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Taking Depositions Through an Interpreter

By Joseph M. Hanna and Daniel B. Moar

While the use of foreign languages in legal proceedings becomes more and more widespread, attorneys and courts too often relegate language interpretation to an afterthought, creating serious consequences to the fairness of the legal system. "Taking Foreign Witness Depositions," from the fall 2010 issue of Minority Trial Lawyer, detailed some of the many difficulties posed by foreign witness depositions as well as strategies for selecting a competent interpreter.

An attorney's job is not finished, however, once he or she selects an interpreter. To the contrary, an attorney should be proactive and take steps to avoid the common pratfalls prevalent in foreign witness depositions. The following are strategies an attorney should consider when taking depositions through an interpreter.

Provide Advance Copies of Pleadings, Statutes, and Exhibits
An attorney should consider providing interpreters with copies of pleadings, relevant statutes, and any exhibits to be used prior to the deposition. This will save time during the deposition by giving the interpreter some background on the dispute and the witnesses. For example, if the complaint indicates that the dispute involves alleged violations of fishing regulations, the interpreter can ensure that he or she has a thorough understanding of customary fishing industry terms and the applicable regulations that will be addressed during the deposition. Additionally, by providing copies of exhibits to be used at the deposition, the interpreter can determine whether any unfamiliar terms or idioms are likely to be raised. Finally, “[p]roviding documents early allows the interpreter access to glossaries and gives her time to understand illegible or unclear materials.” Administering Justice, at 131.

Provide a List of Technical or Unusual Words Relevant to the Litigation
An attorney should similarly provide the interpreter with a list of technical or unusual words that will likely be raised in the deposition. For example, even the most highly qualified interpreters are unlikely to be able to make off-the-cuff interpretations of pharmaceutical terminology in a transnational patent infringement lawsuit. By providing a list of such complex terminology in advance, the attorney can avoid delays and increased costs.

Explain the Interpreter’s Role on the Record
A witness’s frequent reaction to legal proceedings through an interpreter is to attempt to seek the interpreter’s advice on how to properly answer questions. For example, one interpreter acknowledged that “Sometimes they whisper to me in Spanish, ‘Should I take this plea? Is my lawyer doing a good job?’” Jan Hoffman, New York’s Court Interpreters: Overworked Link,
N.Y. Times, Dec. 24, 1993, at A1. By laying down the ground rules from the start, the attorney can reduce the risk that the witness will either misunderstand the interpreter’s role or seek to make the interpreter act outside his or her role. To the extent that the witness nonetheless attempts to engage in extraneous communications with the interpreter, the interpreter can avoid appearing arbitrary to the witness if he or she can state that the witness must follow the instructions that the attorney provided at the start of the deposition.

Direct Questions to the Witness
An attorney should direct his or her questions to the witness, and the interpreter should provide the response as if the witness were speaking. See People v. Shaw, 674 P.2d 759, 764 (Cal. 1984) (noting the requirement of using “direct questions to and answers from the witness”). For example, the attorney should not turn to the interpreter and say, “Ask him what color the light was when the accident occurred.” Instead, the attorney should ask the witness directly, “What color was the light when the accident occurred?” Similarly, the interpreter should not respond with “He said the light was green.” Instead, the interpreter should respond with “The light was green.” Essentially, both the attorney and interpreter should act as if the witness is being asked and responding to the questions directly. This ensures a smooth-flowing and comprehensible transcript and leaves no doubt as to who is providing testimony at the deposition.

Occasionally both the attorneys and the interpreter will lapse from the proper format.

When this occurs, the interpreter should refer to himself or herself in the third person to ensure that the record adequately distinguishes between the witness’s testimony and statements of the interpreter. For example, if a witness used a word with multiple meanings, the interpreter should state, “the interpreter [or I, the interpreter,] would like to inquire as to what he means when he refers to an ‘alpaca’ comb because the word can translate into either a type of metal or a llama-like creature.” While having the interpreter refer to himself or herself in the third person may seem awkward, it ensures that when the interpreter refers to “I,” the record clearly reflects that the “I” refers to the witness’s statement.

Use Short, Plain Sentences
Given attorneys’ over-reliance on convoluted sentences, jargon, or other legalese, many people already believe that legal proceedings are conducted in a foreign language. When complicated legalese must then actually be interpreted into a foreign language, the result will probably be as successful as an exercise in the “children’s game of ‘telephone,’” in which a message is repeated from one person to another and then another; after some time, the message bears little

Attorneys should be particularly careful to ask questions in short, plain sentences in foreign language depositions. By doing so, the attorney increases the chance that the witness will hear an accurate interpretation of the question. Short questions also are more likely to lead to short responses, which increases the likelihood that the interpreter can accurately state the response.

If an attorney asks a question about “the nocturnal segment of the diurnal period preceding the annual Yuletide celebration,” which then must be interpreted into a foreign language, the question ultimately posed to the witness will likely have nothing to do with “the night before Christmas.” Nor will the witness’s response make much sense either. Instead, the witness should simply be asked about “the night before Christmas.”

**Avoid Using the Subject Pronouns I and You**

An attorney should avoid inserting subject pronouns, such as “I” or “you” into deposition questions. Given that the interpreter is acting as an intermediary between the attorney and witness, the terms “I” and “you,” can be mistakenly understood as referring to either “I, the attorney” or “I, the interpreter” and either “you, the interpreter” or “you, the witness.” For example, if an attorney asks, “I would like to know where you were an hour before the accident,” the witness might think that the “I” refers to the interpreter and that the interpreter is asking his or her own question. *See Bilingual Courtroom*, at 115.

**Avoid Idioms or Slang**

The use of idioms or slang expressions poses difficulties to interpreters because the words cannot be interpreted directly into the foreign language while retaining their meaning. Asking a foreign witness about whether he “paid an arm and a leg” for something is likely to cause little more than confusion to a witness unfamiliar with the expression, who may think that the question refers literally to paying with body parts. While an interpreter may be able to provide an interpretation that conveys the meaning of the question without conveying its specific words, there is no reason to ask an interpreter to do this. Slang and idioms should be simply removed from the attorney’s vocabulary during foreign language depositions.

