Motions in Motion: Incorporating the Carnegie Apprenticeships into a Legal Drafting Course

Sarah Morath, Elizabeth Shaver, and Richard Strong
Assistant Professors of Legal Writing
University of Akron School of Law

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Motions In Motions: The Course Design

At our law school, legal writing professors traditionally have taught a one-credit hour upper-level "drafting" or writing course designed to enhance the students' legal writing beyond the first-year curriculum. In 2011, we collaborated to link our three, previously autonomous, courses together such that each class of students took on the role either of plaintiff's counsel, defense counsel, or judge. We received a 2011 ALWD Teaching Grant to further support the design and implementation of this course.

We had several goals in mind when we embarked on this new course design, many of which aligned with the three Carnegie Apprenticeships: legal analysis, practical skills, and professional identity. Our first goal was to have the course simulate the actual practice of law within the somewhat limiting confines of the classroom. Our second goal was to improve our students' legal writing skills. Our third goal was to expose our students to our state court civil procedure rules, local court rules, and customs of our local bar. Finally, we sought to further our students' growing sense of professional identity.

To further those goals, we created a number of case file materials for a hypothetical medical malpractice action filed in Ohio state court. We developed course materials that would provide students with instruction in and exposure to the substantive law, procedural issues specific to state court civil litigation, and the professional issues that can arise in the course of such a case. The following materials describe some of the in-class exercises that our students completed in each class. A more detailed description of the course can be found in our forthcoming article *Motions in Motions: Teaching Advanced Legal Writing Through Collaboration*, 22 PERSPECTIVES ___ (2013).

In-Class Exercise for Student-Judges: The Order of the Order

Early in the semester, the class playing the role of the judge discusses the organization and contents of an order and reviews the elements of good legal writing. The following exercise allows students to work on organization, content and writing style.

Students complete short readings on these topics before class. In class, we review the appropriate organization of a judicial order together. Students then complete "The Order of the Order Exercise," set forth below. In this exercise, students arrange the various sections of a judicial order in the appropriate order.

The Order of the Order Exercise

Instructions: Arrange the following paragraphs using the "Order Format" handout. The focus at this point is on order and not writing mechanics or citation.

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On January 10, 2012, Plaintiffs filed a Complaint against the City of Akron and the paramedics it employed alleging negligence for failing to deliver Jane Hardy to Metropolitan Hospital's ER unit in a timely manner. The City filed its answer on January 24, 2012, in which it asserted a number of affirmative defenses, including immunity because it is a political subdivision under Chapter 2744 of the Revised Code. The city also filed a motion for judgment on the pleadings, asserting statutory immunity under Chapter 2744.

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This matter is before the Court upon the motion for judgment on the pleadings filed by Defendant City of Akon on January 24, 2012. On January 25, 2012 the opposition by the Plaintiffs Jane and Patrick Hardy was filed. The court denies the motion.

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The Ninth District court of appeals of Ohio has recently considered a similar issue on Dec. 21, 2011. In *Riffle v. Physicians,* the plaintiff Andrea Riffle sued the City and the paramedics who responded to her 911 call for the death of her unborn child. Mrs. Riffle was in the third trimester of her pregnancy when she began experiencing serious bleeding. When the paramedics arrived, they did not take the fetus's vital signs and, instead of taking Mrs. Riffle immediately to the hospital, called American Medical Response to take her. American Medical Response arrived a few minutes after receiving

the paramedics' call and took Mrs. Riffle to the hospital. Doctors diagnosed her fetus as having fetal bradycardia and performed an emergency cesarean section. The baby died three days later. The City moved for judgment on the pleadings, alleging it is immune under Section 2744.02 of the Ohio Revised Code. Under Section 2744.02(A)(1), "[e]xcept as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." Division B provides, "a political subdivision is liable for injury, death, or loss to person or property [if] civil liability is expressly imposed upon the political subdivision by a section of the Revised Code." The section of the code the plaintiff's argued was applicable was section 4765.49(B), which provides

> (B) A political subdivision, joint ambulance district, joint emergency medical services district, or other public agency, and any officer or employee of a public agency or of a private organization operating under contract or in joint agreement with one or more political subdivisions, that provides emergency medical services, or that enters into a joint agreement or a contract with the state, any political subdivision, joint ambulance district, or joint emergency medical services district for the provision of emergency medical services, is not liable in damages in a civil action for injury, death, or loss to person or property arising out of any actions taken by a first responder, EMT-basic, EMT-I, or paramedic working under the officer's or employee's jurisdiction, or for injury, death, or loss to person or property arising out of any actions of licensed medical personnel advising or assisting the first responder, EMT-basic, EMT-I, or paramedic, unless the services are provided in a manner that constitutes willful or wanton misconduct.

