to a participant's choice of auxiliary aid or service. "Participants" include parties, attorneys, and witnesses. "Court proceedings" include trials, hearings, ceremonies, and other public programs or activities conducted by the court. Whether a prospective juror with a communication disability is legally qualified to serve as a juror is left to the trial judge's determination under the Jury Selection and Service Act, 28 U.S.C. § 1861 et seq. If a juror with a communications disability is found qualified to serve, the court will pay for a sign language interpreter or other appropriate auxiliary aid or service from its jury fee appropriation.
2. If a criminal defendant's attorney is appointed under the Criminal Justice Act, interpreter services are generally paid under that statute rather than from general court funds. However, a contract or staff interpreter can provide at no expense to the CJA appropriation short attorney-client consultations for the Federal Public Defender or CJA panel attorneys if the interpreting occurs in the courthouse immediately before or after a proceeding (as covered by 28 U.S.C. § 1827), and only if the matter is incidental to a court proceeding which was already scheduled to take place. The judge or the clerk of court should authorize such interpreting arrangements in advance. If a government witness

requires an interpreter, the United States Attorney is expected to secure and pay for the interpreter's services. However, if the U.S. Attorney uses a court-provided contract interpreter for a government witness, the court can bill the Department of Justice for the interpreters' services if the costs are sufficient to offset the accounting administrative cost. Moreover, if the U.S. Attorney uses a staff interpreter, the court can bill the Department of Justice for reimbursement of the interpreter's salary at the hourly rate that is equal to the interpreter's salary plus benefits (e.g., government contribution to retirement; overhead; etc.).

3 A person may waive his or her right to court-provided interpreter services under the act and use (and pay for) the interpreter of his or her choice. The individual must waive an interpreter on the record, after an opportunity to consult with counsel and after the court's explanation of the consequences of the waiver. 28 U.S.C. § 1827(f). However, witnesses entitled to interpreter services under section 1827(d) may not waive an interpreter's services.

4 Additional information on the certification program is available from federal judiciary's public Web site at http://www.uscourts.gov/interpretprog/interp_prog.html.

5 The Judicial Conference of the United States Courts has authorized 105 staff interpreter positions. As of mid-2009, 93.9 of those positions have been filled. The majority of staff interpreters serve districts in the border states: Texas Southern (9), Texas Western (14), Arizona (12), California Southern (14), New Mexico (7), and Florida Southern (7).

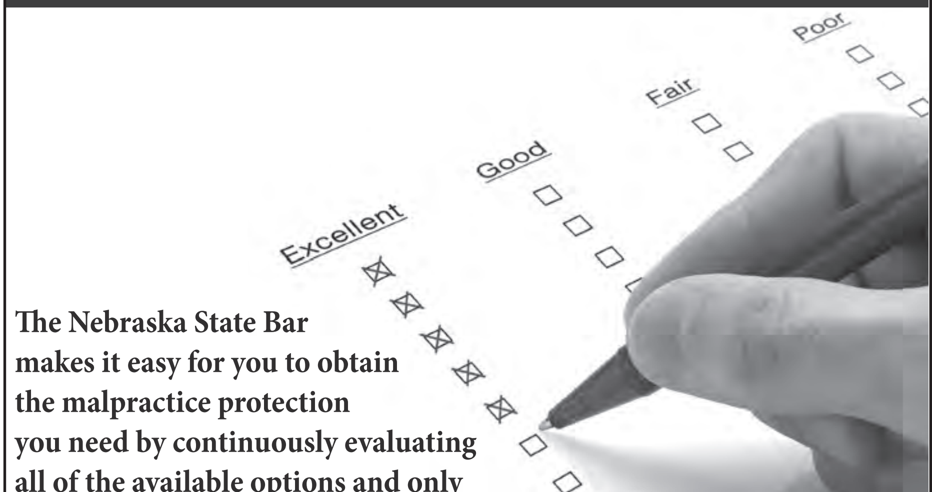
6 In consecutive mode, the interpreter verbally conveys the translation of the speaker's message into the target language after the speaker has paused. Consecutive mode is used to interpret a witness's testimony from the stand, for other statements on the record involving questions and answers, and for interviews. *Guide to Judiciary Policy*, Vol. 5, Ch. 1, § 140(e). In simultaneous mode, the interpreter renders the full and accurate meaning of speech from one language into another while the speaker or signer is still talking. *Id.*, § 140(l). Sight translation requires the interpreter to convey orally in one language the meaning of text written in another language. *Id.*, § 140(n).

7 The National Association of Court interpreters and Translators (NAJIT) is an example of a respected professional organization that also offers interpreter and translator certification. See http://www.najit.org/.

8 Nebraska has joined 39 other states in offering a certification program developed by the Consortium for State Court Interpreters. See http://www.supremecourt.ne.gov/interpreters/index.shtml?sub10.

9 The AO's 2009 TIP statistics show 3754 TIP hearings, worth an estimated cost savings of $1,142,612. Spanish was the language most commonly used in TIP hearings. Others included Punjabi, Tagalog, Kanjobal, Mongolian, Urdu, Bengali, and Gujarati, to name just a few.





# Indigency Determination in Nebraska

by Jeff Wirth and Melodie Bellamy

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the US Supreme Court "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Unfortunately, the Court has not provided the States with any standards to determine indigency. There is no uniform system to determine who is eligible for public defenders' services and who is not.

Neb. Rev. Stat. §29-3903 provides: "At a felony defendant's first appearance before a judge, the judge shall advise him or her of the right to court-appointed counsel if such person is indigent. If he or she asserts indigency, the court shall make a reasonable inquiry to determine such person's financial condition and shall require him or her to execute an affidavit of indigency for filing with the clerk of the court."… However, who collects the information and even what information is collected varies widely between jurisdictions. The courts have found that a judge, when determining indigency, should consider, the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, social security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents. *State v. Richter*, 221 Neb. 487, 378 N.W.2d 175 (1985).

Neb. Rev. Stat. §29-3901(3) states, "Indigent shall mean the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family." What does this mean? The fact is that the definition of indigent is subjective, and varies widely from judge to judge, and case to case. Judges rely on their own philosophies and experiences when determining indigence.

There is also an ongoing issue with accuracy and truthfulness of the financial affidavits filed by defendants. Judges typically ask defendants if they swear the information contained on the affidavit is true, but there is no procedure in place to check or verify the information. Recently in Buffalo County, a defendant was determined to be indigent and granted the services of the public defender. After the county attorney found out that the defendant owned livestock, had a one quarter interest in a pending estate, and had been found in possession of at least $12,000, he filed a motion to have the defendant disqualified for public defender services. Before the motion could be heard, the defendant voluntarily hired his own attorney and the public defender was allowed to withdraw. How can such scenarios be avoided in the future? Is a uniform rule necessary?

Often a defendant's financial affidavit shows absolutely no assets and no debts. That same defendant then arrives at his attorney's office driving a nicer vehicle than his attorney can afford, and carrying a $300 cell phone! More than likely, he also has cable or satellite TV and a broadband internet connection. Not bad for a person who three weeks before when questioned about his assets, had no assets whatsoever. What is even more frustrating is that, as the defendant's public defender, the

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attorney is not allowed to challenge the appointment or even suggest that the appointment should be challenged, but must rely on the county attorney to contest the defendant's indigency status. See Neb. Rev. Stat. § 23-3402 (4) (a public defender shall not recommend to a court that a defendant be determined or not determined as indigent).

Is it possible for the court to verify the information given to them before or during the time that a defendant has been granted public defender services? After all, taxpayers should not be forced to fund the legal bill for defendants capable of paying for their own legal defense. However, if the information is not voluntarily given, it is almost impossible for court staff to find out whether a defendant is employed, where such employment is, and what his or her rate of pay may be. Finding assets such as a bank account or investments is equally daunting as well. This information is available to the State for purposes of collection of child support; could it also be made available for other purposes of judicial administration? These are questions to which there are presently no answers.

Neb. Rev. Stat. § 23-3402 also states that a public defender has a duty to represent all indigent people against whom a mental health petition has been filed. However, it is not even a judge who makes the determination of indigency in such cases. Neb. Rev. Stat. § 71-945 allows the Mental Health Board to make the determination of an alleged mentally ill person's indigency. The Board then certifies that determination to the clerk of the Mental Health Board who notifies the public defender of his or her appointment. The appointment of the public defender occurs without a judge ever looking at the financial information! As with judges, Nebraska statutes provide no guidance to the mental health board.

Another area of indigency determination that could use some revision concerns college students. In Buffalo County, if you are in college and charged with a crime punishable by imprisonment, you will get a public defender. There are many college students who truly are indigent, but there are also those who could afford their own attorney, but abuse the system. In other jurisdictions in the past, if a college student came into court and requested a court-appointed attorney, the judge would advise the person that in order to be considered for a public defender, the person would need to submit an affidavit from their parents. The affidavit stated the extent of college expenses that were being paid by the parents, and by the student, on their own. When presented with that requirement, the vast majority of the students would withdraw their request for a free attorney, and plead guilty or no contest! Whether the majority of the students were being funded from home, or just didn't want to tell mom and dad about their criminal charges, it seemed to be a rather effective way to reduce the workload of both the public defender's office, and the county attorney's office.