**Avoid Negative Questions**

An attorney should also avoid asking negative questions, because non-English speakers tend to be confused as to the proper response to that type of question. For example, suppose an attorney asks “So she wasn’t at the bar that night?” If an American responded no, that response would be understood to mean “no, she wasn’t.” However, a Latin American could provide the same response by answering either “yes,” meaning “yes, you’re right; she wasn’t there” or “no,” meaning “no, she wasn’t.” *Id.* at 73. An attorney should simply avoid asking such questions. Instead, ask “Was she at the bar that night?”
Provide Frequent Breaks
Attorneys often fail to recognize that interpretation is a taxing skill. While the attorney gets to pause each time a witness answers a question, the interpreter is constantly processing or relaying information. As a result, the interpreter should be allowed to take a break every 30 minutes. See Protecting the Rights of Linguistic Minorities, at 296 (“Because interpreting requires intense concentration to hear each word to then render it into the target language, the United Nations, the United States Department of State, and the federal courts have determined that [30] minutes is the period of maximum efficiency for an interpreter using the simultaneous mode.”); Administering Justice, at 135 (“Interpretation requires intense concentration; interpreters, therefore, need frequent breaks to relieve mental fatigue. An interpreter’s efficiency decreases after [30] minutes.”).

Avoid Interpreter Improprieties
If an interpreter enters into a lengthy dialogue with the witness and then states that the witness said “no,” an attorney should inquire as to the content of the dialogue. Given that the interpreter’s role is to simply provide the foreign language question to the witness and interpret his or her response, the interpreter generally should not be engaging in extraneous conversations, even if he or she is simply trying to clarify the meaning of a question to a witness. An attorney should intervene if “an interpreter engages in a lengthy exchange with a witness or client, seems to be attempting to influence an answer through facial expression or head nodding, or in any other way appears to be going beyond the proper role of an interpreter.” Angela McCaffrey, Don’t Get Lost in Translation: Teaching Law Students to Work with Language Interpreters, 6 Clinical L. Rev. 347, 350 (2000).

An attorney should not, however, simply assume that an interpreter is changing a response simply because the witness’s statement is lengthier than the interpretation. Many words in English require multiple words in a foreign language such that the interpretation will necessarily be longer. Spanish, for example, generally takes about 30 percent more words to make the same statement. Bilingual Courtroom, at 120, NCSC Model Guides, at 145.

Additionally, an attorney should not assume that the interpretation is necessarily inadequate if a response appears to be off the mark. If an attorney asks a confusing or grammatically improper question, the interpreter should state the question in the foreign language in the same form. The witness’s response is not likely to be comprehensible when such a question is asked. Similarly, if a witness provides a poorly worded or evasive answer, the interpreter should state the answer as the witness provided it. The interpreter should not state the question or answer as he or she believes it was intended. This will inevitably lead to some confusion, and an attorney must accept that this is part of the process.

Unfortunately, attorneys sometimes make the immediate assumption that the interpreter is not doing his or her job when the response provided is not what was expected. Attorneys may then
challenge the interpreter’s competency and create a situation where the interpreter begins making his or her own edits to questions or answers to avoid further criticism from the attorney.

If an attorney or judge has made any linguistic errors in the formulation of a question or statement, theoretically it is the interpreter’s duty to interpret the erroneously worded English utterance into as close an equivalent as possible in the target language. . . . Similarly, if a witness or defendant in reply to a question answers improperly (e.g., tangentially, off-target), the interpreter’s obligation is to interpret that response in the nearest English equivalent, even though the outcome potentially may sound evasive or even nonsensical to those in the courtroom. Clearly, accurately interpreting a witness’s off-target reply will put the interpreter into a certain jeopardy: [S]he runs the risk of looking incompetent herself. In other words, if an interpreter correctly interprets a poorly worded answer, it is very possible that the monolingual judge or attorney might assume that a faulty interpretation has been made. Bilingual Courtroom, at 65.

Make the Interpreter’s Job as Easy as Possible
While some error or confusion is unavoidable, much of it can be eliminated by planning and by not asking interpreters to stray from their role. One interpreter provided a guide to judges called “What Court Interpreters Would Tell Judges if They Could Speak From Their Hearts.” Many of the suggestions apply equally to attorneys taking a deposition through an interpreter, including:

- Don’t ask the interpreter to explain or restate what you say. His job is limited to putting precisely what you said into another language.
- Don’t let multiple people talk at the same time, because there is no way everything can be interpreted.
- If someone alleges an interpreter error, do not automatically assume that there was an error. NCSC Model Guides, at 144.

Use a Check Interpreter
Whenever possible, an attorney should bring a second interpreter to the deposition. The second interpreter can serve not only as a check on the accuracy of the interpretation on the record, but can also be used to facilitate privileged and other off-the-record communications between a party witness and an attorney. An attorney should also make certain that communications with the party through an interpreter will be treated as privileged. While most courts broadly treat communications through an interpreter as privileged, some courts have taken a narrow view of when the privilege applies. Compare Oxyn Telecomms., Inc. v. Onse Telecom, 55 Fed. R. Serv. 3d 1263 (S.D.N.Y. 2003), with Advanced Tech. Assocs. v. Herley Indus., 1996 U.S. Dist. LEXIS 17931 (E.D. Pa. Dec. 3, 1996). Having a second interpreter present at the deposition is necessary to discover any interpretation disputes and to preserve any interpretation objections, because the transcript will contain only the English interpretation provided typed by the court reporter.

Alternatively, the parties might agree or seek court permission to have an audio or a video recording of the deposition made so that any interpretation disputes can be subsequently raised. Cf. Millerson v. City of New York, 178 Misc. 2d 803, 808 (Sup. Ct., N.Y. Co. 1998) (noting that the court allowed the plaintiffs to have their depositions audio taped to alleviate transcription
concerns); Administering Justice, at 136 ("The quality of court interpretation cannot be evaluated or challenged on appeal absent an audio and/or video recording of the proceedings.").

Take Cultural Differences into Account
Cultural differences underlie all legal proceedings involving a foreign witness. Culture can affect the manner in which a witness testifies, the manner in which an interpreter phrases the questions and answers, and the demeanor of a witness at the deposition and other court proceedings.

For example, many people outside of the United States and Europe are reluctant to pass blame for an incident upon others. This can impact how they testify at a deposition or in court and the language used. For instance, Japanese possesses a form of “adversative passive construction,” which connotes that the subject of the sentence was involuntarily subject to an act. Bilingual Courtroom, at 99. Similarly, “Spanish possesses a variety of passive-like and impersonal constructions” that can be used to distance a blameworthy person from his conduct. Id. at 100.

