

PRESIDENT'S MESSAGE

What Kind of Leader Are You?

By Tara Aschenbrand



As many of us focus on refining our leadership skills, I was reminded at a recent CLE that the key to leadership is that we have followers. At one

session, we were asked to describe followers. As a group of lawyers, we threw out words like: weak, lacks initiative, assistant, dependent, not original. Then, the professor (yes, a college professor) asked us to list famous followers. We filled the chalkboard with a list of famous followers like Robin (Batman & Robin), Ethel (Lucy and Ethel from I Love Lucy), Oates (Hall & Oates), Watson (Holmes & Watson), Frodo (Sam & Frodo from Lord of the Rings) and Teller (Penn & Teller). In doing this, we were reminded that it is the pairings of the follower and the leader that matters the most. The pairs complement and save each other. The followers have to be comfortable being somewhat invisible, and the leaders have to be comfortable knowing that they don't know it all.

That conversation changed our perception of how we describe followers. In order to have a high-performing team, we need followers who want to be led by us as leaders. Followers are crucial to our success, and being an effective leader means that we need to create trust so our

followers are comfortable being somewhat invisible and want to "save" us.

Shortly after attending that CLE, I attended a meeting that started with the recitation of a famous fable illustrating the gravity of the evil tongue. The story is about a man who went around his village gossiping and telling stories, with no concern about the impact of his behavior on others. In time, he began to realize that his stories had hurt people. He then visited his rabbi asking how he could make amends. The rabbi instructed him to take a feather pillow, cut it open, and spread the feathers to the wind for everyone he had hurt. The man did as he was instructed, and returned to the rabbi for further instructions. Upon returning, the rabbi told him to go out and collect all of the feathers and return them to the pillow. The man could not collect all of the feathers and returned once more to the rabbi. The rabbi told him that your words are like feathers. Once they leave your mouth, you know not where they will go, and you can never retrieve them again. As leaders, this story reminds us that we impact our teams on a daily basis. We have all experienced the client, boss, or coworker, who diminishes the team, is disrespectful, or leads by fear. Although this leadership style might work in the moment

on occasion, it was definitely not a component in the famous pairings that we identified in the CLE. Inspiring our teams to achieve incredible outcomes like the famous pairings requires tremendous trust. As leaders, we need to create this trust by being reliable, open, concerned about others, and competent. By creating these trusting environments, we encourage our followers to want to "save" us. As effective leaders, we have to admit when we need help, and appreciate and allow our followers to join us. We can't be leaders without followers. ■

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The Ohio Women's Bar Foundation Celebrates 10 Years!

Congratulations to The Ohio Women's Bar Foundation for celebrating a decade of promoting diversity, advancing women in the law, and providing extraordinary education and leadership training! The OWBF held their 10th Anniversary Gala & Fundraiser at The Vault in Columbus on September 14. Guests enjoyed great food, fun themed cocktails, a silent auction and raffles, and groovy music by the Bluewater Kings Band.

The night was filled with friends dancing and laughing while bidding on amazing items. As the program for the night commenced with a plated dinner, all of the distinguished attendees had the honor of celebrating Marilyn McClure-Demers as the 2018 recipient of the Leading the Way Award. McClure-Demers is the Vice President and Associate General Counsel in the Office of the Chief Legal Officer at Nationwide and a past president of the Ohio Women's Bar Association. She's an exceptional recipient as this award is presented to outstanding women lawyers who demonstrate exemplary leadership in the legal profession and their communities and commitment to the promotion and enhancement of women in the legal community by inspiring and mentoring other women to raise their performance to the same high standard.

Also recognized at the Gala were the incredible efforts and initiative to offer the first Leadership Institute Scholarship. Vorys, Sater, Seymour and Pease LLP, along with the OWBF board, had the vision of promoting diversity and inclusion within the Leadership Institute and turned it into a reality by offering the first Leadership Institute Scholarship for the 2018-19 year. This scholarship covers the cost of the Leadership Institute for a well deserving individual who is making an impact in diversity prevention and intervention. With passion filling the room, we had the pleasure to announce Perez & Morris as the 2019-20 Leadership Institute Scholarship sponsor.

The Ohio Women's Bar Foundation and Gala Committee would like to thank our generous sponsors, special guests and everyone who participated in making this event a success.

Cheers to 10 years! ■



Guests mingled with coworkers and friends as the night began.



