

Hearsay

A Publication of the Minnesota State Bar Association New Lawyers Section

Summer 2007

Volume VIII, No. 4

In This Issue

Greetings From The Chair <i>Jamal Faleel</i>	1
Client Counseling in a Multicultural Environment: Best Practices for Serving Clients Living in Poverty <i>Artika Tyner</i>	3
Employers May Reasonably Rely on Investigative Reports <i>Kevin Finnerty</i>	5
Possibility vs. Plausibility: A New Federal Pleading Standard for Surviving Motions to Dismiss <i>Tiffany Quick</i>	7
Joe Closer <i>Chris Bradley</i>	9
Hennepin County Affiliate News <i>Elizabeth A. Larsen</i>	11
Sixth District Affiliate News <i>Mark Betters</i>	12
Eleventh District Affiliate News <i>Anna Mickelson</i>	12
2006-2007 NLS Liaisons	13
NLS Open Liaison Positions	13
2006-2007 NLS Contacts	14

Co-Editors

Shanda Pearson
spearson@bassford.com

Kevin Brady
bradylaw@gmail.com

If you have questions about the newsletter, or would like to submit an article for a future issue, please contact one of the co-editors.

MSBA



www.mnbar.org

Greetings From The Chair

By: S. Jamal Faleel

The MSBA New Lawyers Section has accomplished quite a lot over the course of the past bar year. Here are a few highlights:

Toys for Tots

The New Lawyers Sections of the Minnesota State and Hennepin County Bar Associations conducted a joint fundraising event to benefit Toys for Tots at the Graves 601 Hotel on December 7, 2006.

The event raised over \$3,000, and generated 125 toys for disadvantaged kids throughout the Twin Cities. The checks, cash, and toys were presented to Toys for Tots at the KARE 11 studio during a news telecast the day after the event. HCBA and MSBA New Lawyers Section members solicited support from the bar in two ways. First, a group of members called dozens of local law firms to encourage donations, and several law firms donated \$250 to the cause. Additionally, each of the guests at the event brought a new toy or made a \$10 donation. We arranged for airtime and a trip to the KARE 11 studios, where several of our fully-loaded SUVs and vans met with Toys for Tots officials, who were on hand to accept the donations.

In addition to the contributions from the HCBA NLS representatives, I would be remiss if I did not mention three individuals who worked tirelessly on behalf of the MSBA New Lawyers Section to make sure that this event was a success: Community Service Committee chairs Deanna Dailey and Christina Weber, and our Membership and Social Committee chair Kathryn Gettman.

CLEs

Under the leadership of our CLE Committee chair Jennifer Lurken, we were able to offer several free hour-long CLEs just before our monthly section

meetings. These CLEs were designed to cover topics most relevant new lawyers. We offered CLEs on “Ethics and Professionalism in the Law,” “The New Rule 26 and E-Discovery,” and “Clerks: Dos and Don’ts for New Lawyers,” featuring a panel of state and federal law clerks who provided useful tips and information for lawyers appearing before their respective judges.

Hands on Twin Cities – Spring Yard Cleanup for Seniors

Just a few weeks ago, several NLS members participated in the Hands On Twin Cities Spring Yard Cleanup for Seniors. Working with the Neighborhood Involvement Program, the Spring Yard Cleanup is just another way that the Hands On Twin Cities organization provides assistance to seniors so they can continue to live independently. Volunteers from the NLS spent a morning trimming bushes, cleaning the garden, and raking and washing windows at the home of a senior who greatly appreciated our time and effort.

Spring Social at Nami

The MSBA and HCBA New Lawyers Sections teamed up to host the annual Spring Social Event in April at Nami. The MSBA NLS and local businesses contributed approximately \$1,200 in gift cards, which were given away as door prizes to some of the approximately 130 lawyers in attendance. Nami dedicated its new back bar room to the event, which included free drinks and Japanese food courtesy of Robert Half Legal and Pat Carl & Associates.

MSBA Annual Convention

The MSBA Annual Convention took place in St. Paul from June 27th to June 29th. The NLS sponsored an entertainment and hospitality suite at the Convention

Continued from page 1

and the MSBA provided two scholarships to NLS members to attend the Convention.

Election of New Officers

Please also join me in congratulating the new officers for the 2007-08 bar year:

Chair: Dan Gilchrist
Vice Chair: Erika Donner
Secretary: Lacey Anderson
Treasurer: Christina Webber

I would like to thank my fellow officers Dan Gilchrist, Erika Donner, and Lacey Anderson for all their hard work and the generous contribution of their time over this last year. I would also like to thank each of the committee chairs, Deanna Dailey, Christina Weber, Kathryn Gettman, and Jennifer Lurken, and Hearsay Editors, Kevin Brady and Shanda Pearson for their dedication and hard work.