An illustration can show the impact of the cultural and language differences on a deposition. For example, suppose an attorney asks “How long were you managing the account before you started taking funds from it?” The interpreter might then state the question in the foreign language as “When the funds were caused to be taken from the account, how long were you managing it?” While the witness is no longer cast in a blameworthy light, the question is no longer what was asked.

Often, an interpreter unconsciously misinterprets statements to conform to cultural norms of the witness. This can significantly impact the tone and certainty of a witness’s testimony. For example, when an interpreter inserts hedges such as “might have” or “could have” into an interpretation to avoid sounding accusatory, a witness will appear less certain about his testimony.

Cultural differences may also impact how the witness and interpreters address others. Many other cultures expect the use of formalities in situations involving asymmetrical social relationships or communications between persons with no prior history. As a result, the foreign equivalents of “sir,” “ma’am,” and “miss” can be inserted by the interpreter into questions and answers even if they were never stated by the speaker. Bilingual Courtroom, 138.

An attorney should conduct background research on a foreign witness’s culture to determine if any cultural differences are likely to impact a deposition or other legal proceedings. This will allow the attorney to formulate deposition questions in a manner that will be least likely to cause disruption and an uncooperative witness. For example, should an attorney learn that the topic of the deposition is a subject that is deemed taboo by the witness’s culture, the attorney can prepare advance questions in the manner that will most delicately allow questioning on the subject.
Keywords: deposition, interpreter, foreign witness, interpreter selection

Joseph M. Hanna is a partner in the Buffalo, New York, office of Goldberg Segalla, LLP. He also serves as editor-in-chief of Minority Trial Lawyer. Daniel B. Moar is an associate in the Buffalo office of Goldberg Segalla LLP.

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Labor Disputes May Lead to Union Decertification in the NBA and NFL

By Brian Josias

As another successful NFL season winds down and the 2010–11 NBA season gathers momentum, the focus of owners, players, and fans of these leagues is beginning to shift from the playing field (or court) to conference rooms and league offices where a critical labor-management battle is brewing. At the same time as the owners and players in these two major American sports prepare to battle, fans should be mindful about the impact from both labor laws and antitrust laws on when their next opportunity to cheer their team on to victory will arise. As a result of the interplay between antitrust and labor laws, sports fans should not be surprised to see either the NBA Player’s Association (NBAPA), NFL Player’s Association (NFLPA), or both decertify if a work stoppage hits either league.

The union-ownership relationship and dynamic in the professional sports context is, by virtue of the structure of the enterprises, quite a bit different from the conventional union-ownership relationship in America. As the Supreme Court recently evaluated and discussed in American Needle, Inc. v. National Football League, 130 S. Ct. 2201 (2010), in contrast to the typical union-ownership relationship between one business entity and its employees, in the professional sports context, the leagues are comprised of multiple business enterprises that are legally independent but work together and depend on each other to fully create their product. NBA and NFL players are represented by unions, the NBAPA, and the NFLPA, respectively. The players’ union and their respective leagues collectively bargain the terms and conditions of their employment on a regular basis, forming collective bargaining agreements (CBAs) that run for terms of several years. The CBAs in the NBA and NFL regulate the terms and conditions of the employment of the players and regulate issues such as player pensions, maximum salaries, revenue sharing between teams, scheduling of games, drug and performance-enhancing substance testing, and even who is eligible to play in the league. For example, the NBA CBA currently prevents players from being eligible to play in the league until one year after their high school graduation, and players must be at least 19 years old (as of the end of the calendar year of

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the entry draft) to be eligible for selection in the draft. NBA.com, *NBA Collective Bargaining Agreement Ratified and Signed*, (July 30, 2005) (last visited on January 6, 2011).

After the conclusion of the 2010–11 seasons, both the NBA and NFL CBAs are due to expire. Already, astute observers of these two sports are well aware of the impending expiration of CBAs, and media reports regarding ongoing negotiations on the new CBAs are beginning to appear with increasing frequency. Like all businesses, the recession that has gripped the American economy for the last several years has by various accounts severely impacted the revenues and operations of both leagues. At the same time, player salaries have either stayed the same (as a result of long-term contracts) or continued to rise. As a result, the leagues have aggressively made the case that when their current CBAs expire following the current season, they need greater control over costs—especially player salaries—and more flexibility. Early negotiations in both leagues, which have played out largely in the media, seem to be unproductive, with reports frequently discussing the distance between the parties’ respective positions. Ronald Blum, *Lockout watch continues to tick for NFL, NBA*, Peoria Journal Star, Dec. 24, 2010. The general consensus appears to be that both leagues will be unable to agree with their respective unions on new CBAs prior to the expiration of the existing agreements. *Id.* As a result of the expiration of the existing CBAs, it is very likely that owners in both leagues will lock out the players in an effort to increase the pressure on the players to agree to the leagues’ collective bargaining proposals.

To the horror of fans of both sports, an extended lockout will likely lead to the cancellation of parts of the next season, if not the whole season. An extended lockout may also see radical efforts on the parts of the respective unions in the form of potential decertification to break the deadlock through litigation. Decertification may become the favored tactic of the unions due to the antitrust immunity that the collective bargaining relationship confers upon both the union and management. As many attorneys know, the antitrust laws prohibit contracts, combinations, or agreements in restraint of trade. Absent an exemption, all unions would violate the antitrust laws, since these would constitute a contract, a combination, or an agreement in restraint of trade. The federal antitrust laws, however, contain an explicit exemption for labor unions and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. See United States v. Hutchenson, 312 U.S. 219 (1941); Section(s) 6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U. S. C. Section(s) 17 and 29 U. S. C. Section(s) 52, and the Norris-LaGuardia Act, 47 Stat. 70, 71, and 73, 29 U. S. C. Section(s) 104, 105, and 113. Perhaps more importantly, the Supreme Court has recognized a “non-statutory” labor exemption from the antitrust laws, which permit unions and ownership to engage in conduct and reach agreements that might otherwise violate the antitrust laws. Brown, et al. v. Pro Football, Inc., DBA Washington Redskins, et al., 518 U.S. 231 (1996).

Without the non-statutory labor exemption from the antitrust laws, unions and ownership could not engage in the collective bargaining process, and the purpose of the nation’s labor laws would
be thwarted. In Brown, the Supreme Court held that conduct engaged in by employers “during and immediately after a collective bargaining negotiation” that “grew out of, and was directly related to, the lawful operation of the bargaining process” would not give rise to antitrust liability.” Brown, 581 U.S. at 250. Implicit in this exemption is that when the bargaining process breaks down and ownership unilaterally imposes terms and conditions of employment or engages in other concerted action, such as a lockout of players, the union may not bring a suit against the ownership for antitrust violations. Put more simply, as long as the union exists and collective bargaining is ongoing, the labor-management dispute is confined to the bargaining table and cannot migrate to the courtroom. However, as the Supreme Court has held, “an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process” that the exemption would not apply. Id. Unfortunately, the Supreme Court has not conclusively determined where the line should be drawn regarding exempt agreements between employers and those that are not sufficiently related to the bargaining process.