Could changes to our public defender system be made that would lead the representation of only the truly indigent defendants? Changes could lead to more effective representation of indigent defendants as court appointed attorneys and public defenders would not be using their limited resources representing clients who can afford their own attorney.

# Parents, Children and Deportation

*by Christine A. Lustgarten*

With the increased focus on the return of undocumented persons to their countries of origin, a growing number of children of these persons are being left behind. These children have been referred to as the "collateral damage" of deportation.

The irony is, in those situations where mothers and fathers cross the border to fight for a better life for their children, the greater battle comes for them when they seek to reunite their families upon their arrival home following deportation

Typically, when an undocumented parent is detained for deportation, his or her child either becomes an emergency ward of the state or the subject of guardianship proceedings. Some parents, upon incarceration, have completed a Delegation of Parental Powers, authorized by Neb. Rev. Stat §30-2604. This document requires a 'properly executed power of attorney' and allows for the delegation of parental powers regarding care, custody, or property of the minor child by the parent to another person for a period not to exceed six months. Absent the parents executing this delegation immediately prior to or upon detention, and the exercise of these powers by the person to whom they are delegated, it is likely the state will place the children in foster care or an 'interested person' would seek guardianship.

Children who are born in the United States of foreign parents have dual nationality and are considered citizens of both the U.S. and the country of their parents. Likewise, children born of a foreign parent and a U.S. parent have dual citizenship, which provides these children with all the rights and protections of both nations. Among these rights is the constitutionally protected right of biological parents to raise their children and the right of children to be raised by their biological parent. Cooperation and understanding between the nations through the court systems is imperative for the speedy reunification of families torn apart by deportation proceedings.

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## Juvenile Court Proceedings

Section 43-247(3)(a) of the Juvenile Code provides that the Court has jurisdiction over children who are without proper parental support through no fault of his or her parent, i.e. absent allegations of abuse or neglect. Juveniles adjudged under this subsection (3)(a) may be placed under the custody and care of the Department of Health and Human Services and the courts have broad discretion as to the disposition of the children under these circumstances.

In the cases involving the disposition of children of undocumented persons, family members, if found, may be the most appropriate placement choice for these children. Juvenile courts have jurisdiction to appoint a guardian and it has exclusive jurisdiction to appoint a guardian if the juvenile is already under its jurisdiction. Likewise, County Courts have jurisdiction for the purpose of commencing guardianship proceedings.

In the event the children become wards of the state and are placed in foster care, services will be provided by the state for the care and custody of the children. Should evidence be uncovered indicating abuse or neglect by the incarcerated parent, it is likely that termination proceedings will begin. Alternatively, once the parent has been returned to his or her home country, upon the state's dismissal of the proceedings, the children can be returned to their parents.

### County Court Proceedings

Neb. Rev. Stat. § 30-2605 et seq provides the procedure for the appointment of a guardian for a minor child. Specifically, if, upon a hearing on the matter, the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of section 30-2608 have been met, and the welfare and the best interest of the minor will be served by the requested appointment, it shall make the appointment. Neb. Rev. Stat. § 30-2611. Proper venue for proceedings for guardianship of a minor is the place where the minor resides or is present.

## Parental Preference

In either court, the parental preference principle protects the constitutional rights of the biological parent to rear his or her children without state interference. This right has been recognized by the United States Supreme Court as a fundamental liberty interest protected by the Fourteenth Amendment and a fundamental right derived from the privacy rights inherent in the constitution and is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court. See *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Smith v. Organization of Foster Families*, 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977).

The parental preference principle provides that a parent has a natural right to the custody of his or her child which trumps the interest of stranger to the parent-child relationship and the preferences of the child. For a court to deny a parent the custody of his or her minor child, it must be affirmatively shown that such a parent is unfit to perform parental duties or that he or she has forfeited that right. *In re Interest of Angelica L & Daniel L.*, 277 Neb. 984, 767 N.W. 2d 74 (2009). *In re Guardianship of Cameron D.*, 14 Neb. App. 276, 706 N.W. 2d 586 (2005). *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W. 2d 135 (2004). *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004).

Recently, the Nebraska Supreme Court weighed the rights of an undocumented immigrant to maintain custody of her children against the State's duty to protect her children. In re *Interest of Angelica L & Daniel L.*, 277 Neb. 984, 767 N.W. 2d 74 (2009), is an important case when the children of deported individuals are the subject of guardianship proceedings. In determining the rights of a Guatemalan mother to have her children reunited, the Court held that deportation is not a de facto termination of parental rights. The Court guides us to uphold the constitutional right of families to be together, holding that the proper starting point for legal analysis when the courts involve themselves in family relations is always the fundamental constitutional rights of parents.

Of equal importance is the finding of the Court that a parent's right to be with his or her children cannot be ignored simply because a court determines that one set of circumstances may be superior to another. "The best interest standard is subject to the overriding presumption that the relationship between parent and child is constitutionally protected and that the best interests of a child are served by reuniting the child with his parent." Id at 1007. In other words, biases about perceived lifestyle in foreign countries cannot cloud our judgment when reunification of families is sought. Our courts do not require perfect parents. The presumption of the parental preference doctrine can be overcome only when a parent is proved unfit. *In re Guardianship of Cameron D*, 14 Neb. App. 276, 706 N.W. 2d 586 (2005).

## Role of the Consulate

When a parent is deported, he or she cannot return to the United States for the purpose of asserting their parental rights and seeking the return of their children. 'Emergency visas' are unavailable to a deported person and an illegal entry would result in incarceration and deportation again, only delaying the process.

The Vienna Convention on Consular Relations, art. 37, Apr. 24, 1963, 21 U.S.T. 77, 102, and Nebraska law, Neb. Rev. Stat. 30-333 and 43-3801 to3812, provide for notification to, and involvement by, the consular officials when subjects of their country are or may be interested parties of a guardianship or termination proceeding affecting the minor child of their nation.

Notification of the Consulate is not jurisdictional, but early involvement of the Consular officials can assist in the reunification process. If a guardianship has been put into place upon the incarceration of an undocumented person, a consular official fits the definition required for guardianship termination proceedings as a party "interested in the welfare of the minor child".

It is well understood that, in order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *In re Interest of Natasha H*, 258 Neb. 131, (1999).

**PARENTS, CHILDREN AND DEPORTATION**

In matters seeking the removal of a guardian of a minor, the legislature has conferred this legal interest upon any person interested in the welfare of a ward, or the ward, if fourteen or more years of age if removal of a guardian is sought in the best interest of the ward. Neb. Rev. Stat. § 30-2616.

Among the Consulate's functions is safeguarding the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons. Vienna Convention on Consular Relations art. 37, Section 5(h).

With the cooperation of the Department on Infants and Families (Mexico's equivalent to Nebraska's Department of Health and Human Services), the Mexican Consulate in Nebraska works with the families and the courts to obtain home studies and necessary documentation to facilitate the reunification of the families of its nationals.

The process can be heartbreakingly slow. Particularly in the case of a four year old child, an eight month separation is fraught with anxiety, fear and sadness. The constitutional guarantees of the parental preference, when applied at the onset, can reunite families with the least amount of delay.

# Everything I Learned About Civil Law, I Learned From My Mother

Dear Mother:

I received a letter from another attorney, perhaps twenty years my junior. Her opening sentence noted that my "continued lack of understanding of the Nebraska Revised Statutes astounds" her. She then requested that I agree to continue a hearing and threatened to take up the matter with the judge (whose name she misspelled) if I didn't agree. How do I respond?

My Dear:

The best response is no response. Acknowledge only the legitimate request made in the letter and respond with objectivity and respect. The unseemly remarks by the sender serve only to diminish her stature as a competent attorney. There is no advantage to answering 'in kind'. The slightly threatening words regarding continuing the hearing are indicative of the writer's insecurity and self doubt. Just make the necessary arrangements. In other words, "tend to business". As I have always told you, "If you can't say something nice, say nothing at all."

Dear Mother:

A colleague sent me an email noting that a client was to "imitate" a phone call (I think the word was to be "initiate") and the client was to "bare" the expenses ("bear"?). Should I correct this person or simply read between the lines and move ahead?

My Dear:

Write a courteous reply using, in corrected form, as many of the sender's misspelled words as possible. If any grammatical errors are cause for confusion or misunderstanding, politely request clarification. Respect for your professional counterpart is foremost but certainly continued disregard for accuracy in written documents will make communication difficult. Hope for improved skills with subtle suggestions. As the saying goes: a word to the wise is sufficient. And make sure you proofread your own work twice before it goes out.

I am sure she would gladly advise others seeking to keep civility in the practice of law.