Marilyn McClure-Demers, recipient of the 2018 Leading the Way Award, poses with husband Alan Demers.



Member Benefit Highlight – Events

Are you using all of your OWBA member benefits? From events to education, publications to charity, OWBA offers members amazing benefits. To find a complete list of benefits, please click <http://owba.org/memberbenefits2>.

OWBA and OWBF have remarkable events planned year-round. From educational events to fundraising galas, we provide our members with the opportunity to socialize with peers across the state. Check out a couple of our event recaps in this newsletter and mark your calendar for future events by visiting www.owba.org. ■

Highlighting a Member of the OWBF Leadership Institute: Katrina M. Thompson, partner, Barnes & Thornburg LLP, Columbus



What did you enjoy the most about the Leadership Institute?

The confidence gained and the friendships made. My Leadership Institute experience came at the perfect time in my personal and professional life. I had recently switched firms and had become a new mom. I felt overwhelmed and unsure of myself. Participating in the program and getting to know the other fantastic females that made up my class gave me the boost I needed to make Partner at my Firm and successfully serve as President of the Women Lawyers of Franklin County.

What is something that you learned that you implemented into your career/life?

My favorite Leadership Institute session was the one on negotiation. It helped me embrace my own unique negotiation style and more effectively negotiate with those that utilized different styles or techniques to better negotiate for myself and for my clients.

Do you stay in contact with anyone from your class?

You form such a special bond with everyone in your class. Unfortunately, life gets in the way, and I do not see my classmates as often as I would like, but I really enjoy running into them and catching up right where we left off at OWBA or other networking events. I feel such pride when I see their names in the news or online for various personal and professional successes!

What piece of advice would you give to someone who is just beginning the Leadership Institute or who is considering applying?

Any time you get the opportunity to say yes to yourself and take time away

from work and personal responsibilities to focus on self-reflection and personal growth it is a meaningful investment. If you are considering applying – DO IT!!! And if I know you, work with you, or have supported an organization or cause with you, let me know if I can complete your application by writing a letter of recommendation for you!

How did participating in the Leadership Institute change you and/or make you better?

As I mentioned previously, I walked in as a new mom and had recently switched firms. At that stage in my life, I felt insecure about my talents and leadership qualities and was unsure of what direction I wanted my career to go. I graduated from the Leadership Institute with a renewed sense of purpose and confidence and a contact list full of inspiring women I was proud to call my peers and friends.

Where do you work?

Barnes & Thornburg LLP (Columbus office)

Do you specialize or have a niche?

I have a real estate practice that focuses on Community Development and Tax Credit Financing. I work on transactions involving low-income housing tax credits, historic tax credits, new markets tax credits, and energy credits. Through the difficult and complicated transactions I oversee, I am able to work with great people who are revitalizing communities, preserving historic buildings, and helping to provide affordable housing to those that need it most.

If you weren't a lawyer, what would you be?

Depends on the daydream of the day...

Probably a teacher, unless I could get paid to make crafts.

What is your dream job?

I suppose in a lot of ways this (my current job) is my dream job. Growing up I had dreamed about becoming a lawyer or a judge, but to be honest I did not really feel that it was an attainable goal. My father had immigrated to the U.S. from Brazil and I was one of four children in a family with very limited means. At the time, I thought a legal career was only for the inherently wealthy, but my family helped instill in me the belief that if I worked hard enough I really could be anything I wanted to be.

What would you like to tell us about yourself (i.e. your family, hobbies, etc.)?

My daughter Kaleesi is my everything. She was diagnosed as autistic when she was two and a half, which adds another layer to the struggle for “balance” (in quotes, because it is not a real thing). However, we are incredibly fortunate to have a great support system and I do what I can to help others facing similar challenges by supporting The Mothership, Inc. (a non-profit organization supporting the parents of special needs children), donating to Autism Speaks, and participating as a Board Member for The Childhood League Center (an education facility committed to serving children under the age of six with developmental delays).

Is there anything else you'd like to share?

You will never regret this investment in yourself and should leap at the opportunity to participate in the Leadership Institute if you can! ■

Highlighting a Member of the OWBF Leadership Institute: Heather Stutz, Squire Patton Boggs (US) LLP



What did you enjoy the most about the Leadership Institute?

It was different. So much of what we are taught focuses on professional development and

business development. I thought the Leadership Institute would be the same. I was pleasantly surprised. Instead, the Leadership Institute was about personal development, a holistic approach to the things we struggle with daily – how to effectively work with other people; what clients, judges, and colleagues want; how to be more well-rounded and confident; and how to better balance work, family, and personal needs, among many other things.