This leads to the question of when, if ever, NBA and NFL players could ultimately challenge ownership conduct in court. In Brown, the Supreme Court did suggest that one dividing line between exempt conduct and conduct subject to antitrust liability may be the existence of the union. Specifically, the Brown court suggested, without specifically reaching the issue, that the decertification of the union is sufficient evidence of the collapse of the collective-bargaining relationship and the expiration of the non-statutory exemption. Id. If the NBA or NFL players are locked out for an extended period of time and future seasons are threatened, it is likely that the players will test the limits of the non-statutory exemption and decertify. Indeed, in the last several months, numerous media outlets reported that the NFL distributed decertification voting materials to its members and may pursue decertification if a new CBA cannot be reached. In the NBA, media reports indicated that some teams have already voted on decertification in the event there is a lockout or other work stoppage. Howard Beck, N.B.A. Players Voting on Step Toward Dissolving Union, N.Y. Times, Dec. 14, 2010, at B13. If the players in either league decertify, then the battlefield will likely shift to the courts for a lengthy and costly dispute, as the unions will almost certainly bring antitrust challenges to whatever concerted action the leagues take in locking out the players.

Fans of either league should be hopeful that this scenario does not unfold, as it could lead to the loss of at least one season and perhaps fundamental changes to the way the leagues operate in the longer term. For a sport like the NFL, which has enjoyed an extended stretch of labor peace and, simultaneously, enormous growth in popularity, such a result could strip away momentum that has been built over many years. For the NBA—a league that recently endured a lengthy lockout and has struggled to recover—extended antitrust litigation could be disastrous and lead to continued erosion of popularity. It is also possible that several teams in either sport may not survive an extended labor stoppage and that they could simply disappear. Moreover, antitrust litigation for either league could lead to structural changes in the longer term as certain recent innovations the leagues utilize to control costs, like revenue sharing and salary caps, could be
found to violate antitrust laws. Ultimately, fans (and perhaps players and owners) should be hopeful that the parties can reach agreement on extensions to their existing CBAs and the games can go on.

**Keywords:** labor, dispute, NBA, NFL, union decertification, NBAPA, NFLPA

Brian Josias is with Cotsirilos, Tighe & Streicker in Chicago, Illinois.

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**HIV, AIDS, and Barring Discovery**

By Jessie Zaylia – February 16, 2011

It is difficult to rejoice when an appellate court rules in your favor if the rationale behind the ruling is faulty. In defense of workers’ compensation, *Children’s Hospital & Research Center Oakland v. McKnight* (McKnight) is such a case. Although the case is unpublished and, hence, cannot be cited, unpublished cases may foreshadow trends that develop into precedent. When such cases involve marginalized groups, it behooves us to pay attention.

The facts in *McKnight* can be summarized as follows: McKnight was employed with the Children’s Hospital & Research Center as a specialist in infant development between November 1981 and June 1999. Specifically, McKnight worked in the hospital’s Parent Infant Program. Though the program did not provide medical treatment to children, it did provide services to children three years old and younger with developmental disabilities. Part of McKnight’s duties included visiting children in their homes and supervising the children in groups.

Beginning in November 1996, McKnight began experiencing symptoms such as rash and fever. In 2001, she lost 20 pounds over a period of eight months. In January 2002, McKnight began having “unexplained daily fevers,” and an HIV test was finally administered. She tested positive. The court noted and explained that McKnight had no external risk factors that would lead her to encounter the virus outside of her work at the hospital.

A year later, in October 2003, McKnight submitted a petition for increased benefits to the Workers’ Compensation Appeals Board. She argued that exposure to children and their bodily fluids during her work within the program caused her to contract HIV. McKnight cited two particular instances when she came into direct contact with a child’s blood: (1) in early 1996 or late 1997, when a child bit her finger to the point that it drew blood, and (2) in early 1997, when McKnight cared for a child who had split his lip open. More generally, McKnight also recalled having to take care of children with bloody noses and scraped knees. Because McKnight gardened, she argued that her hands were susceptible to cuts.
The issue of causation was tricky in this case: “[B]efore an employer can be held liable, the worker must show not only that the injury arose out of and in the course of employment but also the injury was proximately caused by the employment. [Citations.]” *City of Long Beach v. Workers’ Comp. Appeals Bd.* (2005) 126 Cal.App.4th 298, 310.

One doctor, Dr. Allems, indicated that non-blood sources, such as mucus and feces, are not sources of HIV. Dr. Allems also stated that causation could not be attributed to her work with “reasonable medical probability.”

Another doctor, Dr. Fishman, concluded differently. Though the chances that McKnight could have contracted HIV at work were small indeed, it was nevertheless a possibility. Therefore, since other non-industrial factors did not present a source of transmission, Dr. Fisherman concluded that McKnight’s contraction of HIV likely resulted from her work at the hospital.

This is where the case becomes legally, and not just factually, intriguing. To bolster her claim of causation, McKnight served a discovery request, which sought all of the hospital’s records that reflected the HIV status of the children in the program between 1989 and 1996. In turn, the hospital argued that the discovery would violate Health and Safety Code section 120975, “which prohibits the compelled disclosure in a legal proceeding of individually identifiable HIV-related blood test information.”

The *McKnight* case involves the competition of two very important policies. On one hand, society, and, by extension, the legislature, wants to protect the identities of those who are HIV positive. This is likely due to the stigmatization of such individuals and resulting discriminatory treatment. On the other hand, however, it seems unjust for a person to be wholly precluded from discovering the cause of his or her own HIV infection, thus stymieing one’s factual causation argument. This is a case of legislative privacy protection versus the right to discover.

McKnight urged that she sought data—not identification. Further, records would be redacted to ensure the children’s privacy.

The judge granted the discovery petition and ordered the hospital to provide the number of HIV-infected children in the program, their ages, and their genders from February 1981 to the end of 1993, and from January 7, 1997, to the end of 1999. (The years of 1994, 1995, and 1996 had already been reviewed by stipulation.) The judge reasoned that information regarding age and gender “would not identify an individual child” who was HIV-infected.

