Missouri Lawyers
Winner, 2008 Missouri Press Gold Cup for Best Weekly Newspaper

LEGAL BARtering

Will litigate for chickens

By David Knopp
Special to Missouri Lawyers Weekly

"Would like to barter legal services, such as handling traffic tickets, DUIs, contracts, leases, power of attorney, small claims, small business, miscellaneous legal forms, simple living wills etc."

The Kansas City attorney who posted this listing on Craigslist hoped to exchange legal services for items including a road bike, a Wii and a treadmill, as well as a long list of improvement projects, including completion of a retaining wall and a privacy fence, repair to a bedroom wall and floor cleaning for a store.

The individual, contacted via the blind e-mail address included in the Craigslist ad, didn't respond to an interview request.

But John Tresslar, a downtown St. Louis attorney with 24 years' experience in both criminal defense and civil litigation, has no problem talking about bartering and using Craigslist to reach potential clients.

Tresslar posted a Craigslist ad in early May.

[SEE BARTER ON PAGE 14]

SOLO AND SMALL FIRM CONFERENCE

Beating the blues in a troubled economy

By Allison Retka
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For any solo and small firm practitioners battling the tough economy, the 2009 Solo and Small Firm Conference may have a temporary cure: The Blues Brothers.

Or rather, a Blues Brothers tribute band that will soulfully serenade attendees at a Friday night dinner.

The rest of the conference, which starts Thursday at Tan-Tar-A Resort in Osage Beach, offers more long-term solutions for solo and small firm attorneys trying to weather a bad economy.

Possible remedies include beefing up collection efforts, enhancing marketing and even

Quellos controversy

Bryan Cave made more than $1 million in fees, committee says.

V&S

Six new V&S reports in this issue join our database of hundreds of Missouri cases online.

Correction

The CLE listings for June 9, 29 and 30 of the 2009 Spring Risk Management: "Malpractice & Ethics Risks of Practicing Law in an Uncertain Economy" sponsored by The Missouri Bar and The Bar Plan listed an incorrect price for the seminar. It's $85 for attorneys. We regret the error.
Murphy: It can be pretty lonely as only woman on court

**FEMALE JUDGES BY CIRCUIT ON THE U.S. COURT OF APPEALS**

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<td><strong>21 percent</strong></td>
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**Active**

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**PipeLine effect**

There has been a paucity of women to tap for the 8th Circuit in particular. The circuit handles cases from Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota. Historically the federal district courts in those states have had 12 female judges, or 6 percent of the 205 total, and most are still serving. Today there are 38 federal judges in the states, and 10 are women. The 8th Circuit Court of Appeals, created in 1981, has had 58 judges in its history, with one woman among them.

But the odds are evening, as 47.5 percent of cases receiving law degrees in 2007 were women, the APA reports. Still, it will take years for those new lawyers to become qualified to ascend to federal federal judgeships.

"The process takes a long time to filter up," said Christina Boyd, who has a law degree and is completing work on a PhD in political science at Washington University. "Twenty years down the road, we would expect to see a lot of a different story as far as female appointments."

**A woman's perspective**

Boyd researched cases heard by federal appeals courts to determine whether male and female judges decide cases differently. She worked with professor Andrew Martin and a colleague at Northwestern University and studied cases from the early 1990s through 2002. They also looked at whether having a woman on a court changes how the male members rule. Their work, which hasn't yet been published, found that only in sex discrimination cases was there a difference, but it was notable.

In those cases, women judges were 10 percent more likely to rule for the person alleging discrimination than men were, Boyd said. Also, on courts where a female judge was among those hearing the case, all judges were 15 percent more likely to rule for the plaintiff. That finding held true across circuits and regardless of the judge's political background, she said. Martin couldn't be reached for comment.

"There are very few female judges in the federal judiciary generally, but there's a real difference that can come from their presence," Boyd said.

**Political pressure**

Kenney, who teaches law and political science at University of Minnesota, helped found the Infinity Project to press for more women on the 8th Circuit. She disagreed that more women in the pipeline will help attract more women on the bench in another decade or two.

She cited other research and her own work in determining that having more female attorneys in the labor pool doesn't mean they will increase their ranks on the bench. Rather, she says politics is the biggest nemesis to getting more women on the bench, and it's a matter of drawing public attention to the disparity.

"I've been tearing down the other explanations people tend to offer," she said. "Unlike the 1970s, women's groups and women's bar groups have really dropped their laser focus on this issue once they get the first one in."