We certainly could not have accomplished all that we did without the support and assistance of these individuals and all the NLS members who have freely given of their time over the past year.

You can visit the New Lawyers Section website to stay apprised of upcoming programs, projects, and events. As always, the Section wishes to provide its members with services that are relevant to their professional needs. I encourage each of you to participate in the Section in some way — by attending meetings, volunteering to serve on a committee, volunteering to help with a community service project, or attending a CLE. Watch for upcoming opportunities and announcements in the Bench and Bar or on the MSBA website.

S. Jamal Faleel
2006-07 Chair

Jamal Faleel is the 2006-07 Chair of the MSBA NLS. He can be reached at jfaleel@fredlaw.com.

Client Counseling in a Multicultural Environment: Best Practices for Serving Clients Living in Poverty

By: Artika Tyner

The poor give us much more than we give them. They're such strong people, living day to day with no food and they never curse, never complain. We don't have to give them pity or sympathy. We have so much to learn from them.

Mother Theresa

In order for attorneys to ensure equal access to the legal system and meet the growing needs of clients living in poverty, they must recognize the diverse needs of these clients by learning about the culture of poverty and building their cross cultural competence.

Presently, those living in poverty are in dire need of direct legal services for matters ranging from resolving a landlord/tenant dispute to obtaining an order for protection; an estimated 80 percent of their legal needs are not being met.¹ However, clients living in poverty often experience a cultural disconnect when seeking to obtain these services. Attorneys can bridge this gap through cross cultural skill training and dialogue.

Defining the Culture of Poverty

The learning process begins with defining poverty, then identifying cultural distinctions, and finally discovering methods to serve clients living in poverty.

The culture of poverty is characterized by the extent to which an individual does without resources: financial, emotional, mental, spiritual, physical, support systems, relationships/role models, and knowledge of hidden rules.² There are two classifications of poverty, generational poverty and situational poverty. Generational poverty is defined as being in poverty for over two generations. Situ-

ational is shorter and defined by circumstances (death, illness, divorce). Those that live in poverty have their own hidden rules and customs. "Solving problems minute-by-minute, day-by-day with limited resources is a valuable survival skill that people in poverty possess."³

Best Practices for Representing Clients Living in Poverty

The culture of poverty and its hidden rules impact the way in which clients view the legal system and interact with attorneys. Failure to address these cultural differences will limit the attorney's ability to effectively serve clients living in poverty. The following practices can be used to successfully serve clients living in poverty:

- **Recognize differing communication styles**

Educators, like Dr. Ruby Payne and Dr. Donna M. Beegle, have identified differences in communication patterns due to socioeconomic class distinctions. Those who live in poverty value oral culture practices. The characteristics of the "oral culture" are being present-oriented while in survival mode, having a willingness to be emotional, and using repetitive storytelling methods.⁴ However, attorneys operate in a "print culture," otherwise known as a "formal register," which places a value on being analytical, thinking in a linear pattern, and planning in advance.⁵ These differences can create challenges in the attorney/client relationship. The influence of "oral culture" may become evident when a client provides story length answers to simple questions, attempts to make emotional pleas in court, and fails to take consideration of the collateral consequences of legal choices. In order to overcome these challenges, attorneys should explain the nature of the "print culture" and its influence on the legal system. Also, attorneys must discover creative ways to explain complex legal concepts and procedures. This requires patience and incorporation of "oral culture" dialogue techniques.

Continued on page 4

¹ Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, www.lsc.gov.

² Payne, Ruby, *Bridges Out of Poverty* 49 (2006).

³ Beegle, Donna, *Overcoming the Silence of Generational Poverty*. Talking Points (Oct./Nov. 2003).

⁴ Payne at 34.

⁵ *Id.*

Continued from page 3

- **Promote client autonomy**

When working with clients living in poverty, attorneys should follow a client-centered model of representation. The attorney and client should engage in a dialogue about the client's objectives, the legal remedies available, and subsequent consequence of each course of action available. Paulo Freire suggests that when serving marginalized populations "it is not our role to speak to the people about our own view of the world, nor attempt to impose that view on them but rather to dialogue with the people about their view and ours."⁶ During this dialogue process, attorneys will minister to their clients in a holistic manner. As a result, clients will feel engaged in the legal process and confident that their legal needs are being met.

- **Provide empowerment to clients**

Those that live in poverty may distrust the legal system due to the challenges that they and others similarly situated have faced in accessing the legal system. This fear can be overcome when attorneys increase their client's sense of personal and political power.