The appellate court argued that the judge’s decision ran counter to the decision in *Irwin Memorial Blood Centers v. Superior Court* (1991) 229 Cal. App. 3d 151, where the court found that a discovery order that permitted anonymous discovery of individuals with AIDS violated what is now section 120975. The potential deponents in *Irwin* were blood donors whose blood
had resulted in contaminated transfusions. Even though the deponents would have been concealed behind a screen during their depositions, and other identifiers such as names and social security numbers would not be disclosed, a strict reading of section 120975 required absolute prohibition against compelling disclosure from such individuals. The court reasoned that the deponents’ voices could identify them. Also, the referee and the recorder would see those persons. Further, the deposition process itself would identify the deponent as soon as the person matching an anonymous number would appear for deposition. The hard and fast rule from Irwin is that no type of protection against the identification of a person with HIV or AIDS will satisfy section 120975’s absolute ban on the discovery of infected individuals in a third-party legal proceeding.

In McKnight, the court failed to distinguish between the case at bar and Irwin. The court explained that the hospital’s staff would have to comb through records, implying that this would, hence, identify the children to the staff. In fact, the court likened such a hospital worker to the referee or court reporter in Irwin. However, the files for these same children are already available to the staff; this is not so with a court referee or reporter. Moreover, this concern of the court does not speak to the legislature’s concern that the identifying information would be used in a legal proceeding rather than in a hospital on a clipboard where only statistics would be recorded.

The statute does not indicate that anyone anywhere shall not learn of any statistics related to HIV or AIDS-infected persons. Such a law would be unreasonable. It is important to note that, as was the case here, medical staff have access to records of those infected with HIV and AIDS so that proper treatment can be administered when necessary. We want hospital staff to have access to these records for treatment purposes.

Yet, the court conflated identification in third-party legal proceedings with identification already existing within medical records that would then be presented in data-like form for the purposes of third-party legal proceedings. The two instances are quite different, especially since hospital staff already have access to files that contain information regarding individuals’ HIV status. If anything, hospital staff would merely rediscover what had already been noted and filed away in the first place—namely, in this case, the children’s HIV status.

The court also noted that the test in McKnight should not be one of balancing privacy and discovery; after all, section 120975 expressly rejects such balancing by creating an absolute ban on identifying HIV-infected people in third-party proceedings. However, nothing in the statute places an absolute ban on discovery—only identification, which occurs through discovery. Again, the court has conflated two very distinct concepts. The statute specifically speaks to identification—not broad, vague, and anonymous statistics.

Section 120975 provides: “To protect the privacy of individuals who are the subject of blood testing for antibodies to human immunodeficiency virus (HIV) . . . no person shall be compelled
in any state, county, city, or other local civil, criminal, administrative, legislative, or other proceedings to identify or provide identifying characteristics that would identify any individual who is the subject of a blood test to detect antibodies to HIV.” (emphasis added.)

The leap that data in the form of statistics—the type of information that McKnight sought in her case—somehow amounts to identification in legal proceedings is, at best, attenuated. At worst, the connection is simply erroneous. That the court propounded the fact that no exception existed in third-party proceedings is, thus, irrelevant.

McKnight needed data. She needed it so that she could either prove causation or be proved wrong regarding causation. She did not care about identifying the children. She did not want to depose them. She did not want to bring them into court. She wanted numbers—not specific identifiers that would point to any individual. The data would likely look something like this, if anything: “two male children, age 3, between February 1981 to the end of 1993.” It is hard to see how this quantitative information equates to identification or to characteristics that would identify an individual so as to compromise that particular person’s identity. This is especially true considering that in all probability, the program provided services to hundreds of children during the periods of requested discovery.

This case is highly distinguishable from Irwin, where infected persons would literally be brought before officers of the court in a legal proceeding in the form of a deposition. In McKnight, no individuals would be required to participate in any legal proceeding in any manner. Rather, a statistic would be brought before the board.

Even if we agreed that the age and gender requirements go too far—that those characteristics identify or provide identifying information within the meaning of the statute—certainly a quantity that would reflect only the number of cases of children within the program would not. Yet, the court manages to reason otherwise. In footnote 8, the court addressed McKnight’s willingness to limit discovery so that neither the ages nor the genders of HIV-infected children would be disclosed. The court responded that, although such a modification would better protect privacy, this did not change the fact that the hospital’s staff would have to thumb through records and report the participants’ HIV status.

The court attempted to support its opinion by looking to California Health and Safety Code section 121022, which was implemented after section 120975. Section 121022 “requires health care providers and laboratories to report cases of HIV infection to the local health officer using patient names, in order to ‘ensure knowledge of current trends in the HIV epidemic and to assure that California remains competitive for federal HIV and AIDS funding’” (§ 121022, subd. (a)). Notwithstanding, the legislature insisted that “reported cases of HIV infection shall not be disclosed, discoverable, or compelled to be produced in any civil, criminal, administrative, or other proceeding” (§ 121022, subd. (d)). Therefore, the court concluded that section 121022,
subdivision (d), “creates a blanket prohibition against disclosure (including discovery) of ‘reported cases of HIV infection’ in a third party’s legal proceeding. Taken together with section 120975, section 121022, subdivision (d) reinforces the view that the legislature has determined that the prohibition against compelled disclosure of such information is ‘absolute.’”

The problem is that the court, yet again, combines two very distinct issues. It mixes the need for names for the purposes of obtaining federal funding from section 121022, subdivision (a) and the concern with privacy from subdivision (d). The court takes the language from subdivision (d)—that reported cases shall not be disclosed—out of context and the very essence of section 121022 as a whole, which requires the use of infected persons’ names—an obvious identifier.

Further, the court takes its misinterpretation of section 121022 and uses it to bolster the idea that the fact the HIV cases exist can’t even be discoverable in a purely quantitative, non-identifying manner. As a result, the court expands section 120975’s concern with privacy to an all-out ban on the discoverability of cases, even when discovery would comply with the statute’s overarching privacy concerns.

The court disposed of the case by granting the hospital’s writ of mandate and vacating the board’s orders to allow discovery. The court also reprimanded the board for impermissibly applying a balancing test between infected individuals’ privacy and the need for discovery.

There appears to be a false dichotomy between whether section 120975 permits a balancing test or whether the statute requires an all-out ban on the discoverability of all things related to HIV third-party proceedings. This is misleading. Though the court in McKnight was right that nothing in section 120975 permits a balancing test, the court goes too far by interpreting the statute to require an absolute ban on all things discoverable regarding HIV third-party cases.