What is something that you learned that you implemented into your career/life?

We took a personality test, which helped us learn not only about ourselves, but also about others' personalities. I've taken personality tests before. They've always been somewhat predictable and didn't provide me with new information (I know I'm a type "A" introvert!). This test was different. What I liked most about it was that it helped me understand others' personalities and how those personalities interact with mine. We live in a diverse world. We can't expect everyone to be motivated by the same things that motivate us, nor can we expect everyone to have the same talents. And we wouldn't want it that way. I can't say I have fully implemented what I learned, but I can certainly say that I have

used what I learned to think more deliberately about how I interact with individuals and how to capitalize on each person's unique talents for the betterment of the whole.

What piece of advice would you give to someone who is just beginning the Leadership Institute or who is considering applying?

INVEST. I had a wonderful time in the Leadership Institute and learned so much. I met an amazing and diverse group of people. But I could have gotten more out of it had I invested even more, particularly learning more about my peers and staying in touch with them.

How did participating in the Leadership Institute change you and/or make you better?

I've never had a problem speaking to crowds, juries, or judges. But when it comes to one-on-one basic conversations getting to know other people, I'm an introvert. It takes a lot of energy and effort for me to get to know people. The Leadership Institute didn't turn me into an extrovert, but it did give me more confidence in real world situations. All of the women in my Leadership Institute class were genuine, welcoming, and friendly, in addition to being hardworking, successful women.

Where do you work?

I am a Partner at Squire Patton Boggs (US) LLP ("SPB").

Do you specialize or have a niche?

I am proud to say I am a unicorn in the world of global law firms. I have a mix of complex litigation, regulatory and transactional work, mostly in

areas related to healthcare, retail, and public entities. It is rare for litigators to cross over into transactional matters, particularly at a firm of our size. Thankfully, I have a strong base of corporate partners that keep me in line.

If you weren't a lawyer, what would you be?

I don't know yet, but I will probably find out some day. My school and career paths have been marked by unexpected changes. Every time I think I know what I want, I'm surprised. I started college as a vocal music major. After my first year of college, I transitioned to a communications/public relations major. I was about to graduate after three years of college and realized public relations wasn't what I wanted to do. Afraid to enter the real world without a clue, I decided to take the LSAT on a whim. I did pretty well and ended up in law school. Coming to SPB as a summer associate, I thought for sure I wanted to be a corporate/transactional lawyer. After testing out corporate versus litigation projects, I changed my mind. Litigation was the path for me. But now, after practicing 14 years, I've come nearly full circle. It was a gradual transition from 100% litigation, then some regulatory/compliance work, and now some transactional work. And I like it all. Maybe it is more about the people and the challenge than the label.

What is your dream job?

Well, so long as we are dreaming and it need not have any basis in reality or my talents, how about a retired beach volleyball player? *(Continued on next page)*

Dear Attorneys (and Other Humans): Write Better Emails

By Kailee Goold, Litigation Counsel for Cardinal Health



We all read a lot of emails.

As in-house litigation counsel, I read a lot of emails drafted by attorneys. It seems that some of them believe that dense, legalese-ridden emails help prove their hourly

rates are worth it.

Not the case.

Be the outside counsel that makes our lives easier. We will like working with you and give you more of our work.

To help, here are a few tips for attorneys to keep in mind when communicating with their in-house counterparts (or anyone really).

1. Tell us what you need + when you need it.

If you need something, let us know in the first few lines. And be explicit. Don't bury it at the bottom of paragraph 4 - we won't find it.

For example, I often write emails starting with a sentence that begins "Bottom Line" or "Question" where I describe exactly what I need or am asking and when I need it. I follow that line with a brief bulleted list under the heading "More Details."

It's short and sweet, and if people have questions or need more information, they'll ask.

If you don't need anything from us and are providing a status update or an FYI email, tell us that at that start too.

2. Use the subject line to its fullest potential.

Efficiency bonus points are earned by telling us what you need (if anything) and when in the subject line.

Examples:

FYI Only - Status Update on Case X

Response Needed by 3/13: Review

Motion to Dismiss

New FL Case Filed re Product Z | Need Outside Counsel?