Attorneys can increase their client's sense of personal and political power by:⁷

1. *Developing a relationship of genuine equality and mutual respect with his/her client.* Both attorneys and clients have personal life experiences that affect how they view the world and legal system. By recognizing these different lenses and engaging in an ongoing dialogue, a strong attorney/client relationship will emerge.
2. *Conducting one's self in a way that demystifies the symbolic authority of the state.* Attorneys must uphold the fundamental principles of justice that ensure life, liberty, and the pursuit of

happiness for all by providing legal representation to marginalized populations.

3. *Reshaping the way legal conflicts are represented in the law, revealing the limiting character of legal ideology and bringing out the true socioeconomic foundations of legal disputes.* Attorneys should acknowledge the "structural causes of poverty such as the lack of living-wage jobs for people with limited literacy or a lack of affordable housing for people with limited incomes."⁸ By acknowledging the need for systemic changes, attorneys will reshape the client's perception of justice and equality.

Conclusion

By learning about the culture of poverty, attorneys will be able to meet the diverse needs of their clients and deliver legal services in a competent manner. This learning process will build mutual respect and improve communication between attorneys and clients living in poverty.

Artika Tyner is a Clinical Law Fellow in the Family Law practice group at the University of Saint Thomas School of Law Interprofessional Center. She has demonstrated her commitment to the furtherance of public service and social justice by volunteering with domestic violence coalitions and local nonprofit organizations, mentoring at risk youth, and advocating for legislative reform. She can be reached at artyner@stthomas.edu or (651) 962-4960.

⁶ Freire, Paulo, *Pedagogy of the Oppressed* 77 (1999).

⁷ Adapted from Peter Gabel and Paul Harris, *Building Power and Breaking Images: Critical Legal Theory*, 11 N.Y.U. Rev. of L. & Soc. Change 369, 375 (1982).

⁸ Beegle, Donna, *Overcoming the Silence of Generational Poverty*. Talking Points (Oct./Nov. 2003).

Employers May Reasonably Rely on Investigative Reports

By: Kevin Finnerty

Good employment lawyers generally advise their clients to take all complaints and allegations of misconduct in the workplace seriously. In other words, employers should not brush aside the crude joke or the unwelcome advance as harmless fun or an insignificant event.

Taking complaints and allegations seriously does not mean accepting them as true prior to an investigation, however. Indeed, the Minnesota Supreme Court has warned, “[w]e believe that an employer who takes no steps to investigate but relies entirely on accusations either made by employees who may be biased or on second-hand hearsay with no identification of sources, has not acted as a reasonably prudent person . . .”¹ In *Wirig v. Kinney Shoe Corp.*, the Minnesota Supreme Court refused to recognize as privileged potentially defamatory statements made by an employer concerning thefts at one of its stores, where the company did not conduct an investigation and relied heavily as its source on an individual accused of sexually harassing one of the individuals the company indirectly accused of the thefts.²

In many instances, investigations are not conducted by the company’s ultimate decisionmaker. Indeed, as the business world becomes more complex and international in scope, employers often have to rely

on those outside of their organization to conduct parts, if not all, of their investigations. This raises a not-so-insignificant concern: to what extent may the employer rely on reports when taking action against an employee?

An employer may rely on an investigative report when making a decision to terminate or discipline an employee as long as the employer reasonably believes the report to be accurate.³ An employee will be unable to demonstrate pretext simply by offering evidence of the falsity or inaccuracy of an investigative report used in making an employment decision. Rather, the employee must demonstrate the employer (1) did not actually rely on the report as asserted; or (2) knew the report was false.⁴

In *Tesh v. United States Postal Service*, the Postal Service terminated an employee after an investigation revealed the employee had dishonestly pursued a workers’ compensation claim and added medical restrictions to his health report without the authorization of his physician. The employee alleged the employer discriminated against him because of a disability.⁵ The Tenth Circuit upheld the district court’s reversal of a jury verdict for the plaintiff.⁶ Although the employee claimed the investigative report was incomplete and inaccurate, the court stated such inquiries should not be the focus of the fact-finder. Rather, the critical issue was whether the employer could