A middle ground does exist. Indeed, the middle ground is apparent from the statute itself. Section 120975 is concerned with one overarching policy: privacy. Because of this, it focuses on three aspects of cases that it seeks to preclude: (1) anything related to the identification of an individual with HIV or AIDS (2) in a legal proceeding. This is the test.

When the court concluded that the legislature meant to ban the quantifiable fact that HIV cases exist in the hospital in McKnight, it went too far. Consequently, the court engaged in precisely what it sought to avoid—namely, poor reasoning.

The idea that a case with facts similar to McKnight would cross anyone’s desk seems highly unlikely. The holding in this case may inevitably help workers’ compensation defense attorneys if it is indicative of an upcoming trend in case law, because it would create an absolute ban on the discoverability of HIV cases. Hopefully, however, any such case with precedential value will not create an absolute ban on discovery in HIV cases where the legislature has not created one.
Keywords: HIV, AIDS, workers' compensation, McKnight

Jessie Zaylia earned her JD at the University of San Diego. She lives and works in Southern California.

Life as a Young Lawyer in Canada

By Christina Khoury – February 16, 2011

Years ago, I made a declaration to my parents. I announced that when I grew up, I would be a lawyer and the first girl to play in the NHL for the Toronto Maple Leafs. Clearly, the latter option did not exactly pan out. Now, at 26 years old, I am writing about myself as a young lawyer.

The law in Canada is based on English common law and statutory law, with the exception of the province of Quebec, where the system of civil law is derived from the French. English and French are the two official languages of Canada and “have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.” Moreover, “a party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.” Canadian Charter of Rights and Freedoms,(1982). Retrieved from the Government of Canada, Department of Justice Canada.

The city of Toronto is home to the famous Bay Street, Canada's equivalent of Wall Street. To Torontonians, it is known simply as “the Street.” The following will give you an idea of what being a young lawyer in Canada is like.

Thursday morning. The screen of the Toronto Stock Exchange flashes over the streets of the financial district. Subways, trains, streetcars, and buses arrive into Union Station. Throngs of suits follow one another in a march to their skyscrapers. I step into what has become my second home and collapse at my desk. Traffic disappears. The rush of pedestrians lulls in the distance. The stack of files on my desk defies the height of my coffee cup, asserting its grandiose importance. I work for an hour. I glance at my watch. I am due in court this morning. I am once again thrown into the rush of morning pedestrians on my way to Old City Hall. The palatial structure was built at the intersection of Bay and Queen Streets. It is the product of Toronto architect Edward James Lennox. The building served as Toronto's City Hall until the construction of a newer City Hall in 1965. Since that time, it has been used as a courthouse for the Government of Ontario.
I arrive at the courthouse and head to the Lawyers' Lounge. I hang my coat amongst the coats of Toronto's finest legal minds. In awe, I place my briefcase alongside the briefcases of lawyers who have paved the rules of justice in this country. I am not . . . my thoughts are halted when my BlackBerry rings. My clients have arrived. I greet them in front of the courtroom. We shuffle inside. I am not . . . my thoughts are halted when the Honorable Justice enters the courtroom. “All rise. Court is now in session.” “Good morning, your Honor,” I begin.

One hour later, I find myself saying, “Thank you, your Honor.” My clients and I happily exit the courtroom. There is a nagging in my head. I have a confession to make to the court, I think to myself. I am not a lawyer—yet.

I am not a lawyer yet because I am a “student-at-law,” or an “articling student.” The articling student has already completed law school. Even after one graduates and successfully passes the Bar examinations, admittance to the Ontario Bar is not automatic. An individual wishing to acquire a license to practice law in Ontario is subject to the Licensing Process of the Law Society of Upper Canada. The qualified candidate must graduate from a common-law university or receive a Certificate of Qualification issued by the National Committee on Accreditation (NCA), which has been appointed by the Federation of Law Societies of Canada and the Committee of Canadian Law Deans. Becoming a Lawyer in Ontario. The Law Society of Upper Canada (LSUC).

In simple terms, an articling student is given tasks very similar to a first-year lawyer and must prove his competence throughout this “probation” period. According to the Law Society of Upper Canada, “the focus of the Licensing Process is to ensure that candidates have demonstrated that they possess the required competencies at an entry level in order to provide legal services effectively and in the public interest.” LSUC.

Today, I appear in court by virtue of my right of appearance as a student-at-law. The articling student possesses certain rights of appearances before Ontario courts and tribunals. In-depth references and guidelines pertaining to these rights may be found on the Law Society of Upper Canada's website. It is ironic that while articling, students may conduct certain trials; they are essentially on trial every day for 10 months.

Prior to articling, some candidates acquire in-firm experience through summer employment after their first and second years of law school. Summer employment and internships—although valuable—are not required. It is often the case that the firm at which a candidate is hired to article is the firm at which summer employment was previously secured. The process is unique for each candidate.
To be eligible to be called to the Ontario Bar, a candidate must complete a 10-month articling term, succeed in the Ethics and Professional Responsibility exams throughout the term, and succeed in the Bar exam.

My passion for civil litigation was cemented through a case of faulty cement. International litigation in construction law occupied most of my time as a summer student after second year. I have had the good fortune of in-firm experience in many aspects of civil and criminal litigation. I appear regularly before the Ontario Court of Justice on behalf of multiple clients on both criminal and provincial matters. This combination is inspiring and refreshing for me. My path thus far has been to learn through various aspects of the law and as such I have truly found value in the variety.

The candidate is not required to complete all 10 months of articles in the same location. Articles may be completed in private practice, in-house, with the government, at various legal clinics, with sole practitioners, or at any location approved by the Law Society of Upper Canada. One may select joint articles that consist of alternative weekdays between locations. In consecutive articles, the articling student can complete a certain number of months in various places. For example, the student can complete six months at Firm A and four months at Firm B, or three months at Firm A, three months with Sole Practitioner B, and four months in-house at National Bank C. The combinations are flexible.

The Law Society of Upper Canada must approve the location, arrangement, and “articling principal.” The articling principal is the supervising partner or lawyer responsible for the student's assignments, evaluation, mentorship, and guidance. Typically, lawyers will assign work to the articling student just as if he or she were a practicing first-year attorney.