URGENT Meeting to Discuss April 8 Deposition

In-house coverage is mile wide, inch deep. We rarely spend an hour at a time on one case or issue. Descriptive subject lines help us prioritize and get us in the right head space for your email. It also helps us get you what you need quicker.

3. Make it reader-friendly.

The ideal email is one we can forward without having to spend time searching for the point and editing so the business will read it.

Remember: most in-house attorneys (and business people) don't write briefs and we avoid reading them when we can. We are used to executive business communication styles. Short and clear sentences. Lots of PowerPoint. Formatting with headings, bullets, and, certainly, no Latin.

You know what types of articles your eyes have an easy time reading and which you skip over because of the dense text. Apply these same rules to your emails.

In response, outside counsel often say, "but it is all important and we need to explain everything." These folks are missing the point. Our job is to provide direct advice to the business. In other words - we have to take your 2,000-word email and distill it into 3 bullet points that are helpful, reader-friendly chunks of information that drive towards a decision point.

My Plea

When you are ready to provide a recommendation or sit down to write an email to your client, please leave your brief and memo writing habits aside. Think and write like a business person.

It will save you (and me) time, and earn you favor with clients. ■

Kailee Goold is an in-house litigation attorney at Cardinal Health (a Fortune 15 company) where she manages litigation and government investigations including class actions, false claims, intellectual property, pharmaceutical and medical device product liability, insurance as well as other complex commercial disputes.

Kailee is known for her presentations and articles about effective communication. She is also passionate about driving diversity and inclusion in the legal profession. Kailee is actively engaged on social media (@kaileegoold) and in the community. She sits on the boards of Women Lawyers of Franklin County (@columbuswmnlaw) and Community for New Direction (@CNDonline).

Heather Stutz (From previous page)

What would you like to tell us about yourself (i.e. your family, hobbies, etc.)?

Family is number one for me. Period. One piece of advice I always give young attorneys is to put family first. You may regret it if you don't, you won't regret it if you do. I lost my mom when I was 33 and she was 57. I had been practicing law for 8.5 years. She was sick with stage 4 breast cancer for nearly my entire career to that point. I am grateful that I was able to take her to chemo treatments, be there for the important oncologist appointments, leave on a moment's notice when she was in the hospital, and in the end, spend every last moment being with her and sharing my sweet baby boy with her. It probably set me back a couple years in becoming a partner. Totally worth it. ■

Marilyn McClure-Demers Has Enjoyed a Career of Inclusivity

Throughout her 27 years in the legal profession, Nationwide's Marilyn McClure-Demers has worked to bring conversations around diversity into the spotlight

By Lori Fredrickson

When Marilyn McClure-Demers looks back on her long history of fostering diversity and inclusion in the corporate world, she compares it to keeping your foot on the gas pedal. If you run out of gas on level terrain, you go nowhere, and if you take your foot off the gas while working your way up an incline, you can go backwards. “There needs to be a continued appreciation for the importance of an inclusive work environment,” the vice president and associate general counsel of Nationwide says. “There’s a moral imperative here, and it’s incredibly important to keep that on the horizon.”

Over the course of her 27-year career as a legal professional – including her earlier work in private firms and her latest in-house counsel position at Nationwide, where she has been for the past 11 years, and where she currently oversees corporate, IP, financial services, litigation, and



Marilyn McClure Demers; VP, Associate General Counsel, Corporate & Intellectual Property Litigation and Discovery Management; Nationwide Mutual Insurance Company

discovery management – she has championed these beliefs through involvement with a broad roster of outside associations, through internal diversity efforts, and through mentorships and sponsorships. The

work is something she sees as a calling.

It all began early in her career, after she earned her JD from West Virginia University and began doing legal work in the coal industry. There, she often encountered many challenges as a young female lawyer, and in her later work at firms and businesses in Illinois, Pennsylvania, Ohio, and elsewhere, she overcame perceptions associated with being a native of West Virginia, a region that has often been stereotyped.

What she learned from these experiences was to create opportunities for herself and to challenge herself to look for people’s strengths in their differences. She wanted to help others get ahead. “Everyone is different and we know it,” McClure-Demers says, “but the extent to which we differ – and the extent to which leaders and others are committed to learning the differences – varies greatly.” ■

Welcome Leadership Institute Class of 2018-19

On Thursday, September 13, The Ohio Women’s Bar Foundation kicked off the 2018-2019 Leadership Institute Class with a tasty dinner at Latitude 41 in Columbus. Leadership Institute Co-Chair and OWBF Vice President, Yukiko “Kiko” Yee, welcomed the class and gave a brief introduction by sharing her own experience in the program. Six members of the Ohio Women’s Bar Foundation joined the class and were able to share how the Leadership Institute impacted them and their careers. After a fun night getting to know one another, the class

came back together on Friday morning for their first session.