# "Sexting" by Students Revisited

## To the Editor:

A recent article ("Legal Implications of Student Sexting," Karen A. Haase, March 2010) suggested that school administrators may search the contents of student cell phones if they have a written policy warning such searches may occur. The suggestion is not a safe harbor in the opinion of the ACLU.

The proposal that a policy will protect a school is based on a criminal case from the Nebraska Court of Appeals. But searching a vehicle is much different from searching a cell phone. Cell phones are much more like a diary--nowadays they can contain an exchange of love letters, information about the owner's medical or mental health treatment, photos and even private details of the parents of the student. This is why it is very unlikely that a court would treat the search of a cell phone in a similar manner to the search of a car.

As the article pointed out, the only court to have squarely addressed this issue so far found the search of the phone violated the student's rights. *Klump v. Nazareth*, 425 F.Supp.2d 622 (E.D. Pa. 2006) Just as a school may not pass a policy warning children that their diaries are subject to search on the whim of a teacher, no written rule will waive the privacy rights in a cell phone contents, either.

The right of schools to temporarily confiscate cell phones as a nuisance item is clear. But school officials may not then go through the phone without reasonable and articulable suspicion.

A further problem that schools face is that searching students' text messages is a Class IV felony under the Nebraska law protecting the privacy of telephone and electronic communications. *Neb. Rev. Stat*. 86-290 makes it illegal to intercept, use, or disclose information taken without a warrant from any person's phone in any form. The text messages, pictures and voice messages on a cell phone constitute telephone or electronic communications.

If you represent a school district, you may wish to caution your clients that until the law becomes more clear on this issue, a written policy is not a bulletproof shield allowing them to search student cell phones. Indeed, they may face not only a civil rights lawsuit and damages but criminal prosecution as well.

*Amy Miller, Legal Director*
*ACLU Nebraska*
*941 O St. #706*
*Lincoln, NE 68508*
*402-476-8091*

## Response from Karen Haase:

I did not intend to imply that school officials may search students' cell phones with impunity so long as the school board had adopted a policy advising students that their cell phones are subject to reasonable search. As many, many federal courts have explained, school officials may search students persons and their property if the officials have a reasonable suspicion that such a search will reveal a violation of school rules. These searches must be both justified at their inception and reasonable in scope. In *Klump v. Nazareth Area School District*, the United States District Court for the Eastern District of Pennsylvania denied the school district's motion to dismiss, noting that it was bound to accept the plaintiff's factual summary, which alleged that school officials searched the phone without any justification whatsoever at the inception of the search and that school officials unreasonably continued to search the phone's stored text messages and voice mails after their initial search revealed no wrongdoing. *See Klump*, 425 F. Supp. 2d at 639. The court expressly noted that the defendants' analysis, arguing that school officials only searched the phone after receiving a drug-related text message, was "persuasive," but that the court "cannot rely on their factual summary, which differs materially from plaintiffs'." *Id*. The *Klump* decision certainly does not stand for the proposition that school officials may never examine the contents of students' cell phones.

As for the citation to Nebraska's wiretap statute (Neb. Rev. Stat. § 86-290) I do not believe that examining pictures or text stored on a cell phone constitutes the "interception" of a wire, electronic or oral communication, and I am not aware of any court decision so interpreting the statute. If it is not a violation of the wiretap statute to intercept cordless telephone conversations via police scanner, I am doubtful that it is a violation of that statute to open a lawfully-confiscated cell phone and conduct a search based on reasonable suspicion. *See* 1992 Op. Att'y Gen. No. 102. Of course, that issue may well be litigated in the next few years. If it is, I am confident that *The Nebraska Lawyer* will inform its readers of the outcome.

*Karen A. Haase*
*Harding & Shultz, PC, LLO*
*121 S. 13th St., #800*
*Lincoln, NE 68508*
*402-434-3000*

# Courthouse Notecards

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# NSBA Events Calendar

## May 2010

| | |
|---|---|
| 7 | Ethics Seminar - Co-Sponsored with Security National Bank, *Security National Bank - One Pacific Place* |
| 13 | Ethics Seminar featuring Prof. Nancy Rapoport, *Embassy Suites - Downtown, Omaha* |
| 13-14 | UNL Estate & Business Planning |
| 21 | NMCCP CLE Diversity Seminar featuring Dr. Arin Reeves, *Kutak Rock, Omaha* |

## June 2010

| | |
|---|---|
| 4 | NSBA Community Service Day |
| 4 | Public Interest Law Section Seminar, *Creighton Law School* |
| 4 | NCLE Agriculture & Natural Resources Section Seminar, *Location TBA, Kearney* |
| 10 | Government Practice Fundamentals & Something More, *UNL College of Law* |
| 11 | Negotiation Skills featuring Martin Latz, *Location TBA, Omaha* |
| 25 | Greater Nebraska Golf Tournament, *Prairie Club, Valentine* |

## July 2010

| | |
|---|---|
| 1-3 | NCLE Advanced Estate Planning, *The Stanley Hotel, Estes Park, Colorado* |
| 30 | NSBA Family Law Section's Annual Family Law Institute, *Location TBA* |

## August 2010

| | |
|---|---|
| 5-6 | NCLE Solo & Small Firm Conference, *Embassy Suites, La Vista* |
| 23 | NSBA Golf Tournament, *Hillcrest Country Club, Lincoln* |

## September 2010

| | |
|---|---|
| 10 | NCLE Annual Real Estate Institute, *Location TBA* |

## October 2010

| | |
|---|---|
| 20-22 | NSBA Annual Meeting, *Embassy Suites, La Vista* |

## November 2010

| | |
|---|---|
| 5 | NSBA Workers' Compensation Section Annual Seminar, *Location TBA* |

## Judge Zwart Invested to Office

On November 9, 2009, the Nebraska federal district court judges selected **THE HONORABLE CHERYL R. ZWART** to fill the vacancy created by the retirement of United States Magistrate Judge David L. Piester. Judge Zwart was initially sworn in to begin her new duties on January 15, 2010.

*Judge Zwart is sworn in as U.S. Magistrate Judge for the District.*

Judge Zwart is a native of Lennox, South Dakota. She graduated *summa cum laude* from the University of South Dakota in 1980 with a bachelor's degree in Medical Technology. After graduation, she moved to Lincoln, Nebraska, where she practiced and taught laboratory medicine until 1985. Judge Zwart's legal education began in 1985. She obtained her law degree with high distinction from the University of Nebraska College of Law in 1988. Upon graduation, she became an associate, and five years later, a partner in the Knudsen, Berkheimer, Richardson, and Endacott law firm. Judge Zwart's private practice focused on civil litigation. While working at Knudsen, Judge Zwart also served as an adjunct professor at the University of Nebraska College of Law, teaching civil clinic and pretrial litigation.

Judge Zwart's employment with the United States District Court for the District of Nebraska began in 2001, when she became a judicial clerk for Magistrate Judge David L. Piester. As a law clerk, Judge Zwart drafted memoranda, orders, and report and recommendations in civil and criminal cases. In addition to her law clerk duties, Judge Zwart worked on the pro se docket, and served on the court's Continuity of Operations Plan Committee and Docket and Local Rules Committee. Judge Zwart also continued her work as an adjunct professor at the University of Nebraska College of Law, teaching pretrial litigation, remedies, and trial advocacy. She also judged moot court, served as a facilitator for beginning law students during break-out sections on professionalism, and served as a mentor for the Summer Pre-Law Institute at the College of Law. Judge Zwart is the current President of the Robert Van Pelt Inn of Court and previously served as its President-Elect, Program Chair, and an Executive Committee member.

Judge Zwart's community leadership has included mentoring young people in the community through the Girl Scouts of America, serving as Service Unit Event Coordinator, Silver and Gold Award Advisor, and Troop Leader. She has also volunteered her time and talents to the Lincoln Arthritis Foundation Board, Presbyterian Youth Committee, and Southeast Community College.

## Judge Riley Invested as Chief Judge of the U.S. Court of Appeals

*Hon. William J. Riley*

**THE HONORABLE WILLIAM JAY RILEY** was invested as Chief Judge of the U.S. Court of Appeals for the Eighth Circuit, Wednesday, April 7, 2010. The Honorable Joseph F. Bataillon, Chief Judge, U.S. District Court for the District of Nebraska presided.

Judge Riley was nominated to the Eighth Circuit Court of Appeals in 2001 by President George W. Bush and was unanimously confirmed by the U.S. Senate. He filled a vacancy created when the Honorable C. Arlen Beam took senior status. As Chief Judge, he succeeds the Honorable James B. Loken.

Judge Riley was born in Lincoln, Nebraska, educated at Lincoln High School, and received his B.A. from the University of Nebraska - Lincoln and his J.D., with distinction, from the University of Nebraska College of Law. After law school, he clerked for the Honorable Donald P. Lay and moved to private practice with Fitzgerald, Schorr, Barmettler and Brennan for 28 years, before being appointed to the Eighth Circuit Court of Appeals. Judge Riley has served as an adjunct professor of trial practice at both the Creighton Law School and the University of Nebraska College of Law.