Continued on page 6

1 *Wirig v. Kinney Shoe Corp.*, 461 N.W. 2d 374, 380-81 (Minn. 1990), *superseded by statute on other grounds*.
2 *Id.* at 376-77, 380-81.
3 *See Tesh v. United States Postal Serv.*, 349 F.3d 1270, 1274 (10th Cir. 2003).
4 *See Smith v. Int’l Paper Co.*, 160 F. Supp. 2d 1335, 1346 (M.D. Ala. 2001); *Sweeney v. Alabama Alcoholic Bev. Control Bd.*, 117 F. Supp. 2d 1266, 1273 (M.D. Ala. 2000); *see also Hardy v. S.F. Phosphates Ltd.*, 185 F.3d 1076, 1081-82 (10th Cir. 1999) (failure of employer to interview everyone familiar with the situation when performing the investigation does not evidence pretext).
5 *See* 349 F.3d at 1271-73.
6 *See id.* at 1274.
7 *See id.* at 1273.
8 *See id.*
9 *See id.* at 1274.
10 *Id.*
11 *Id.*

Continued from page 5

reasonably rely on the report when making the decision to terminate the employee.⁷ As such, whether the report was, in fact, erroneous, was irrelevant.⁸

The Tenth Circuit also addressed a policy argument raised by the employee: would a rule allowing employers to rely on investigative reports permit employers to insulate themselves from claims of discrimination by allowing them to hide behind a report that may, in fact, be bogus?⁹ The court noted that the policy concern was not applicable because the plaintiff failed to provide any evidence that the investigative report was not credible or incomplete.¹⁰ Moreover, the court expressed confidence that the rule it established was capable of handling such a situation: “If an employee submitted evidence showing that an investigation was a sham only done to cover up discrimination, an employer could not reasonably rely on it.”¹¹

Other courts have similarly held that the crucial issue is whether the employer acted reasonably when relying on the report, rather than whether the report itself was accurate or complete.¹² Only on rare occasions will a court examine the substance of the report itself. In *Walker v. Robbins Hose Co. No. 1, Inc.*,¹³ a fire company rejected the plaintiff’s application for membership, in part, because of information contained in an investigatory report. For almost 80 years, the company had limited membership to “respectable white males.” After it changed its bylaws to permit African-Americans as members, the company added a requirement that an investigative committee make a

recommendation on each applicant. The plaintiff, who was the first African-American to apply, alleged the company’s application and membership processes were racially discriminatory.¹⁴ Given these circumstances, the court perceived the need to independently examine the contents of the investigative report before it concluded the report was “substantially accurate” and did not support an inference of discrimination.¹⁵

Barring unusual circumstances like those present in *Walker*, employers can usually comfortably rely on investigatory reports made in good faith. Unless the employee presents evidence that either (1) challenges the employer’s actual reliance upon the report in reaching its decision; or (2) proves the employer knew the information in the report was false and yet nevertheless relied upon it, the employee likely will be unable to raise a genuine issue of material fact of pretext, even if he or she offered evidence of the inaccuracy, the incompleteness, or the falsity of the report.¹⁶

Therefore, employment lawyers would be wise to advise their clients: take all complaints in the workplace seriously; investigate the allegations fairly either internally or by engaging an outside source; and make a reasonable employment decision on the basis of the investigative report conducted in good faith.

Kevin Finnerty is an associate at the law firm of Dorsey & Whitney LLP. He practices in the area of employment law and commercial civil litigation. He can be reached at finnerty.kevin@dorsey.com or (612) 492-6977.

12 See, e.g., *Smith*, 160 F. Supp. 2d at 1346; *Sweeney*, 117 F. Supp. 2d at 1274; see also *Graham v. Long Island R.R.*, 230 F.3d 34, 44 (2nd Cir. 2000) (reasonable for employer to rely on results as reported by outside laboratory’s drug test even if it is later shown the results were inaccurate); accord *Pearson Candy Co. v. Huyen*, 386 N.W. 2d 253, 256-57 (Minn. Ct. App. 1986) (employer entitled to rely on pre-hire report of doctor who examined job candidate who suffered from epileptic seizures when making decision not to hire job candidate because candidate’s epilepsy posed danger to candidate and others).

13 465 F. Supp. 1023 (D. Del. 1979).

14 See *id.* at 1028-34.

15 See *id.* at 1038-39.

16 Compare *Waters v. Churchill*, 511 U.S. 661, 677-81 (1994), where, in the context of examining a termination based on an internal investigation, a plurality of the Supreme Court found (1) the employer’s investigation had been sufficient even though the employee claimed it was erroneous and incomplete; and (2) reliance on the investigation would have been reasonable had the employer believed it. Nevertheless, the Court held the employee provided sufficient evidence to create a material dispute of fact concerning the employer’s motivation.

Possibility vs. Plausibility: A New Federal Pleading Standard for Surviving Motions to Dismiss

By: Tiffany M. Quick

The recent United States Supreme Court decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), changes the federal pleading standards necessary to survive a motion to dismiss. The longstanding precedent derived from *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) —“that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”— is no longer the standard by which to judge the sufficiency of a federal court complaint. It is not enough for a complaint in a federal civil case to allege a claim that has a mere “possibility” of an entitlement to relief. Now, as a result of *Twombly*, a complaint must plead enough facts to demonstrate the “plausibility” of the claim.