The Ninth District held that "in cases involving alleged willful or wanton misconduct by a first responder, EMT-basic, EMT–I, or paramedic working for a political subdivision, Section 4765.49(B) applies instead of Section 2744.02(A)(1)." Although Section 2744.02 was both enacted after and has been more recently amended than section 2765.49(B), the court in *Riffle* reasoned that "There is nothing in Section 2744.02 that expresses an intention by the General Assembly for that section to prevail over a specific section regarding the immunity of political subdivisions that provide emergency medical services."

In considering a motion for judgment on the pleadings, the court presumes all factual allegations in the complaint are true and makes all reasonable inferences in favor of the non-moving party. The motion will be granted only on a demonstration beyond doubt that the plaintiff can prove no set of facts on which relief can be granted. *O-Brien v. Univ. Community Tenants Union, Inc*. (1975), 42 Ohio St.2d 252.

The issue before the court is whether the City has asserted a defense under Chapter 2744 of the Revised Code to be immune from these allegations.

There are several facts from Plaintiffs complaint that are relevant to this motion. The Plaintiffs assert that the City of Akron's paramedics acted with a "total disregard and complete absence of all care for the safety of Jane Hardy with an indifference to the consequences of failure to assess and the failure to emergently transport" and that this "unreasonable and wanton conduct" was a proximate cause of the injuries asserted in this case. In accordance with the appropriate standard and for the purposes of this order only, the Court accepts as true Plaintiffs' allegations that City's emergency medical care employees acted with willful and wanton misconduct.

The City's motion for judgment on the pleadings is denied. Plaintiffs have articulated a claim for willful and wanton misconduct by medical care workers employed by the city of Akron. Under *Riffle*, this conduct falls within an exception to the statutory immunity of R.C. section 2744.02(B).

The court agrees with the reasoning of the Ninth District. Under section 2744.02(A)(1), a political subdivision is generally not liable civilly when performing governmental or proprietary functions. However, this immunity is subject to exceptions indicated in R.C. section 2744.02(B). Specifically, R.C. section 2744.02(B)(5) provides, "a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of this revised code." Applicable here is section R.C. 4765.49(B), which provides that "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property arising out of any actions taken by a first responder, EMT-basic, EMT-1, or paramedic . . . unless the services are provided in a manner that constitutes willful or wanton misconduct." This statute creates an affirmative obligation, and holds a political subdivision liable for the wanton and reckless actions of its emergency personnel.

In-Class Exercise for Plaintiffs' Counsel: Client Communications

This exercise designed to engage students with the process of formulating an appropriate response to a negative development in a lawsuit. In our hypothetical medical malpractice case, the case takes a negative turn for the plaintiffs after plaintiffs' expert is deposed, and he fails to establish the requisite causation between an alleged breach of the standard of care and resulting injuries. This exercise specifically targets the following skills: (a) analyzing the negative impact of the expert testimony relative to the legal standard for establishing causation; (b) strategizing about likelihood of success if the case is tried versus seeking a settlement; (b) and writing a letter to the client that describes this negative development. The exercise requires students to compose a client letter, which requests a meeting, and discuss how to prepare for that client meeting.

Before class, plaintiffs' counsel reviews both the expert report and the deposition testimony of their expert, Dr. Hurley. Cross examination during the deposition seriously eroded the integrity of Dr. Hurley's opinions primarily on causation. Students are given the following handout, which explains the need to assess the probability of success in light of this negative development. Students then discuss the consequences of the deposition testimony in terms of a plaintiff's burden to establish causation. The discussion emphasizes client expectations, the appropriate description of the expert's testimony, the possibility of settling the case, any ethical considerations, and the mechanics of drafting a client letter, taking into account the client's level of sophistication. Students then compose a draft of the letter in small groups. Finally, students read their drafts and discuss the content and variation among the student drafts.

Handout: Client Communications

The deposition of our expert, Dr. Hurley, was taken by defense lawyers, and he did not do well for our side of the case. He gave arguably inconsistent testimony on the issue of a breach of the standard of case. In addition, his opinions on the causation issue likely did not rise to the requisite level of "probability" required by Ohio law. His written report unequivocally stated that admission and proper treatment would have prevented Ms. Hardy's cardiac arrest and consequent heart damage, however, he admitted in deposition that Ms. Hardy could have gone into cardiac arrest even if she had been admitted to the hospital on February 5.

We know that the defendants are planning to file a motion for summary judgment based on the outcome of the deposition. We can oppose the motion by having Dr. Hurley author an affidavit that attempts to clarify his opinion but, in my view, the likelihood of the court granting summary judgment is probably at least 40%. Defendant's "smell blood" and have extended a settlement offer of $75,000 in the face of our standing demand of $1,500,000. I am confident that the offer would be increased in response to a counteroffer, but I do not expect that the defendants would offer more than $150,000 at this time. We need to draft a letter to our clients that explains this and provides our assessment of what we should do.