A fellow and past chair of the American College of Trial Lawyers, Judge Riley is a former state president of the American Board of Trial Advocates, a former president and executive council member of the Omaha Bar Association and a House Delegate with the Nebraska State Bar Association. Judge Riley was appointed by Chief Justice William Rehnquist and reappointed by Chief Justice John Roberts to serve on the Criminal Law Committee of the Judicial Conference of the United States. In addition, he is a member of the Nebraska Association of Trial Attorneys, the Nebraska Defense Lawyers Association and the Alternative Dispute Resolution Committee of the Nebraska State Bar Association.

nlf news

The Nebraska Lawyers Foundation

# Justice For All
# 2010 Barristers' Ball

The 2010 Barristers' Ball, "Justice for All", was held April 10, 2010 at the Doubletree Hotel in Omaha. Approximately 400 people attended the event and took part in a fun-filled evening of music by Bozak & Morrissey, silent and live auctions, dining and dancing.

This year's theme for the Ball was Justice for All and was dedicated to recognizing the efforts of volunteer lawyers and supporters of the NSBA's Volunteer Lawyers Project, which works to help low-income Nebraskans actually achieve justice in their lives.

*Robert Bartle presents James H. Truell of Grand Island with a 2010 Visionary Award.*

The 2010 Visionary Award winners recognized for their contributions and commitment to the Volunteer Lawyers Project included: Chaloupka Holyoke Hofmeister Snyder & Chaloupka - Scottsbluff; Alton E. Mitchell - Omaha; Stacey L. Parr - Seward; Timothy P. Sullivan - Lincoln; James H. Truell - Grand Island. This year's Robert M. Spire Pro Bono Award winner was: Susan M. Koenig, whose dedication to representing those in need for the 25+ years of VLP's existence has made a real difference in the lives of many individuals in Grand Island and the surrounding communities.

*Robert Bartle presents Susan M. Koenig of Grand Island with the 2010 Robert M Spire Pro Bono Award.*

*Chief Justice Michael G. Heavican and NSBA President Michael F. Kinney*

A fundraiser like the Barristers' Ball could not accomplish its goals without the support of sponsors. We'd like to thank all the sponsors that made the evening a success! Reception sponsor: Bank of America; Dessert Sponsor: ABA Retirement Plan; Band Sponsor: Marsh; Auction Sponsor: The Daily Record; Silver Patrons: Baird Holm, Bartle & Geier Law Firm/Brooks Pansing Brooks PC LLO, Bradford & Coenen, LLC, Brashear LLP, Cassem Tierney Adams Gotch & Douglas Law Firm, Cline Williams Wright Johnson & Oldfather LLP, Continuum Worldwide, Creighton Law School, Fraser Stryker PC LLO, Great Western Bank, Hauptman, O'Brien, Wolf & Lathrop, PC, Husch Blackwell Sanders, LLP, Javoronok & Neilan, Kalkwarf & Smith Law Offices, L.L.C., Kiewit Corporation, Knapp Fangmeyer Aschwege Besse & Marsh, Kutak Rock LLP, Lamson Dugan & Murray LLP, Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., Locher Pavelka Dostal Braddy & Hammes, LLC, Minnesota Lawyers Mutual Insurance Company, NSBA Young Lawyers Section, Powers Law Firm/Rembolt Ludtke LLP, Realcorp Appraisers and Consultants, Ruth Mueller Robak LLC, Schirber & Wagner LLC, Seiler & Parker, P.C., L.L.O., Suiter • Swantz PC LLO, The Berry Law Firm, West Gate Bank, Women & the Law Section; Cash Contributors: Banking Law Section, Business Law Section, Corporate Counsel Section, Elder Law Section, Family Law Section, General Practice Section, Law Practice Management Section, Litigation Section, Natural Resources & Environmental Law Section, Workers' Compensation Section.

*2010 Barristers' Ball Committee Chairs, Robert J. Parker, Jr. & Julie Parker.*

*NSBA President-Elect Robert & Barbara Bartle and Dian & Robert Hillis.*

NEBRASKA
Continuing Legal Education

# 2010 NCLE Calendar

*May 2010*

**7 Ethics Seminar**
***(co-sponsored with Security National Bank)***
***Security National Bank (One Pacific Place)***
(2 hours ethics credits)

**13 Ethics Seminar featuring Prof. Nancy Rapoport**
***Embassy Suites, Downtown Omaha***
(2 hours ethics credits)

**13 NMCCP CLE Diversity Seminar featuring Dr. Arin Reeves**
***Kutak Rock, Omaha***
(2 hours ethics credits)

*June 2010*

**4 Public Interest Law Section Seminar**
***Creighton Law School***
(Estimated credit - 6 hours)

**4 NCLE Agriculture & Natural Resources Section Seminar**
***University of Nebraska - Kearney***
(Estimated credit - 3 hours)

**10 Government Practice Fundamentals & Something More**
***UNL College of Law***
(CLE credit - 3.5 hours)

**11 Negotiation Skills featuring Martin Latz**
***Location TBA, Omaha***

*July 2010*

**1-3 NCLE Advanced Estate Planning**
***The Stanley Hotel, Estes Park, Colorado***
(Estimated credit - 12 hours including 2 ethics hours)

**30 NSBA Family Law Section's Annual Family Law Institute**
***Location TBA***
(Estimated credit - 6 hours)

*August 2010*

**5-6 NCLE Solo & Small Firm Conference**
***Embassy Suites, La Vista***
(Estimated credit - 10 hours including 2 ethics hours)

*September 2010*

**10 NCLE Annual Real Estate Institute**
***Location TBA***
(Estimated credit - 6 hours)

*October 2010*

**20-22 NSBA Annual Meeting**
***Embassy Suites, La Vista***
(Estimated credit - 20+ hours including 6+ ethics hours)

*November 2010*

**5 NSBA Workers' Compensation Section Annual Seminar**
***Location TBA***
(Estimated credit - 6 hours)

# Career Changes......................... .........................and Relocations

**SHIRLEY A. MORA JAMES** has opened the law office of **MORA JAMES LAW** at 601 Calvert Street, Suite A, PO Box 21772, Lincoln NE 68542. Contact information includes: Phone: (402) 890-2295, Fax: (402) 325-1006, Email: SA@MoraJamesLaw.com, Web: http://morajameslaw.com, Twitter: http://twitter.com/MoraJamesLaw.


*Anna M. Bednar*

The Omaha law firm of Robert F. Craig, P.C. is pleased to announce that **ANNA M. BEDNAR** has joined its practice. Anna graduated with distinction from John Marshall Law School where she served as law review editor. She brings with her more than 8 years experience in Chapter 11 bankruptcy cases primarily representing debtors. In addition, she has experience in complex litigation and diverse areas of corporate law, and has represented clients in a variety of different industries. She is founding member of the Nebraska Women's Bar Association, served on its board for 10 years, and served twice as its president. She also served 2 terms as the Omaha Bar Association Corporate Council Chairperson. She is licensed in Nebraska, Illinois and Colorado.


*Thomas R. Burke*

Erftmier Law, LLC is pleased to announce that **THOMAS R. BURKE** has joined the firm as Of Counsel. Mr. Burke is a past President of the Nebraska State Bar Association and the Omaha Bar Association. He was also a Fellow for many years in the American College of Trust and Estate Counsel. Listed in the 2009 edition of The Best Lawyers in America, Mr. Burke was also recognized in Omaha Magazine's Best Lawyers edition for 2009.

The law firm of Dornan, Lustgarten & Troia, PC LLO, is pleased to announce that **SOPHIA ALVAREZ** has joined the firm. Ms. Alvarez is a graduate of the University of Nebraska College of Law and will be working primarily from the South Omaha offices of Dornan, Lustgarten & Troia. The South Omaha Office is dedicated to serving the needs of the South Omaha Community in the areas of criminal and family representation and to offer counsel on a variety of topics. Also joining the firm of Dornan, Lustgarten & Troia, PC LLO, is former United States Attorney, Thomas Monaghan. Monaghan joins the firm 'of counsel' and practices in the areas of criminal law, personal injury and federal litigation.


*Stacia L. Palser*


*Heather Voegele-Andersen*


*Kendra J. Ringenberg*

Koley Jessen law firm has named **STACIA L. PALSER**, **HEATHER VOEGELE-ANDERSEN** and **KENDRA J. RINGENBERG** shareholders of the firm as of January 1, 2010. Palser practices with Koley Jessen's Real Estate, Environmental and Natural Resources Law Practice Group. She earned her bachelor's degree from the University of Nebraska at Lincoln and her law degree from the University of Colorado School of Law. She is also a LEED Accredited Professional. Voegele-Andersen is a member of the firm's Litigation Practice Group. She is a graduate of the University of Mary in Bismarck, North Dakota, and earned her law degree, *summa cum laude*, from Creighton University School of Law. Ringenberg practices with Koley Jessen's M&A/Securities Practice Group and the Real Estate, Environmental and Natural Resources Practice Group. She has a bachelor's degree from Nebraska Wesleyan University and a law degree from the University of Nebraska College of Law, both earned with highest distinction.