In *Twombly*, representatives of a putative class of local telephone and internet services subscribers sued a group of incumbent local exchange carriers (“ILECs”) for antitrust violations under § 1 of the Sherman Act. The plaintiffs’ complaint alleged that the ILECs conspired to restrain trade by inflating charges for the services in “parallel conduct.” The plaintiffs also alleged that the conduct arose from an “agreement” between the ILECs. *Twombly*, 127 S. Ct. at 1962-63.¹

Section 1 of the Sherman Act prohibits unlawful agreements to restrain trade, and a critical element of § 1 is the existence of an “agreement.” Independent conduct that results in a restraint of trade is not prohibited by § 1. The Court thus phrased the issue before it as:

... whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engage in certain parallel conduct unfavor-

able to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.

Id. at 1961.

In a series of cases interpreting the sufficiency of evidence in § 1 claims, the Court has stated that mere “parallel conduct” alone is perfectly lawful and does not give rise to an inference of an agreement that would survive a summary judgment or directed verdict motion. Before the *Twombly* decision, however, the Court had never explained what role “parallel conduct” might play at the pleading stage. Generally, the Court had adhered to Rule 8’s requirement that the pleader make only “a short and plain statement of the claim showing that the pleader is entitled to relief.”²

In *Conley v. Gibson*, the Court elaborated on Rule 8 with two arguably inconsistent statements. *Twombly*, 127 S. Ct. at 1969. First, the *Conley* Court said that the complaint must “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Second, *Conley* set forth the now-familiar language: “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.*

In *Twombly*, the defendant ILECs moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim upon which relief could be granted, arguing that the mere allegation of parallel conduct did not state suffi-

Continued on page 8

¹ According to the Court, the complaint couches its ultimate allegations this way:

In the absence of any meaningfulthe between the [ILECs] in one another’s markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and other facts and market circumstances as alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.

Twombly, 127 S. Ct. at 1962-63.

Continued from page 7

cient “grounds” to entitle the plaintiffs to relief. The district court granted the motion and dismissed the case.³ The Second Circuit reversed, holding that the district court tested the complaint by the wrong standard—“plus factors are not required to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal.”⁴

The Supreme Court, per Justice Souter (joined by Chief Justice Roberts and Justices Alito, Breyer, Kennedy, Scalia, and Thomas), reversed the Second Circuit. The Court first explained that *Conley*’s requirement that the “grounds” of the claim be set forth is critical. It requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Twombly*, 127 S. Ct. at 1968-70. The Court went on to explain that the need at the pleading stage for allegations plausibly suggesting (not merely consistent with) an agreement reflects the threshold requirement of Rule 8(a)(2) that the “plain statement” possess enough “heft” to “show that the pleader is entitled to relief.” *Id.* at 1966. In short, some factual allegations must accompany the elements of a claim. The Court reasoned, because the plaintiffs only alleged parallel conduct and a bare assertion of a conspiracy, these facts, even if proved, would not entitle plaintiffs to relief. The plaintiffs must plead more by, for example, placing the allegation of parallel conduct “in a context that raises a suggestion of a preceding agreement.” *Id.*⁵

The Court justified its holding by stating that the potential expense of discovery in antitrust cases (and in antitrust class actions, in particular) risked coercing settlement before the costs could be controlled by effective judicial supervision and case management. *Id.* at 1966-67. “Probably, then,” the Court stated, “it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases

with no ‘reasonably founded hope that the [discovery] process will reveal relevant evidence’ to support a § 1 claim.” *Id.* at 1967 (citing *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

The Court recognized the “no set of facts” language of *Conley* but said it has been “questioned, criticized, and explained away long enough,” and that “after puzzling the profession for 50 years, this famous observation has earned its retirement.” *Twombly*, 127 S. Ct. at 1969. “The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been adequately stated, it may be supported by showing any set of facts consistent with the allegations in the complaint.” *Id.*

Turning to the allegations in the plaintiffs’ complaint, the Court found that they were inadequate. The allegations of parallel conduct were insufficient without more facts and the bare allegations of agreements and conspiracies were “legal conclusions resting on the prior allegations.” *Id.* at 1970. In short, the Court thought that “nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy.” *Id.*

In concluding the main opinion,⁶ the Court stated the following:

. . . we do not require a heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

Id. at 1974.

Continued on page 9

2 Federal Rule of Civil Procedure 8 sets forth the “General Rules of Pleading.”

3 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003).