For the young lawyer, the task of choosing an area of law may be daunting. Some simply know in which field they wish to practice, while others are hesitant, having never really experienced any of the fields. Take, for example, the pressure of predicting the future in one word when the young lawyer is asked, “What kind of lawyer do you want to be?”

The journey of being a young lawyer in Canada is often a matter of perspective. Professor Emir Aly Crowne-Mohammed, the 2010 Young Practitioner of the Year for the South Asian Bar Association, elaborates:

As a law professor, I can tell you that one of the main problems with the articling process in Canada is the expectation on law students to know, very early in their law school careers, what “type” of lawyer they want to be [when they grow up]. Most students participate in a speed-dating process called “on campus interviews” or OCIs in October of their second year in law school. As the name suggests, these are a series of interviews held by larger firms or successful boutiques where students are further down-selected for the
grueling, and often insincere, “in firm interviews” or “in firms.” I say “insincere” because each student must act as though every interview is “the one,” and each firm acts as though each student they interview (among the many dozens) is “the one.” This process is designed to help firms select students for their summer program, which—unless you burn the firm down—almost always leads to the promise of an articling position. Students who do not secure summer jobs (and therefore articling positions) through this process must apply for articling positions during their third year of law school. This can be a nerve-racking and confidence-robbing situation. It also reveals several subtle forms of bias. In a legal system that is dominated by adversarial “maleness” and privilege, many minorities and women often feel out of place in law school and the legal profession. Therefore, to expect all law students (who have barely completed [eight] months of schooling)—let alone marginalized groups like women and minorities—to articulate the “type” of lawyer they want to be [when they grow up] is a mentally daunting and unenviable situation to place a second year law student in. Combined with the fact that most of the larger firms or boutiques which participate in the OCI process are so-called “Bay Street” firms (i.e., corporate commercial firms or litigation-oriented—there are few (if any) criminal law or family law firms that participate in the process), minorities and women may feel even more “out of place.” But perhaps I am being overly dramatic, I'm pretty sure I've seen women and minorities on Bay Street.

Professor Emir Aly Crowne-Mohammed, University of Windsor, Faculty of Law; Barrister and Solicitor, Law Society of Upper Canada, personal communication, December 12, 2010. Last I checked in the mirror, I am pretty sure I have too.

Can the appearance of your face as a young lawyer predict future success? According to the studies that are currently making international headlines, yes. Psychologists Nicholas Rule (University of Toronto) and Nalini Ambady (Tufts University) claim that “inferences of power from photos of the faces of the managing partners of America’s top 100 law firms significantly corresponded to their success as leaders, as measured by the amounts of profits that their firms earned.” Judgments of Power from College Yearbook Photos and Later Career Success. Social Psychological and Personality Science, 1(4) (2010) (Judgments of Power).

The aspiring lawyer should keep in mind that “judgments were made based on photos of the leaders taken from their undergraduate yearbooks, before they began their careers or entered law school. Facial cues to success may therefore be consistent across much of the lifespan, approximately 20–50 years.” Judgments of Power.

The University of Toronto released a further statement online:

Rule and Ambady had people judge photos of 73 managing partners from the top 100 law firms in the United States for the year 2007. They used a scale of 1 to 7 to measure qualities such as dominance, facial maturity, likeability, and trustworthiness, with 7 indicating high amounts of those qualities.” “Half of the judges rated current photos downloaded from law firm websites, while the other half rated college yearbook photos of the same individuals, which on average were taken 33 years prior,” said Rule. We correlated those scores with the profits of the leaders’ respective firms and found that they are positively associated with one another, both for the judgments made from current photos and those made from college yearbook photos.” University of Toronto psychologists make link between college yearbook photos and career success. (2010).
Retrieved from the University of Toronto Faculty of Arts and Science website. The study is indeed entertaining—and it has tempted me to submit my photograph for analysis. It is also an example of the various societal pressures and expectations placed on the young lawyer. This does not mean that we should immediately edit our graduation portraits before applying for work, nor does it mean a confrontation with our family to discuss the gene pool. The young lawyer must remember to stay true to his or her untouched, non-airbrushed self.

On the subject of driving, it may be easy to forget yourself or your original goals throughout the legal test-drive otherwise known as articling. Unfortunately, many candidates lose their identity in a relentless effort to be hired back by their employer after being called to the Bar. While trying to be a good fit with the firm, they ignore the question of whether the firm is a good fit for them. I consider articling to be a journey—not just a destination. On my road to being a young lawyer in Canada, I have discovered possibility beyond the border.

Being a young lawyer in Canada is being the neighbor to the United States, both on the map and on the desk. A good neighbor is there in times of need. A good young lawyer, however, can make positive contributions to the clients and neighbors by expanding his or her knowledge in relevant law. As opposed to smaller towns where many matters are within the same jurisdiction, Toronto is an international hub of litigation, mergers, acquisitions, and Big Apple-quisitions. In this city, for example, The Toronto–New York City legal connection is a constant element. Being a young lawyer in Canada who is interested in expanding my horizons, I am glad to be afforded the opportunity to learn through international legal issues. Mostly, I value the chance given to me and my colleagues to make this important determination.

Thursday evening. I leave the office. It is frigid outside. The sun is setting and the entire city is splashed in orange. Frank Sinatra once said that “orange is the happiest color.” I notice the different shades bouncing off the glass skyscrapers. The journey to being a young lawyer in Canada cannot be defined by one firm, experience, or color. I spelled my journey out in the only way I knew how—and I did it my way.

Keywords: young lawyer, Canada, LSUC, Law Society of Upper Canada

Christina Khoury received her J.D. at the University of Windsor and now resides in Toronto. She is currently completing the Licensing Process of the Law Society of Upper Canada with an expected call to the Bar in June 2011.
Supreme Court Hears Argument on Arizona Immigration Law Employer Sanctions Case

On December 8, 2010, the Supreme Court heard oral argument in the matter of Chamber of Commerce v. Whiting (09-115), a case centered on the hot-button topic of Arizona’s immigration laws. In the case, businesses and civil liberties groups (backed by the Obama administration) are challenging an Arizona law signed in 2007 that threatens to revoke the licenses of businesses that knowingly hire undocumented workers. The law has only been used three times in the past three years and was previously upheld by the Ninth Circuit Court of Appeals in San Francisco. While immigration law is generally a focus of the federal government, Arizona has argued that the state has been forced to act due to the federal government’s failure to meaningful enforce immigration law. A decision is expected by summer 2011.