**BEN THOMPSON** recently relocated his law practice to new office space in west Omaha. Thompson Law Office, PC, LLO is now located at 13906 Gold Circle, Suite 201, Omaha, Nebraska 68144, Phone/Fax: (402) 330-3060, Toll-Free Phone/Fax: (888) 330-3060. Thompson has a general practice that includes, but is not limited to, town home and condominium owners associations, employment law, family law, business law, estate planning, and Federal Indian law.

Carlson & Burnett, LLP is proud to announce that **ANDREW M. FERGUSON** and **JEFFREY B. SMITH** have joined the firm as partners. Andrew Ferguson is a graduate of Creighton University School of Law and is a member of the Nebraska State Bar Association. Andrew brings significant experience in the areas of Family Law, Civil Litigation and Criminal Defense. Jeffrey Smith is a graduate of Creighton University School of Law. and is a member of the Nebraska State Bar Association. Jeffrey bring significant experience in the areas of Personal Injury, Civil Litigation and Workers' Compensation.

## TRANSITIONS

At its annual partnership meeting, Woods & Aitken LLP elected **FRANK J. MIHULKA** and **PATRICK D. TIMMER** as partners of the Firm effective January 1, 2010. Frank J. Mihulka joined Woods & Aitken's Omaha office in 2008 after practicing 25 years with another Omaha-based firm. He is one of the area's most respected mortgage attorneys, and one of two Nebraska attorneys who is a Fellow in the American College of Mortgage Attorneys. Mihulka focuses his practice in the areas of real estate, banking and finance, business entities and related transactional law. Mihulka also has significant experience representing agribusiness companies. After several years with another Lincoln law firm, Timmer joined Woods & Aitken in 2007 to support and expand the Firm's Estate Planning and Business Entity practice areas. A recently elected Fellow of the American College of Trust & Estate Counsel, Timmer's practice focuses on estate planning and tax-efficient wealth transfer planning for individuals, and succession planning for business owners. A portion of Timmer's practice is also devoted to the administration of estates and trusts.

*Frank J. Mihulka*

*Patrick D. Timmer*

The law firm of Denney & Chilen is pleased to announce the hiring of **HEATH STEWART** as an associate attorney with the firm. Stewart graduated from Fairbury Jr-Sr High School in 1999, and is the son of Roger and Terri Stewart of rural Fairbury. Stewart graduated from Nebraska Wesleyan University in 2003 with" a Bachelor of Science degree in economics and accounting. He received his J.D. from the University of Nebraska School of Law in 2008. Prior to joining Denney and Chilen, Stewart worked for Union Pacific Railroad as a Manager of Yard Operations at Bailey Yard, in North Platte. Stewart also has a year of banking experience from employment with West-Star Bank in Vail, Colo. During law school, Stewart was employed by McGrath North Mullin & Kratz, PC LLO, in Omaha for two years as a law clerk. Stewart performed work in the firm's contract, tax, real estate, and environmental departments. In addition to continuing his work in these departments while employed with Denney & Chilen, Stewart plans to practice in juvenile matters, criminal defense, and wills and estates.

Person Law Office has announced that **NATE DEWALD** has joined Kent Person in the practice of law at the Holdrege office. Mr. DeWald was a graduate of Holdrege High School in 1999 and received his law degree from the University of Nebraska School of Law in 2006. Since graduating from law school, he has served as Corporate Counsel for Sandhills Publishing Company in Lincoln. He is licensed to practice law in Colorado as well as Nebraska.

Keating, O'Gara, Nedved & Peter, P.C., L.L.O. is pleased to announce **JOEL BACON** has become a shareholder in the firm. Mr. Bacon graduated with high distinction from the University of Nebraska College of Law in 2002. Upon graduation, he served as a judicial law clerk for Honorable William M. Connolly of the Nebraska Supreme Court. Mr. Bacon joined the firm as an associate in 2005. His practice emphasizes business and estate planning, employment law and commercial litigation.

Mattson, Ricketts, Davies, Stewart & Calkins is pleased to announce that **PATRICIA L. VANNOY** has joined the firm. Vannoy is a Lincoln native who received her Juris Doctor from the University of Nebraska College of Law in 2009 and a Bachelors of Journalism in News-Editorial and Sociology from the University of Nebraska - Lincoln College of Journalism and Mass Communications in 2005. While attending the University of Nebraska College of Law, Vannoy was a member of the Nebraska Law Review and the Nebraska Moot Court Board. Her article, "R.I. P.: The Federal Common Law Waiver Approach to Retirement Plan Death Benefits Finally Rests in Peace After Kennedy v. Plan Administrator for DuPont Savings & Investment Plan," was published in the Nebraska Law Review last year. Vannoy 's primary areas of practice include investor rights, natural resources law and general civil litigation. She is admitted to practice in Nebraska and Colorado.

McGill, Gotsdiner, Workman & Lepp, P.C., L.L.O. announces the addition of three attorneys to the corporation: **J. P. SAM KING** has become a Shareholder of the Corporation and **ERIN R. HARRIS** and **NATHAN R. WATSON** have joined the Corporation as Associate Attorneys. A South Dakota native, King received his J.D. from Creighton University School of Law and was admitted to the Nebraska Bar in 1991. He represents clients in commercial disputes and litigation. He also represents creditors and other parties on bankruptcy matters and employers on employment matters. Harris is from Alliance, Nebraska and earned her J.D. in 2006 from the University of Nebraska College of Law. She was admitted to the Nebraska Bar in 2006. She works in the areas of creditors' rights and commercial litigation. Watson was born in Iowa and received his J.D. from Drake University Law School, in Des Moines in 2004. Licensed to practice in both Iowa and Nebraska, he is engaged in commercial litigation and corporate law and also works with non-profit organizations.

*J. P. Sam King*

*Erin R. Harris*

*Nathan R. Watson*

## Awards and Recognition

**THE NEBRASKA CRIMINAL DEFENSE ATTORNEYS ASSOCIATION** was recognized as "Defenders of the Bill of Rights" by the American Civil Liberties Union of Nebraska. “The NCDAA was chosen for this award because of their ongoing defense of the rights of people accused of a crime, both in the courts and at the legislature. On any bill that affects searches and seizures, the death penalty, the treatment of minors in the justice system, or right to access the courts, NCDAA is there as a powerful voice for the Constitution. The members, board and staff of NCDAA speak out for people that are often viewed as disposable by society, and we commend them,” said ACLE Director Amy Miller. ACLU Nebraska presented the award at their annual banquet to be held in Omaha in April.

*Rod Rehm*

**ROD REHM**, senior member of Rehm, Bennett & Moore, P.C., L.L.O. with offices in Lincoln and Omaha, was recently inducted a Fellow of the College of Workers Compensation Lawyers. Mr. Rehm is a member of the 3rd class nominated to the college and is the first Nebraska member. Rod is a past president of the Nebraska Association of Trial Attorneys and past chair of the NSBA Workers Compensation Section. The College of Workers' Compensation Lawyers has been established by two sections of the American Bar Association and the Workplace Injury Law and Advocacy Group to honor those attorneys who have distinguished themselves in their practice in the field of workers' compensation. Members have been nominated for the outstanding traits they have developed in their practice of twenty years, or longer, representing plaintiffs, defendants, serving as judges, or acting for the benefit of all in education, overseeing agencies and developing legislation. These individuals have convinced their peers, the bar, bench and public that they possess the highest professional qualifications and ethical standards, character, integrity, professional expertise and leadership. They have a commitment to fostering and furthering the objectives of the College and have shown significant evidence of scholarship, teaching, lecturing, and/or distinguished published writings on Workers' Compensation or related fields of law. In addition to these characteristics, a Fellow is expected to display the following traits in their day to day practice of workers' compensation and related fields.

FBI Director Robert S. Mueller III awarded the Director's Community Leadership Award to Omaha attorney **BILAL KHALEEQ** as one of the 50 people or organizations across the nation recognized for going above and beyond to make communities safer and stronger. Khaleeq helped sponsor the first Community Relations Executive Seminar Training Program that the FBI Division conducted in March 2009 at the Islamic Center of Omaha. Khaleeq is on the board of directors of the Midwest Islamic Foundation and the Tri-faith Initiative of Omaha.

**KEITH HARVAT** was tabbed by Governor Dave Heineman to serve on the Nebraska Jail Standards Board, which develops and implements minimum standards for detention facilities. Harvat graduated *cum laude* from Creighton University School of Law in 1996. He practiced in North Platte until November 2009, when he moved to Omaha. He said he suspected that his North Platte connection had something to do with his appointment, with Lincoln County's new jail being constructed. The Jail Standards Board was established in 1978. Since 1993, their statutory authority has extended to overseeing the standards of juvenile detention facilities along with adult jails and detention centers. The board is comprised of 11 members. Harvat will represent Nebraska's Bar Association. "Our job is to monitor civil rights issues within our own geographical areas and then" to meet periodically and report any concerns- and hopefully some successes - in the areas of civil rights," Vampola said. Vampola said he was referred to the U.S. Commission on Civil Rights based on the nine years he served on the Minority Justice Committee that was formed by the Nebraska Supreme Court and Nebraska Bar Association.