The Leadership Institute was honored to have Betty Montgomery, Montgomery Consulting Group, kick off the first session by sharing her personal experience in addressing “Leadership Issues for Lawyers”.

James D. Thomas Law, partnered with Vorys, Sater, Seymore and Pease led a discussion on strategies for business development by using effective communication and leadership skills. Finally, the class was presented with two panels discussing



Betty Montgomery, Montgomery Consulting Group, kicked off the 2018-19 Leadership Institute by teaching our class about Leadership Issues for Lawyers

the importance of “Rainmaking and Business Development and Business Development” from an in-house perspective. ■

Update: Equal Pay for Equal Work: It's the Law!

By Beth Schneider Naylor and Ashley Ramm, Frost Brown and Todd Cincinnati



Last summer, OWBA published an article, *Equal Pay for Equal Work: It's the Law!*, which detailed lawsuits filed against BigLaw firms by female Partners for inequitable pay. Present in each suit was the big *unknown* – are Partners protected as “employees” under the Equal Pay Act and Title VII?

Leaving the question unanswered, *Campbell v. Chadbourne & Parke LLP*, settled in March of 2018 for \$3.1 million. Campbell, while a Partner at Chadbourne, filed suit in 2016 alleging that Chadbourne paid women less than men. Out of the settlement, Campbell, now a former Partner of the firm, is set to receive \$1 million – another \$1 million will be split between the two other Partners who later joined the suit. While this settlement may be viewed as a win for the

women involved (even though Chadbourne escaped admitting liability), the case is no longer alive to answer whether female Partners can pursue Equal Pay claims.

Also mentioned in the OWBA article published last summer, *Doe v. Proskauer Rose LLP* has yet to be decided. It too begs the question of whether Partners can be considered employees under the Equal Pay Act and Title VII. Among other allegations, the suit against Proskauer Rose alleges unequal pay for women – that male Partners earn more than double of female Partners' salaries. Just this year, the attorneys for the plaintiff, Jane

Doe, released her identity. Ironically, the plaintiff is Connie Bertram who heads up the firm's D.C. labor and employment practice and also co-heads the firm's whistleblowing and retaliation group. In its defense, in addition to denying the alleged gender discrimination, Proskauer Rose unsurprisingly argues that Bertram should not be allowed to pursue the action because a Partner is

considered a business owner and not an employee.

In 2018, Dawn Knepper, a female Partner at the employment firm Ogletree, Deakins, Nash, Smoak & Stewart, P.C., filed suit against the firm for gender bias, seeking \$300 million. The complaint alleges discrimination against female Partners in the form of pay, promotions, and other opportunities. Knepper contends the firm selects men more often than women for business pitches and does not provide the same training and development opportunities for women as they do men. Roughly 80% of Ogletree's equity Partners are male and Knepper argues that female Partners are left to handle the administrative tasks and the bulk of the legal work, which provides minimal impact on compensation. In response to the suit, Ogletree reiterated its past practices to promote equality and the firm's dedication to diversity and gender inclusion.

In a recent *U.C.L.A. Law Review* article, the author argues for Title VII's operative language to be reinterpreted – that it should be unlawful for an employer to discriminate against “any individual” and not just an “employee.” As pointed out by the *Law Review* article, the actual language of Title VII's discrimination prohibition section states that employers may not discriminate against “any individual” – not *employees*. Under this textualist approach, it would be unlawful for employers to engage in discrimination against any individual, including equity Partners.

To further bolster this argument, though not mentioned in the *Law Review* article, the Supreme Court recently defined the word “any” when deciding who may challenge issued patent claims before the Patent Office, based on the applicable statute. In *SAS Inst., Inc. v. Iancu*, Justice Gorsuch opined that ordinarily and in the context of the statute, “any” means “every.” Thus, by applying a textualist interpretation of Title VII in conjunction with Justice Gorsuch's recent Opinion and the Equal Pay Act of 1963, it is illegal for law firms to discriminate against female Partners by paying them less than their equivalent male Partners. Unfortunately, the Supreme Court, or any court for that matter, has yet to make this distinction.