4 425 F.3d 99, 114 (2d Cir. 2005).

5 With regard to its holding, the Court states:

In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Id. at 1965.

6 Justice Stevens, joined in relevant part by Justice Ginsburg, dissented. *Twombly*, 127 S. Ct. at 1974-89.

Continued from page 8

**Will the *Twombly* Decision Affect
Cases Outside the Antitrust Context?**

Whether the standard set forth in *Twombly* applies to cases outside the antitrust context is not entirely clear from the opinion, though one can certainly argue that it should. If the *Twombly* opinion is that Rule 8 requires that all complaints set forth factual allegations demonstrating that the claim is “plausible” (versus merely “possible”), then we may see an increase in Rule 12(b)(6) litigation on the sufficiency of fact pleading and many more cases dismissed. If, on the other hand, the opinion is that it is the combination of the § 1 requirements and the burdens on defendants in cases such as *Twombly* that justify the plausibility requirement, then the *Twombly* standard may not extend to cases outside the antitrust context.

Defense counsel have good reason, based on the language of *Twombly*, to argue that the standard set forth therein should apply outside the antitrust context — namely, that many other kinds of cases clearly are “sprawling, costly, and hugely time-consuming,” as the Court describes in *Twombly*. Various class

actions, mass torts, and a host of other causes of action require involved showings of proof (yet fall under Rule 8’s general pleading requirements rather than Rule 9’s special requirements) and have the potential to impose enormous costs on a defendant. The Court does not explicitly state that the standard set forth in *Twombly* ought to only apply in the antitrust context, though plaintiffs’ counsel will likely argue it should. Defense counsel, however, can and should argue that the new *Twombly* “plausibility” standard supersedes the *Conley* standard for all cases, particularly those in which there is the potential for “sprawling, costly, and hugely time-consuming” litigation.

Tiffany M. Quick is an associate at BASSFORD REMELE, A Professional Association, practicing in the areas of commercial litigation, ERISA, health law, professional liability and products liability. She can be reached at tiffanyq@bassford.com or 612-376-1663.

Joe Closer

By: Chris Bradley

I sit in my ergonomic chair, slightly reclined, hands clasped behind my head. In front of me are the tools of my trade. Touchtone phone, pads and pens, computer keyboard, open internet browser. The all-important calculator with the big buttons. I am here to learn how to close deals. Lawyers call it rainmaking. I work in sales.

I met Joe Closer shortly after law school. Joe Closer is a figment of a corporate trainer’s imagination, but to me, he’s quite real. Joe Closer makes money by making quota. His compensation consists of a base salary, commissions, a bonus each month, and a bonus each quarter. Joe Closer is good at his job. He rarely misses. He helps me hit the mark through his contagious enthusiasm and persistence. I like Joe Closer because he taught me how to close a deal.

I make the first cold call on an account in California, expecting good things. As the phone rings, I sit

straight and clear my throat. I want to project confidence and authority. The line picks up.
“Lawyer Bob speaking!”

“This is Chris from sales. Did I catch you at a good time?”

“Not really. What do you want?”

“I’d like the opportunity to demonstrate online research products that will help you in your practice of law.”

Silence. “What does it cost?”

“Well,” I stammer, “it depends on your needs. How are you currently doing your legal research?”

“Cases. Statutes. You know: Primary law. What’s the cost?”

Continued on page 10

Continued from page 9

I click the mouse. I don't know the answer. I take too long. I can feel Lawyer Bob's frustration brewing through the phone. I feel like hanging up. Joe Closer looks at me, wearing his look of amused disapproval. Joe Closer wouldn't hang up now. He would hang in there, calm and collected, and find the answer no matter how impatient Lawyer Bob is.

"Listen, this ain't rocket science." *Click.*

One of my colleagues has been with the company four years. Like me, she is required to make 50 dials per day. In four years, that's over 50,000 outbound calls. That's a lot of hang-ups. The next call took place in my imagination, in which I subjected Lawyer Bob to a frothy-mouthed sales tirade he couldn't refuse. This is a needs-based product, Lawyer Bob. Good luck in your practice, because you're going to be out of it this time next year. "Where do I sign?" he begs. I don't call him back, of course. To close deals I must push aside my ego and let hang-ups be hang-ups. Perhaps later I'll catch him at a better time.

The phone rings.

"This is Chris from sales. How can I help you?"

"I need access to legal materials. Can you help me?"

"Sure! Are you in front of a computer?"

"Are your cases and statutes annotated?"

"Certainly. Pull up an internet browser and I'll show you."

"Hold on. I need to boot my computer. The dog is biting my ankles."

"Boot your computer, pull up a browser, and we'll head to a website."