The Iowa Academy of Trial Lawyers recently elected Council Bluffs Attorney **RANDALL J. SHANKS** as their president for 2010.

## 2nd Annual Quashing Hunger Food Drive

**will be held September 20th - October 1st, 2010.**

**JOHN L. BAKER**, 81, of Angier, NC, died on March 11, 2010. John was born July 8, 1928, a native of O'Neill. John served as a fighter pilot in the U.S. Air Force during the Korean War, flying the first U.S. jets and as fighter gunnery instructor for the U.S. Air Force. After the war, John attended Creighton University where he earned his law degree. John served with the U.S. Department of Justice as a trial attorney in the civil division, then worked as a legislative assistant to the U.S. Senator Roman L. Hruska of Nebraska. Later, Grumman Aircraft Engineering Corporation, the U.S. Department of Transportation as deputy director, the Federal Aviation Administration as assistant administrator for general aviation, Airline Pilots Association as executive director, Aircraft Owners and Pilots Association (AOPA) as president and CEO from 1977-1990. He served as a consultant to AOPA after retiring. John is survived by his wife, Kathy H. Baker; children, John Michael Baker of San Antonio, Texas, Robert Brian Ezzell of Prescott, AZ, Camille E. Knouff and husband Tim of High Point, NC; sisters, Ellen L. Kadow and husband Brian, Jean L. Salata and husband Kalman, all of Chevy Chase, MD; sister-in-law, Myra H. Fulmer and husband Robbie of Angier, NC ; along with a cousin and several nieces and nephews.

**CHARLES "CHUCK" H. BEATTY**, 78, of Kearney, died March 10, 2010 in Kearney. Charles was born January 12, 1932 in Lincoln, Nebraska. He joined the Army Air Corps on July 4, 1954 and was assigned the 82nd Airborne Division, flying Cessna L-19 "Bird Dogs" as an aerial fire observer. He moved to Kearney where he served as Deputy Buffalo County Attorney. He served as a member of the Nebraska Aeronautics Commission, and practiced law for many years. Survivors include wife, Gertrude "Gitch" Beatty of Kearney, Neb.; sons, Jack Beatty of Kearney, Neb., Patrick Beatty of Basehor, Kan; daughter, Mary Brown of Kearney, Neb.; five grandchildren and four great-grandchildren.

**THOMAS J. CARRAHER**, 90, passed away March 8, 2010. He was born January 24, 1920 on a farm west of Petersburg, NE. He graduated from Creighton University School of Law in Omaha in 1950. On June 19, 1948 he married Celestine Herrmann in Omaha. From 1950 to 1969, Tom had a solo law practice in Petersburg, and also was the owner and publisher of the Petersburg Press weekly newspaper. In 1969 he took an administrative position with Northeast Community College in Norfolk. In addition to his duties as an Administrator, he taught classes in criminal justice, history, and journalism. He also served as Legal Advisor to the college president. He retired in 1987. After retirement, he continued teaching several courses at Northeast Community College and also taught philosophy at Wayne State College. One of his avocations was writing and he had many articles and poems published. He was preceded in death by his wife Celestine, five sisters and two brothers. He is survived by his daughter & son-in-law, Mary Beth and Del Lienemann Jr.; son & daughter-in-law, Dr. James and Susan Carraher; son Patrick Carraher, (all of Lincoln, NE); and six grandchildren.


*Truman Clare*

**TRUMAN CLARE**, 88, died March 1, 2010 in St. Petersburg Beach, FL. After serving as an officer in World War II, he earned an accounting degree from the University of Nebraska at Lincoln and a master's degree in business administration from Northwestern University. After graduating from Creighton Law School in 1951, he became the law partner of Ephraim Marks, a well-known trial attorney in Omaha. After a merger in 1994, the firm became Marks Clare & Richards. After a very distinguished career, particularly in the fields of tax and estate planning, Truman Clare retired in 2001, and with his wife of 66 years, Rosemary, moved to Florida. "I experienced discrimination early in life, and I didn't like it. I don't like to see discrimination against others," the Irish-Catholic Clare told the Midlands Business Journal in a 1989 interview. His motto was, "Try to help your fellow man," said his daughter. "He lived it. It was in everything he did. He was adamant to make sure people were treated fairly." In 1995, the Nebraska State Bar Association awarded the Marks Clare & Richards firm the Robert M. Spire Pro Bono Award. In accepting on behalf of the firm, Truman Clare said, "We do a lot of pro bono work, not all of it planned." Although a devout Irish-Catholic, Truman Clare was also heavily involved with the Jewish community. He was recognized by the State of Israel and was named humanitarian of the Year by the Jewish Federation of Omaha. Truman Clare is survived by his wife, Rosemary Minton Clare of St. Petersburg Beach; daughters, Marianne Clare and Denise Clare, both of Omaha; son John Clare of Clearwater, Fla.; and three grandchildren. Another son, Joseph, preceded him in death. Memorials are suggested to the National Conference for Community and Justice or a charity of the donor's choice.

**BARBARA GALE BLACKBURN KRATZ**, 84, died on March 17, 2010 in Omaha. Barbara was born March 27, 1925 to Albert and Edith Blackburn in Colby, KS, and grew up in Grand Island, NE. Barbara is survived by her beloved husband of 61 years, Dean George Kratz; her older sister Edith (Doll) Linder of Broken Bow, NE; children, Kathy Kratz (St. Paul, MN), Steve Kratz (Salt Lake City, UT and Omaha, NE), Annie Kratz (John La Puma) (Santa Barbara, CA) and Tim Kratz (Anne) (Denver, CO); grandchildren, Matison, Cole, and Gianna Kratz; sisters-in-law, June Rasmussen Blackburn (Grand Island, NE), and Betty Williams Kratz (Omaha, NE); numerous nieces and nephews; great nieces and nephews; and many close friends who were like family to Barbara. Preceded in death by parents Edith Forbes Blackburn and Albert Blackburn; siblings: Helen Blackburn McElroy (Bob), Lucy Blackburn Fagin (Bret), Albert Blackburn (Maxine), Bill Blackburn (June) and Byron Blackburn; and, brothers-in-law Chet Linder, and Kent Kratz.


*Barbara A. Kueny*

**BARBARA ANNE KUENY**, 48, of Omaha, died March 7, 2010. She was born on August 20, 1962 in Sioux City, Iowa. She graduated from North High School in 1980, and earned her bachelor's degree from the University of Northern Iowa in 1985 and her J.D. from Creighton University School of Law in 1988. Barbara engaged in the private practice of Law for over twenty years and was a member of the Nebraska State Bar Association. She also served as a judge for the Winnebago Tribe of Nebraska for six years. Barbara did pro bono work for the YWCA and for Legal Aid Society. She received an award from the YWCA for her assistance in domestic violence training. She will be missed by her friends and family. She is survived by her parents, Richard and Sally Kueny of Sioux City; sisters, Mary Beth Runge and her husband, Patrick (also a member of the Nebraska Bar). Sandra Stewart and her husband Shannon; Kathleen Roe and her husband, Robert Roe, Jr.; three brothers Mark Kueny and wife, Elizabeth, Paul Kueny and wife, Becky, and Andy Kueny and wife, Katie. Barbara was the "favorite aunt" to 10 nieces and nephews. Memorials may be made to Making Memories Foundation (foundation to fight breast cancer), PO Box 22066, Milwaukie, OR 97269.

**ANDREW J. MCMULLEN**, 80, passed away at his residence in Kearney, NE on March 13, 2010. He was born May 18, 1929 in rural Buffalo County Nebraska to Andrew and Susie (Schepers) McMullen. He was a graduate of Shelton High School, UNO and Creighton School of Law. He was married to Pat Worford in Kansas in 1947. Later he was married to Margaret Anderson in 1965. She died in 1980. He was married to Bonnie Roessler in Kearney on Nov. 3, 1983. He served as Buffalo County Attorney for 16 years (4 terms). He served as president of the Buffalo County Bar Association, 50 year member of the Nebraska Bar Association and was a member of the Nebraska County Attorney's Association. Survivors include his wife, Bonnie of Kearney; sons, Robert and wife, Jeffie of Kearney; William and wife, Candy of Kearney; Andrew Jr. of Santa Clarita, CA; Ross of Kearney; stepson, Barrett Roessler and wife, Dani of Liberal, KS; sister, Alice Green of Nampa, ID; 8 granddaughters; 3 grandsons; 3-great grand children and numerous nieces and nephews. He was preceded in death by his parents; wife, Margaret; two brothers and four sisters.