As *Doe v. Proskauer Rose LLP* and *Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C.* proceed, courts may have the chance to send a message to BigLaw that it is illegal to discriminate against all individuals working for the firm, including Partners.

Recommended Reading/Viewing:

“Balancing the Scales” (2016) directed by Sharon Rowen

Note about Ashley Ramm: *Ashley Ramm is a 3L at the University of Cincinnati College of Law and was a 2018 Summer Associate at Frost Brown Todd LLC.* ■

Public Private Sectors Connect

Annual Statewide CLE

Thursday, November 29

1:30 – 4:30

An in-person event will be held at BakerHostetler in Columbus, Ohio and will be live-streamed to BakerHostetler's Cleveland and Cincinnati locations for viewing and networking. Be sure to save the date on your calendar and keep an eye out for more information. Visit our website to register!

<http://owba.org/events>

Carpenter: A Reason for Limited Optimism

By Benjamin Dusing and Augustus Flottman



As any white-collar practitioner will tell you, the significance of personal communications as evidence cannot be overstated. The issue in all white-collar cases is a question of intent. But because there is no direct evidence of intent, the government must make its case with circumstantial



evidence. Emails, text messages, and social media communications are absolutely critical in this regard. Consequently, judicial determinations about the admissibility of such evidence can be outcome determinative.

Of course, there are multiple avenues for the government to obtain personal electronic communications or similar data. Commonly, the government simply executes a warrant and seizes computers and servers on site. But this is not always possible in our digital world, and often impractical. The government can request such communications, but the Fifth Amendment production privilege is another obstacle to compulsive disclosure.

Consequently, for the government, third-party electronic service providers (“ESPs”) are increasingly becoming a key point of access to an individual’s electronic communications and data. This is because data from hand-held devices is typically automatically stored by

ESPs and can be accessed without physical control over the particular device simply by logging into a cloud server or other remote access point. Law enforcement’s new focus on obtaining information from ESPs directly makes the issue of Fourth Amendment protection to digital personal communications that much more relevant.

Under the so-called “third-party” doctrine, an individual enjoys no Fourth Amendment protection in information he or she voluntarily turns over to a third-party, even where confidence is placed in the third-party. Smith v. Maryland, 442 U.S. 735, 743-44, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979). However, this historical doctrine does not translate well to our modern reality. Even where an individual opts out of backing up their devices to cloud servers, just the use of technology in everyday life, by its mere operation and often without any affirmative act, involves the transmission of the utmost personal and sensitive information through the networks or applications of the ESP. As the U.S. Supreme Court itself observed in Riley v. California, the use of smartphones and inter-connected devices are no longer just a mere convenience, “but are necessary to participate in the modern world.” Riley v. California, 134 S. Ct. 2473, 2494-95 (2014). Accordingly, the notion that the transmission of data to a third-party ESP is necessarily voluntary simply because it occurs by mere operation of a device is tragically outdated. Clearly, the law needs to reflect the new digital reality.

The law recently evolved significantly in this regard by virtue of the U.S. Supreme Court opinion in Carpenter v. United States, 201 L. Ed. 2d 507 (2018). Carpenter v. United States asked the Court to decide whether an individual has a reasonable expectation to privacy under the Fourth Amendment to cell-site location information (“CSLI”), notwithstanding the fact that this CSLI is shared with a third-party ESP (the wireless carrier), such that the government must get a warrant to obtain CSLI from the wireless carrier. Carpenter v. United States, 201 L. Ed. 2d 507, 519-20 (2018). CSLI, which provides a catalogue of an individual’s precise location and movement, is one of the many types of data that is stored and collected by our wireless carriers and other ESPs. In Carpenter, the Government obtained court orders pursuant to the Stored Communications Act to obtain CSLI from wireless carriers. Id. at 516; see, 18 USC § 2703. Carpenter moved to suppress the CSLI as evidence obtained in violation of his reasonable expectation of privacy under the Fourth Amendment. Id. The district court denied Carpenter’s motion, and, after conviction, Carpenter appealed to the U.S. Court of Appeals for the Sixth Circuit, which affirmed. Id. In doing so, the Sixth Circuit found that Carpenter did not have a reasonable expectation of privacy to the CSLI because he had voluntarily shared that information with a third-party (the wireless carrier). The Supreme Court granted certiorari.