"My dog is such a pest. My computer is on. What should I do?"

"Open an internet browser" –

"I'm working a case and I need to research dog bite liability."

"Open an internet browser" –

"My computer is on. Where should I go? Did you say the Internet?"

It went on like this. I couldn't complete a sentence without interruption. My replies became monosyllabic. "Yes!" and "no!" and "sure!" and "what?" We began to exchange verbal gunfire. It continued until I heard these words on the end of the line: "I have a learning disability."

That stopped me from speaking for a moment. I took a breath and regrouped. Her learning disability caused her mind to run in circles. I had not understood the cause of our communication problem, and so our entire conversation, tense and heated and exasperating, was born of ignorance.

I asked if I could follow up later. She said yes because the firm would grow and need access to online legal research, and she said it's okay if I call later as long as I don't mind her being candid. I said I don't mind candidness, if that's a word, and she laughed, I laughed, and we built some solid rapport. I became a little more like Joe Closer.

Writing this note made me think of William Zinsser. Author and one-time Yale writing professor, Zinsser says that writing logical, clear sentences, even in a field like mathematics, will allow you to get a better grasp on the subject. I've put my sales experience on paper and I've seen how, as a new lawyer, it relates to practicing law. In his book *Writing to Learn*, Zinsser quotes schoolteacher Joan Countryman: "What are any of the disciplines but a way in which people try to make sense of the world or the universe?" In law, we try to make sense of the world by understanding each other. By understanding each other we solve problems. That is how Joe Closer closes deals.

Newly admitted to practice law in 2006, Chris Bradley is currently leveraging his bachelor degree in business at Thomson West in sales & marketing. He can be contacted at (651) 808-0791 or at: christopher.bradley@thomson.com.

Hennepin County Affiliate News

By: Elizabeth A. Larsen

The Hennepin County Bar Association New Lawyers had a successful year that is quickly drawing to a close.

On April 10, 2007, the HCBA NLS hosted the Wish Upon A Prom event at Patrick Henry High School. We collected approximately 400 new and gently used prom dresses, gloves, evening bags, jewelry, unopened makeup, as well as gift certificates and cash donations. The new lawyers then hosted a boutique to help the Patrick Henry students find their perfect prom attire.

We also continue to participate in Achieve! Minneapolis by presenting attorney panel discussions at local high schools. These have been popular events that provide the students with great information about what it is really like to be an attorney in various areas of practice. Most recently, the HCBA NLS hosted a panel presentation at Patrick Henry High School, as well as hosting a table at Southwest High School's recent Career Fair.

We closed out our year with two great social events – a happy hour at The Local on May 24 and the annual Saints game outing on June 10. The happy hour was our last for the bar year, but this great networking opportunity will recommence in September.

Finally, we have elected new leadership for the 2007-2008 bar year. Congratulations to our new directors and officers:

Chair:	Cyrenthia Jordan
Vice-Chair:	Sarah Dunn
Secretary:	Mark Belinske
Treasurer:	Patty Wisecup
Directors:	Josh Cooner
	Artika Tyner
	Krista Mathews Dean
	Troy Tatting
	Jocelyn Benton



Members are invited to attend our monthly meetings (the second Wednesday of every month, at noon at the HCBA offices) and are always welcome to contact any of the officers or directors with questions, ideas, or to volunteer. Keep an eye open for upcoming events, announced in our bi-weekly e-mails, or check out our website at <http://www.hcba.org/programs/newlawyers>. We hope to see you at our next happy hour or meeting!

Elizabeth A. Larsen is the outgoing chair of the Hennepin County Bar Association New Lawyers Section. She can be reached at elizabeth.larsen@leonard.com or 612-335-1861.

6th District Affiliate News 11th District Affiliate News

By: Mark E. Betters

By: Anna C. Mickelson

The 6th District NLS will be observing the same schedule as used by the MSBA NLS. Therefore, we will not be meeting again until Fall of 2007. We have exciting year ahead, as we will be electing two new officers – a vice president and a secretary/treasurer. We recently had our last general 6th District gathering for the 2006-07 year. The attorneys and their spouses got together for a formal dinner, drinks, and entertainment on Thursday, May 17, 2007, at the Butler House in Mankato, Minnesota. Enjoy the summer!

Mark E. Betters is the Chair of the 6th District NLS. He can be reached at 507-387-5661 or betters@manahanbluth.com.

Stephanie Balmer, of Falsani, Balmer Peterson Quinn & Beyer has recently taken over as President of the 11th District New Lawyers Section. The 11th District New Lawyers would like to extend our congratulations to Stephanie - we are looking forward to benefiting from her leadership and are confident she will do an excellent job.