**DONALD R. OVERHOLT**, 78, was born March 6, 1932 and died March 24, 2010. He was preceded in death by his parents, Donald M. and Claire A. Overholt, and two infant children. Don is survived by his son, David (Cindy) Overholt, daughter Ann (Colin) Ochs, three grandchildren. Also survived by Mary LeClair, and her children and grandchildren. In addition, he is survived by his brother, Richard (Barbara) Overholt, sisters Gail (Vern) Krenzer and Lynn Wake (J.P. Wehrman), nephews Douglas (Kari) Krenzer, Jeffrey (Megan) Krenzer, Andrew (Amy) Krenzer and Max (Melanie) Wake, nieces Kathleen Overholt, Mary (Tom) Schafer, and Elizabeth Wake (Gary Croke), as well as many great nephews and nieces. Don grew up in Omaha, and graduated from the University of Nebraska in 1954, where he participated in R.O.T.C. and was a member of Kappa Sigma Fraternity (president his senior year). Don was dedicated to scouting, was an Eagle Scout, camp counselor, rifle range instructor at Camp Cedars, and Scout Master. He earned numerous medals for marksmanship in scouting and R.O.T.C. Don proudly served as a navigator in the U.S. Air Force from 1954 to 1957. He completed his first year of law school at the University of Michigan before returning to Omaha to complete his J.D. at Creighton University. He served as General Counsel for InterNorth, Inc. for twenty-five years. He continued to practice law and mediation privately from his historic "bank building" in downtown Waterloo, Nebraska. Don represented the Village of Waterloo and the S.I.D. of Riverside Lakes until the time of his death. Throughout his legal career Don was always helpful to anyone who asked or who needed pro bono assistance. He loved sailing and tennis, still playing in January of this year. Memorials may be made to Nebraska Children's Home or to Boy Scouts of America.


*Byron D. Strattan*

**BYRON D. "BARNEY" STRATTAN**, 79, died February 28, 2010 in Omaha. Born on September 28, 1930, he graduated from Central High School in Omaha, got his bachelor's degree at Colorado A&M, (now Colorado State University) and earned his law degree at Creighton University. Barney Strattan was a longtime attorney for Union Pacific Railroad in Omaha. "He really loved the law," his wife, Jane Ann Strattan said. The Strattans were avid travelers. "He carried his tux halfway around the world just to wear it one night at the Moulin Rouge" in Paris, said his wife. On that trip, the Omaha couple had stopped first in

Kenya to visit daughter Molly, who was serving in the Peace Corps. Another time, the couple took a seven-week RV trip to Alaska. It was part of Barney Strattan's successful plan to visit all 50 states. The Strattans also visited other parts of Europe, Argentina and Australia. Barney Strattan was an avid golfer, loved singing with his kids and was active in fundraising for Rotary clubs. He is survived by his wife Jane Ann Strattan; children, Morgan Strattan and wife Julie, Dr. Sara Strattan, Amy Mahoney and husband Philip, Molly Strattan and husband Collin Stoll; eleven grandchildren; sisters, Belle Innis and Joyce Gibson; nieces and nephews.

**WILLIAM E. WEBSTER**, 81, of Pierce, Nebraska, died on his 81st birthday on March 4, 2010. He was born in Plainview, Nebraska, graduated from Plainview High School in 1947, and from the University of Nebraska College of Law in 1956. He was an officer in the U.S. Army during the Korean War, serving in the military police and criminal investigation division. William and Julia Holland were married on May 22, 1953 at the University of Chicago Hilton Chapel, and they moved to Lewistown, Montana, where he worked for Texaco Oil Company as a land title examiner. He moved to Pierce in 1958 where he joined Edwin Beech as an associate in his law practice. In the early 1970s he opened his own law office on Main Street. He served as Pierce City and Pierce County attorney for 20 years. He was a member of Pierce Chamber of Commerce, served on the Pierce School Board, member of the Pierce American Legion where he served as Adjutant and Commander, member of Pierce Lions Club, Pierce County Historical Society, University of Nebraska Alumni Association, and Nebraska Bar Association. He served on the Pierce Library Board, Nebraska Children's Home Society Board of directors. He was a Boy Scout Volunteer leader and was a member of the MasonicLodge in Plainview. Survivors: wife, Julia (Judy) of Pierce; daughter, Jean and husband, Dr. Michael McHale of Sioux Falls, S.D.; son, John and wife Monica of Tucson, Ariz.; and four grandchildren. Memorials to Nebraska Children's Home, Pierce Carnegie Library, or Pierce Historical Society.

**ERNEST "ERNIE" B. WINTROUB**, 92, passed away March 1, 2010. He was born March 23, 1917 in Omaha. He graduated from Central High School, the University of Nebraska at Lincoln, and UNL College of Law. He was on a championship debate team at Central and as an adult established a scholarship in his coach's name. After law school he joined the army and served during WWII in the Quartermaster Corps as a Major. He married Janet Zien Urich on January 20, 1947 and together they purchased the Omaha Lace Laundry. They were married for over sixty years and enjoyed playing, tennis, golf, meeting with their monthly bridge club and traveling to over 30 countries. As a result of his scouting experiences as a boy, he served on the Executive Committee of the Mid America Council of the Boy Scouts. He was Vice President of the Henry Monsky Chapter of B'nai B'rith, Chairman of the Omaha Chapter of the Anti-Defamation League, on the Board of Directors of the Jewish Community Federation of Omaha, and President of Beth El Synagogue. He also volunteered with his wife for many years at the Blumkin home and provided an endowment. He was most proud of his role as chairman of a subcommittee to determine how integration could be achieved in the Omaha schools. After the overall committee rejected his subcommittees recommendations a federal judge ordered integration using the methods proposed by the subcommittee he chaired. In 1965, after almost 20 years of running Omaha Lace Laundry, Ernie returned to the practice of law and had an active practice focused on discrimination law until his retirement in 1996. He was admitted for practice before the U.S. Supreme Court. Last year, at the age of 92, he was recognized as the oldest active member of the American Bar Association in Omaha. He is survived by his sons Bruce Wintroub (Marya), Frank Wintroub (Marji), John Wintroub, and daughter Beth Wintroub and her husband Tim Schabacker, six grandchildren and one great-grandchild.

***The memory of your colleagues may be honored with a memorial to NSBA's The Nebraska Lawyers Foundation, PO Box 81809, Lincoln, NE 68501-1809 or to the Nebraska State Bar Foundation P.O. Box 95103 Lincoln, NE 68509-5103 .***

*Note: If you hear of the death of a bar member please feel free to contact The Nebraska Lawyer and staff will follow up to obtain information and prepare a notice. You may contact kbellman@nebar.com. We receive notices, but they come from different sources and at different times, so your assistance is appreciated in sharing this important information with your colleagues.*

**BEACH HOUSE FOR RENT**: Nebraska bar member has southwest Florida beach house and brand new 3BR/2BA luxury beach condos for rent. See englewoodbeachhouse.com. Attorney discounts. Contact Lee Hollis 913-385-5400 or email leehollis@hollislawfirm.com. (1210)

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**WANTED TO PURCHASE** - AmJur Pleading and Practice (current), and AmJur Legal Forms 2nd (current). Contact Sarah at 475-7091 or sludvik@nebar.com. (UFN)

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THE NEBRASKA STATE BAR ASSOCIATION
NEBRASKA LAWYERS FOUNDATION (NLF)
Presents the

# 7TH ANNUAL GREATER NEBRASKA GOLF SCRAMBLE

FRIDAY, JUNE 25, 2010
The PRAIRIE CLUB
Valentine, NE 69201
888-402-1101

## Thank You to Our Golf Tournament Sponsors!

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# 7TH ANNUAL GREATER NEBRASKA GOLF SCRAMBLE

FRIDAY, JUNE 25, 2010
The PRAIRIE CLUB
Valentine, NE 69201
888-402-1101

Directions:
The Prairie Club is located 17 miles South of Valentine on HWY 97

## Golf Scramble

Friday, June 25th

**Format:** 4-Person Scramble
**Lunch & Driving Range:** 10:30 AM - Noon
**Shotgun Start:** Noon
**Dinner:** 5:00 PM
**Entry Fee:** $110 per golfer
**Includes:** Lunch, dinner, green fee, cart, range balls, and door prize drawings!
**Players:** Pairings will be made for individual and partial team entries.

## Additional Golf Outings!

Thursday, June 24th or Saturday, June 26th

- **Golf only:** $155 includes golf & golf car
- **Golf & Single Room:** $300 includes 1 round, 1 golf car, 1 night in single room.
- **Golf & Double Room:** $235 includes 1 round, 1 golf car, 1/2 of double occupancy room (requires 2nd individual also playing in the event to occupy the second 1/2 of double room).
- **Golf & Double Room:** $330 includes 1 round, 1 golf car, 1 double room (people that may bring a spouse or another person that would not be playing in the event.)