In-Class Exercise for Defense Counsel: Opposing Counsel Communications

This in-class exercise asks students to respond to a "snippy" letter received from opposing counsel on a discovery issue. The discovery issue is whether a document labeled as an "incident report" is privileged under a statutory peer-review privilege granted to medical health professionals. During discovery, defense counsel wrote a very short letter indicating that a single document had been withheld from production on grounds of statutory privilege (counsel also provided a privilege log). Plaintiffs' counsel writes a responsive letter that does not address the legal issue in any detail but rather criticizes defense counsel on a number of other ancillary topics. The exercise requires defense counsel to draft a responsive letter.

The handout below is both the "snippy" letter received from opposing counsel and, on the second page, a set of facts that could be included in any responsive letter. As part of this exercise, students are asked to consider (a) the audience for the letter (your client, opposing counsel, the court); (b) the purpose of the letter overall; (c) the necessary details of the letter relative to both the legal issue and status of the litigation; and (d) appropriate tone of the letter. In particular, students are asked to consider which of the potentially relevant facts (identified on the second page) should be included in the letter. After reviewing opposing counsel's letter and some sample letters from actual cases, students discuss how best to draft a responsive letter. At the end of class, the students as a group have completed a responsive letter.

Handout: Opposing Counsel Communications

Law Offices of Evan Carino, Esq.
150 University Avenue
Akron, Ohio 44235

Via Email: eas68@uakron.edu
Elizabeth A. Shaver, Esq.
150 University Ave.
Akron, Ohio 44235

December 28, 2012

Re: Jane Ann Hardy, et. al. v. Metropolitan Hospital, et. al.,
Case No. CV-2012-01-X500

Dear Elizabeth:

I write in response to your letter of December 15, 2012 regarding the discovery requests that were served upon your client, Metropolitan Hospital. First, I must express dismay at your delay both in producing documents in this litigation and in responding to my attempts to resolve discovery disputes.

As I am sure you will recall, the plaintiffs in this matter initiated discovery in this matter immediately upon the filing of our complaint. We served initial discovery requests on or about October 1, 2012. Per Ohio Rule of Civil Procedure 34, the defendants were to have responded to discovery by October 29, 2012. Because the defendants filed a motion to dismiss the complaint, a motion that the Court summarily denied, you requested that we delay the initiation of discovery until after the motion had been resolved. We graciously agreed to do so. The court denied the motion to dismiss on November 15, 2012 and, per our agreement, the defendants were to have responded to discovery by November 25, 2012.

You then asked for an additional extension of time, citing the disruption in routine due to the Thanksgiving holiday. We again were gracious in allowing the defendants additional time to respond. On December 3, 2012, you did serve upon us Answers to our First Set of Interrogatories and Responses to our Request for the Production of Documents. At that time, you made some documents available for inspection and said that other documents would be made available within the near future.

However, not until December 15 did you inform us that Metropolitan Hospital would be withholding an essential, relevant, non-privileged document from production. After carefully reviewing your December 15 letter and the applicable

law, I left you a detailed voicemail message on the afternoon of December 22 asking that you call me **immediately** so that we could satisfy our obligations under Ohio Rule of Civil Procedure 37 and attempt to resolve our discovery dispute. Now, nearly one week later, **I have heard nothing from you.**

I understand that it may be "business-as-usual" for you and your clients to withhold documents and otherwise employ delay tactics. My clients, a wonderful family whose lives have been changed forever by the gross negligence of your clients, are not similarly situated. They want their day in court as soon as possible.

I do not agree that the incident report of February 5, 2012 authored by Jason Kern, the nurse who cared for my client in your hospital's emergency room, is privileged. The document is relevant to the claims asserted in this litigation. We need the document in order to properly prepare for our deposition of Mr. Kern. Your refusal to produce it does not comport with law and is an obvious attempt to keep from us a highly relevant document that, no doubt, contains damaging admissions.

Please do me the courtesy of calling me at your earliest convenience so that we can discuss this matter. Per Rule 37, we must engage in a serious discussion of this discovery dispute, a discussion that, I hope, will result in production of the document without the requirement of filing a motion to compel discovery. In that regard, I advise you to make your clients aware of the potential penalties for the failure to produce relevant documents.

Sincerely,

Evan Carino, Esq.

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1. December 22 was the Saturday before Christmas. December 28 is the Friday after Christmas. Your voicemail said that you would be away from December 24 through January 2.
2. It took him almost a week to read and response to a simple one-page letter that informs him that a single document will not be produced.
3. He cites no law to demonstrate that the document is not privileged.
4. We have produced documents; the plaintiffs have copies already.
5. The deposition of Jason Kern is not yet scheduled.
6. The case was filed on October 1, so it is barely three months old.
7. We gave the plaintiffs an extension of time to respond to discovery and they haven't produced anything yet.
8. Your December 15 letter identified the statutory peer-review privilege that, in your opinion, applies to the document.
9. Is he only speculating about the document's "damaging" contents?