The Supreme Court reversed,

finding that there was a reasonable expectation of privacy in the CSLI data that was gathered by the wireless carriers. It is firmly established that an individual maintains a reasonable expectation of privacy as to their physical movements, and, prior to the digital age, law enforcement could only monitor an individual's movements for a limited period of time. CSLI, however, provides law enforcement the ability to secretly monitor and catalogue every single movement of an individual over a period of several years. *Id.* at 521. Noting that a cell phone is essentially an extension of human anatomy in the modern world and observing the qualitative nature of CSLI, the Court found a mechanical application of the third-party doctrine inappropriate because CSLI is not exactly voluntarily shared with a wireless carrier. Instead, it is shared simply by the mere operation of a cell-phone, without any particular affirmative act of the user. *Id.* at 524.

The most important aspect of the Court's opinion was its recognition that a straightforward, mechanical application of the third-party doctrine was a square peg, round hole analysis given "the seismic shifts in digital technology." *Id.* at 523. In this regard, *Carpenter* represents a major step forward in terms of our Courts recognizing that the technological advancements of the last decade require more thoughtful application of law developed in past decades. On the other hand, however, the Court expressly limited its holding to CSLI data, and declined to weigh in on the many other types of highly sensitive personal information that is shared with ESP's by the mere operation

of a device or use of a service or application. *Id.* at 525. Thus, the larger issues remain unresolved to some degree.

There are reasons for the defense bar to be less optimistic that the U.S. Supreme Court's decision in *Carpenter* represented a critical pivot in the Court's approach to the Fourth Amendment in the modern/digital age. Courts have declined to read *Carpenter* broadly. For example, in *United States v. Ho et al*, 1:17-MJ-08611 (S.D.N.Y 2017), the defendant provided the password to his smart devices to law enforcement before law enforcement read the defendant his *Miranda* rights. The defendant sought to suppress the communications retrieved from the smart devices as fruit of the poisonous tree. Under existing precedent, *United States v. Patane*, 542 U.S. 630 (2004), statements obtained in violation of *Miranda* rights do not require the suppression of physical objects found as a result of those statements. The defendant relied on *Carpenter*, however, to argue that in today's digital age, non-digital precedent (such as *Patane*) should not be applied to the electronic communications on smart devices. Unfortunately, the Court rejected this argument. The court reasoned that self-incrimination is not implicated by the admission of evidence that is the physical fruit of a statement obtained in violation of *Miranda*, and therefore the communications retrieved from the defendant's smart devices were admissible.

The Court's refusal to mechanically apply the third-party doctrine in *Carpenter* engendered optimism that our courts are beginning to recognize the problems inherent in fitting

the square analog era law into the round hole of the digital era. But the defendant's unsuccessful invocation of *Carpenter* in cases like *United States v. Ho* illustrates the bevy of issues left unresolved by the Supreme Court's narrow holding in *Carpenter*, and the dimming of hope that *Carpenter* ushered in a new era of digital-age Fourth Amendment jurisprudence.

The bottom line is that we live in a world where technology is an intimate and necessary part of daily life, and transmitting personal data to electronic service providers is inescapable. There is nothing truly "voluntary" about participating in it. The importance of electronic communications as circumstantial evidence of intent in white-collar cases will queue up dozens of appealable issues as white-collar defense attorneys, like in *United States v. Ho et al*, ask courts to develop new rules, doctrines, and exceptions as cutting-edge as the technology that requires them. As our justice system continues to stack the deck against defendants, it is more important than ever that experienced white-collar defense attorneys are engaged to properly frame these issues before the courts.

Ben Dusing is a former federal prosecutor in the Southern District of Ohio and Eastern District of Kentucky. Augustus Flottman is an associate at Faruki + who practices in the area of white-collar criminal defense. Ben and Augustus have represented several high-profile defendants in some of the most significant white collar matters federally prosecuted in the Southern District of Ohio and Eastern District of Kentucky in recent years. ■

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News

Unwind and Connect with Thirty-One Gifts: A Success

Unwind and Connect with Thirty-One took place on August 23, 2018 at Thirty-One Gifts in Columbus, Ohio. Sponsored by Vorys, Sater, Seymour and Pease, this networking event included a tour of Thirty-One and an educational presentation by Thirty-One Leaders.

The Ohio Women's Bar Association members and guests enjoyed learning about Thirty-One Gifts and their endeavors to help women of all ages, all around the world. Thank you to Vorys, Sater, Seymour and Pease for sponsoring and to Thirty-One for kindly hosting this beautiful event.



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