1) ______________________________
Name
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Address
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Phone
______________________________
U.S.G.A. Handicap Index Average 18 Hole Score

| ***Thursday, June 24*** | ***Saturday, June 26th*** |
|---|---|
| Golf only ($155): _____ | Golf only ($155): _____ |
| Golf & Sgl Rm($300) : ____ | Golf & Sgl Rm($300) : ____ |
| Golf & Dbl Rm($235): ____ | Golf & Dbl Rm($235): ____ |
| Golf & Dbl Rm($330): ____ | Golf & Dbl Rm($330): ____ |

2) ______________________________
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Phone
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U.S.G.A. Handicap Index Average 18 Hole Score

| ***Thursday, June 24*** | ***Saturday, June 26th*** |
|---|---|
| Golf only ($155): _____ | Golf only ($155): _____ |
| Golf & Sgl Rm($300) : ____ | Golf & Sgl Rm($300) : ____ |
| Golf & Dbl Rm($235): ____ | Golf & Dbl Rm($235): ____ |
| Golf & Dbl Rm($330): ____ | Golf & Dbl Rm($330): ____ |

3) ______________________________
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U.S.G.A. Handicap Index Average 18 Hole Score

| ***Thursday, June 24*** | ***Saturday, June 26th*** |
|---|---|
| Golf only ($155): _____ | Golf only ($155): _____ |
| Golf & Sgl Rm($300) : ____ | Golf & Sgl Rm($300) : ____ |
| Golf & Dbl Rm($235): ____ | Golf & Dbl Rm($235): ____ |
| Golf & Dbl Rm($330): ____ | Golf & Dbl Rm($330): ____ |

4) ______________________________
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U.S.G.A. Handicap Index Average 18 Hole Score

| ***Thursday, June 24*** | ***Saturday, June 26th*** |
|---|---|
| Golf only ($155): _____ | Golf only ($155): _____ |
| Golf & Sgl Rm($300) : ____ | Golf & Sgl Rm($300) : ____ |
| Golf & Dbl Rm($235): ____ | Golf & Dbl Rm($235): ____ |
| Golf & Dbl Rm($330): ____ | Golf & Dbl Rm($330): ____ |

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☐ I am unable to play in the tournament, but have enclosed $________ to support VLP.

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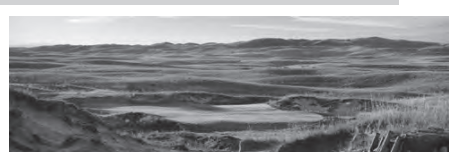

THE NEBRASKA STATE BAR ASSOCIATION
NEBRASKA LAWYERS FOUNDATION
Presents the

# 7TH ANNUAL GREATER NEBRASKA GOLF SCRAMBLE

FRIDAY, JUNE 25, 2010
THE PRAIRIE CLUB
Valentine, NE 69201
888-402-1101

Directions:
The Prairie Club is located 17 miles South of Valentine on HWY 97

## Sponsorship Opportunities

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The Nebraska Lawyers Foundation

# *2010 Diversity Awards*

The Nebraska State Bar Association **DIVERSITY AWARDS** were established in 2010 by the Minority Justice Committee to recognize outstanding efforts made by firms, organizations or individual attorneys in promoting diversity in the legal profession in the State of Nebraska.

**ELIGIBILITY**

• All law related organizations including student organizations, and bar associations are eligible.

• All law firms and legal offices are eligible, including private firms, government/public offices, and the corporate sector (activity must be specific to the Nebraska office).

• Any attorney, admitted to practice in Nebraska is eligible. The attorney can be active or inactive status and from any practice setting, including academia, the judiciary, corporate, private, nonprofit, governmental sectors, etc. Diversity activities can be performed within the scope of employment or on a voluntary basis.

**CRITERIA FOR SELECTION**

• The nominee must demonstrate an exceptional **commitment** to encouraging, increasing and/or retaining diversity in the legal profession. Examples include programs and projects that:

- address issues of **access and bias in the legal profession** based on race, ethnicity, gender, sexual orientation, disability or age
- influence individuals who have been **historically under-represented in the legal profession** to pursue legal education/careers
- increase advancement opportunities for lawyers who have been historically **under-represented in a particular job setting or practice area of the legal profession.**

**SELECTION PROCESS AND AWARDS PRESENTATION**

All nominees and nominators will be notified of the receipt of submitted nominations.

Representatives from the Nebraska Minority Justice Committee will review nominations and make recommendations to the NSBA House of Delegates Nominating Committee for final approval. The awards will be presented during the Nebraska State Bar Association Annual Meeting in Omaha, which will be held from October 20-22, 2010.

# *2010 Diversity Awards Nomination Form*

NEBRASKA
State Bar Association

**ONE COPY OF THE COMPLETED NOMINATION FORM AND SUPPORTING MATERIALS MUST BE RECEIVED BY MAY 15, 2010.**

Submit to: Nebraska State Bar Association, 635 South 14th St. Ste. 200, Lincoln, NE 68508

**SELECT CATEGORY:** ☐ Law Related Organization ☐ Law Firm ☐ Individual Attorney

Name of Nominee:____________________

Organization/Firm:____________________

Address:____________________

City:__________ State:______ Zip Code:________

Email:__________ Phone:__________ Fax:__________

**NOMINATORS:**

| | |
|---|---|
| Name:__________ | Name:__________ |
| Relationship to Nominee:__________ | Relationship to Nominee:__________ |
| Organization/Firm:__________ | Organization/Firm:__________ |
| Address:__________ | Address:__________ |
| City:______ State:___ Zip:_____ | City:______ State:___ Zip:_____ |
| Phone:__________ | Phone:__________ |
| Fax:__________ | Fax:__________ |
| Email:__________ | Email:__________ |

In addition to this cover sheet, please provide the following information:

a. Provide a brief (1 page) description of the nominee (e.g., a bio, description of the firm or organization)

b. Describe the nominee's exceptional efforts in encouraging, increasing and/or maintaining diversity in the law school pipeline or legal profession, including specific examples (2 pages).

c. Describe and provide specific details and documentation on how the diversity efforts of the nominee have resulted in promoting diversity for the organization/or legal profession. (If the nominee is an individual attorney, explain whether the efforts above were made within the scope of employment or on a voluntary basis) (2 pages).

d. Include supporting materials. Letters of support are not required but strongly encouraged (limit supporting materials to 10 pages).

**NSBA First Annual**
**COMMUNITY SERVICE DAY**
**June 4, 2010**

## The 2009 Class of the Leadership Academy and the Nebraska State Bar Association invite you to participate in the first annual Community Service Day.

On **Friday, June 4, 2010**, whether you're a sole practitioner, part of a large law firm, or somewhere in-between…there is a way you can help! Below is a list of some organizations which could use your help. These are only a few suggested organizations. Many more exist. We would encourage you to look for any opportunity in your community that might need your help. Please contact the individuals below or the organization of your choice to coordinate your project

Omaha
Omaha Food Bank: (402) 331-1213
Habitat for Humanity: (402) 457-5657
Omaha Humane Society: Sally Zachary at SZachary@nehumanesociety.org

Lincoln
Special Olympics 2010: Deb Stroh at (402) 467-2010 OR stroh@2010specialolympics.org
Food Bank of Lincoln: Cheri Lawrence at 402-466-8170 ext 106 OR clawrence@lincolnfoodbank.org
Matt Talbot Kitchen & Outreach: Sydne Wirrick-Knox at (402) 477-4116 OR sydnemtko@windstream.net
Capital Humane Society: Alisa Eichorn at edvol@capitalhumanesociety.org

Statewide Opportunities
State Game and Parks Office: Suzanne Ridder at (402)471-1623 OR suzanne.ridder@nebraska.gov
Eastern NE Office on Aging: Karen Kelly at karen.kelly@dhhs.ne.gov
Local Domestic Violence Shelters
Local Senior Citizen Centers
Local Libraries

** For Other Opportunities not listed **visit 1-800-volunteer.org** and input your zip code for other organizations near you.
** Both the Food Bank of Lincoln and the Omaha Food Bank coordinate volunteer opportunities in other counties throughout the state.
** Eastern NE Office on Aging requires a prescreening process including a background check as volunteers work directly with individuals.

**To help us publicize this event, please return the attached form to the NSBA by May 15th!!**

**NSBA First Annual**
**COMMUNITY SERVICE DAY**
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## Volunteer Information Form

________________________________________
Name of Firm or Organization Supplying Volunteers

________________________________________
Contact Person and Phone Number for Your Firm or Organization

________________________________________
Name of Organization You are Assisting

Names of Volunteers/Number of Volunteer Hours Available (Attach List if Necessary):

________________________________________ ________________________________________

________________________________________ ________________________________________

________________________________________ ________________________________________

________________________________________ ________________________________________

Total Number of Volunteer Hours to Be Provided: ________________________________________

Please mail or fax completed form by **May 15th** to:

NSBA
P.O.Box 81809
Lincoln, NE 68508
Fax (402) 475-7098