—Joseph Hanna, Goldberg and Segalla, Buffalo, New York

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New Census Data Reveals Substantial Progress in Desegregation

Racial segregation levels in the United States have dropped to some of the lowest levels in more than a century, according to census numbers released on December 14, 2010. The Census Bureau’s American Community Survey (ACS) is based on a survey of over 10 million Americans and is the largest demographic survey conducted in the country. Neighborhood segregation levels dropped in 70 percent of the 100 largest U.S. metro areas. Several Southern and Western cities showed a noticeable trend toward integration in the past five years, while parts of the Northeast and Midwest remain the most segregated. These changing numbers will play heavily into the upcoming congressional redistricting battles.

—Joseph Hanna, Goldberg and Segalla, Buffalo, New York

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Fourth Amendment Protects Privacy in Email Stored with Internet Service Provider

In *United States v. Warshak*, *al.* Case Nos. 08-3997/4085/4087/4212/4429; 09-3176 (Dec. 14, 2010), a case with broad implications for an increasingly digital world, the Sixth Circuit Court of Appeals held that the Fourth Amendment applies to emails stored by individuals on the servers of Internet service providers and that government agents may not search email contents without a valid warrant. This case creates an important precedent in an area of law that had previously been somewhat unsettled and holds that the provisions of the Stored Communications Act authorizing government agents to subpoena emails from Internet service providers are unconstitutional. The Sixth Circuit determined that email maintained on the servers of Internet services providers is akin to regular mail held by the post office or phone calls routed through the phone company and is not similar to records maintained by a bank (which may be searched without a warrant). Importantly, pursuant to the Supreme Court’s recent decision in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), the Warshak court declined to apply the exclusionary rule to the emails, finding that the government agents had relied on the Stored Communications Act in good faith, thus avoiding the exclusionary remedy.

—Brian Josias, Cotsirilos, Tighe & Streicker, Chicago, Illinois.

Even with Repeal Bill Signed, Legal Battles over "Don't Ask, Don't Tell" Continue

While President Obama signed the "Don't Ask, Don't Tell" Repeal Bill into law on December 22, 2010, the legal challenges surrounding the policy are not yet over. The Justice Department is now seeking a stay of the long-standing federal lawsuit filed over the policy by Log Cabin Republicans (LCRs). The Justice Department argues that the repeal bill establishes a process for ending the DADT policy. However, under the bill, the repeal will not go into effect until 60 days after the certification process is complete. LCRs argue that until the repeal takes effect, service members are still in danger of falling victim to the policy and will continue their appeal to have the stay current blocking a worldwide injunction against enforcement of the DADT policy lifted.

—Joseph Hanna, Goldberg and Segalla, Buffalo, New York

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How Should You Handle Opposing Counsel When They Refuse Settlement?

Dear Ask a Mentor,

I am an attorney in New York and have encountered opposing counsel on a matter that refuses any suggestion of settlement. Counsel has blatantly confirmed to me that they are unwilling to discuss settlement in order to maximize their billing of their client. Of course, when we get before a judge, counsel insists his client believes right is on his side and demands their day in court. I believe ethical considerations, if not disciplinary rules, are being violated in such circumstances, but I'm unsure as to what I can do.

—Concerned about Billable Hour Driven Litigation

Dear Concerned about Billable Hour Driven Litigation:

Your predicament raises a number of important issues in this age of ever-increasing concern for the “bottom line.” If we begin our discussion with a few general principles pertaining to the conduct of your adversary, then we can discuss your responsibilities—both to your client and the Bar—and the role of the court in this matter.

At the outset, the conduct of your adversary in refusing to discuss settlement in order to maximize billing is nothing less than egregious. Your belief that this conduct violates a number of ethical considerations and disciplinary rules is well-founded. In placing his own billing interests over those of his client, your adversary has clearly violated EC 5-1 and DR 5-101. EC 5-1 states, “The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromises, influences and loyalties” (emphasis added).

The statements by your adversary that his client believes right is on his side and demands justice in the face of a weak case is troubling but does not seem to rise to the level of a disciplinary rule violation. A lawyer must represent his client zealously but within the bounds of the law (EC 7-1). A lawyer may not, however, assert a position to harass or maliciously injure another (DR 7-102A1), advance a claim that is unwarranted under existing law (DR 7-102A2), or knowingly make a false statement of law or fact (DR 7-102A7). Standing alone, the general claims by your adversary that his client wants justice or believes right is on his side appear sufficiently general...
in nature that they do not warrant sanctions. This analysis assumes, of course, that opposing counsel has stated the position of his client accurately after fully informing his client of your willingness to discuss settlement. The outcome would be quite different, for example, if your adversary were working under directives similar to yours, that is, to settle whenever possible and as early as possible. If your adversary was told to explore settlement and was refusing to do so, then he would not only be against placing his interests over that of his client, but he would also be making significant misrepresentations of fact to the court and counsel in violation of a number of provisions found at DR 1-102.

It appears from your question that you have made it abundantly clear to opposing counsel and the court that your client is open to discussing settlement. In the future, it may be advantageous to reduce your client’s willingness to settle into the form of a firm settlement offer. The client—not the attorney—decides whether to accept a settlement offer, and an attorney informed of an offer is mandated to communicate the offer to his client (EC 7-7).

You must next consider whether you have any obligations to report your adversary’s conduct in refusing to discuss settlement to maximize the billing of the client. Clearly your adversary’s conduct violates a disciplinary rule and undoubtedly calls into question your adversary’s fitness as a lawyer. Disciplinary Rule 5-101A states:

A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer’s own financial, business, property or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer’s interests.

Because you have knowledge of that conduct, you have an affirmative obligation to report it under DR 1-103A.

Although the judge may have suspicions as to why opposing counsel is unreasonably refusing to discuss settlement, the judge is likely not privy to the remarks of counsel confirming this is taking place so that billing can be maximized. It is your obligation to inform the court of your adversary’s conduct under EC 1-4. Pursuant to Cannon 3 of the Code of Judicial Conduct (22 N.Y.C.R.R. Section 100.3), a judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility is required to take appropriate action. The judge is authorized to look into the matter and report your adversary’s conduct as well. Appropriate action may include direct communication with the lawyer who committed the violation, other direct action if available, and reporting the violation to the appropriate authority or agency or body. See Section 100.3.20.

Keywords: disciplinary rules, ethical considerations, billable time, EC 5-1, DR 5-101
Dennis P. Glascott is a partner with Goldberg Segalla in Buffalo, New York, and is a judge for the Angola Village Court in Erie County, New York.