Recently, the New Lawyers wrapped up several activities: We created and distributed a New Lawyer Referral List so that our members can assist one another with developing our practices and client bases. Also, in late June, we held a weekend camping trip to Tettegouche State Park, on the North Shore of Lake Superior. The two night trip included food, camaraderie, a 2.5 hour kayak tour near Split Rock Lighthouse, and a very competitive lawn game competition. Everyone had a great time.

At our July lunch meeting, we spent some time brainstorming and planning for the coming year. A number of community service projects and social activities were discussed. We look forward to remaining an active affiliate in the coming year.

Anna C. Mickelson is the outgoing President of the 11th District NLS. She can be reached at 218-722-4766 or acm@hanftlaw.com.

Ramsey County Affiliate News

No report submitted.

2006-2007 NLS Liaisons

Antitrust Section

Brian C. Fischer
Brian.Fischer@FischerLegal.com

Construction Law Section

Chanel Melin
melinlaw@sprintpcs.com
Amy Gelhar
agelhar@foleymansfield.com

Diversity Committee

Angela Hall
hall.angela@dorsey.com

Human Rights Committee

Erika Donner
edonner@yahoo.com

Immigration Law Section

Bradley W. Newbolt
BradN@Lawyer.com

Judicial Elections Committee

Benjamin Hayek
benjamin.hayek@lindjensen.com

Labor & Employment Law Section

David James
djames@halleland.com

Legislative Committee

Jessica Theisen
jtheisen77@hotmail.com

Public Law Section

Bridget McCauley Nason
bnason@levander.com

Real Property Law Section

Dan Gilchrist
dgilchrist@lindquist.com

Tax Law Section

Ben Britton
ben.britton@ey.com

Women in the Legal Profession Committee

Dana Bartocci
bartocci@umn.edu

NLS Open Liaison Positions

Committees

Convention Committee
Diversity Committee
Fair Response Committee
Insurance for Members Committee
Judicial Elections Committee
Law School Liaison Committee
Legal Assistance to the
Disadvantaged Committee
Life and the Law Committee
Membership Committee
Multijurisdictional Practice Committee
Paralegal Committee
Professionalism Committee
Pro Se Implementation Committee
Publications Committee
Rules of Professional
Conduct Committee

Sections

Administrative Law Section
Alternative Dispute Resolution Section
Animal Law Section
Appellate Practice Section
Art & Entertainment Section
Business Law Section
Civil Litigation Section
Children and the Law Section
Criminal Law Section
Communications Law Section
Computer & Technology Law Section
Elder Law Section
Employee Benefits Section
Environmental & Natural
Resources Law Section
Family Law Section
Food and Drug Law Section
General Practice Solo
Small Firm Section
Health Law Section
International Business Law Section
Outstate Practice Section
Practice Management
& Marketing Section
Probate & Trust Law Section
Public Utilities Section

As the list indicates, there are a number of openings for New Lawyers to become liaisons to various sections in the MSBA. This is a great opportunity to get involved with a substantive or procedural area of law. If you are a new lawyer and interested in becoming a liaison you should contact the New Lawyers Section Chair, Jamal Faleel at JFaleel@fredlaw.com for more information.

2006-2007 MSBA New Lawyers Section Contacts

Executive Board

Chair: S. Jamal Faleel
Fredrikson & Byron
200 South 6th Street, #4000
Minneapolis, MN 55402
Phone: (612) 492-7303
Fax: (612) 492-7077
JFaleel@fredlaw.com

Vice-Chair: Daniel J. Gilchrist
Lindquist & Vennum
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Phone: (612) 371-6277
Fax: (612) 371-3207
dgilchrist@lindquist.com

Treasurer: Lacey Anderson
The Esquire Group
15 South Fifth Street, Suite 1000
Minneapolis, MN 55402
Phone: (651) 340-9068
Fax: (651) 340-1218
[lacea@esquiregroup.com](mailto:lancea@esquiregroup.com)

Secretary: Erika N. Donner
1115 Gordon Ave.
Maplewood, MN 55109
Phone: (651) 341-8059
erikadonner@yahoo.com

Affiliates

Hennepin County: Elizabeth Larsen
elizabeth.larsen@leonard.com

Ramsey County: Mark Priore
mark_priore@yahoo.com
Sarah Westcott Bashiri
sbashiri@mnfamilylaw.com

Duluth: Anna Mickelson
acm@hanftlaw.com

Mankato: Mark Betters
betters@manahanbluth.com

Rochester: Inactive

Unaffiliated

Brainerd: Inactive

St. Cloud: Inactive

Willmar: Inactive