"It's very much out of sight of the hands of a small number of people, and most people don't pay attention," she said.

**Missouri Plan**

In Missouri, appellate-level and some trial judges are chosen using the Nonpartisan Court Plan, in which panelists screen applicants and then forwards a list of finalists to the governor, who choosess from that list. A review of the current makeup of Missouri's appellate and metropolitan trial courts using that selection process indicates about one-third of Missouri trial judges are women. At the appellate level, 26 percent are women.

That's about the same ratio as the federal appellate bench, where the political appointment process. But Missouri courts at all levels under the Nonpartisan Plan have a higher proportion of women than federal trial and appellate courts.

Kenney has studied the various methods for choosing judges and concluded that merely having women on the bench will not always mean women fare better. In some cases, they do better under a system such as Missouri's, while, in others, direct appointment or even partisan elections result in more female judges, research has shown.

"You can't explain it by method of judicial selection," she said. "There seems to be no evidence of a system effect."

Since 1985, women have made up 16 percent of Republican presidents' federal appellate appointments, and 25 percent of Democratic presidents' appointments, according to Vanderbilt University law professor Tracey George.

George explained that 1980 is a good benchmark year because that's when women began making up a sizeable share of the Nominations Commission. By that time, there had been many more years of Republican presidents. George estimated women should hold half of federal appellate seats by 2030. But if Murphy will have to go it alone in providing the female perspective on judicial matters for the 8th Circuit. She said she has no plans to retire at this point. Murphy said she works hard to understand certain issues, especially matters such as discrimination or harassment at work.

"Sometimes you are able to explain it in a way that other judges might get a perception of it that they wouldn't otherwise," she said.
POSSIBLE NOMINEES FOR THE FEDERAL BENCH

President Barack Obama will have his first chance to make a mark on the federal judiciary in Missouri as soon as next month. That's when U.S. District Judge E. Richard Webber, of the St. Louis-based federal court, will become a senior district judge. He'll be followed by U.S. District Judge Charles Shaw, who will take senior status at the beginning of next year.

No federal judge vacancies are expected in the U.S. District Court of the Western District of Missouri.

Of the eight district court judges in the Eastern District of Missouri, three, including Chief Judge Carol E. Jackson, are women. It has been 15 years since a woman was named to the Eastern District bench, said Vivian Eveloff, director of the Sue Shear Institute for Women in Public Life. Judge Catherine D. Perry was named to the court by President Bill Clinton in 1994.

"I think all you have to do is look at the Supreme Court and know that many of the people who end up at the highest levels start at the district court level or at the federal Court of Appeals," Eveloff said. "It's a pipeline effect. You can't get to the end of the pipeline if you don't come in along the way."

Following are some of the names being floated as possible federal court nominees for the Eastern District of Missouri. The names were gathered in a roundup based on reporter calls to sources ranging from judges and lawyers to political insiders. Each individual listed was mentioned at least twice by sources and are not listed in any particular order.

Nannette Baker
Age: 51
Occupation: Chief Judge
Missouri Court of Appeals, Eastern District
Baker was appointed to the appeals court in 2004. She previously served five years as a circuit judge in St. Louis Circuit Court. As chief judge, Baker heads up the 22nd Judicial Commission, which prepares panels of judicial nominees for the governor.

Audrey G. Fleissig
Age: 54
Occupation: U.S. Magistrate Judge
Eastern District of Missouri
Fleissig was appointed as a magistrate judge in 2001, after completing a year as the U.S. attorney for the Eastern District of Missouri, the first woman named to the post. She worked for nine years as an assistant U.S. attorney in the office before that appointment.

Possible male candidates include:

Michael P. David, 58
Circuit Judge, St. Louis Circuit Court

Michael T. Jamison, 59
Circuit Judge, St. Louis County Circuit Court

Bob McCulloch, 57
Prosecuting Attorney of St. Louis County

Thomas C. Mummert III, 58
U.S. Magistrate Judge, Eastern District of Missouri

Glen Norton, 49
Judge, Missouri Court of Appeals, Eastern District

Kevin F. O'Malley, 62
Partner, Greenfelder, Henke & Gale

Reuben Shelton, 54
Senior Counsel, Litigation, Monsanto Co.

Richard Teitelman, 61
Judge, Missouri Supreme Court

Ronnie White, 57
Partner, Holland White & Schwartz

Sources: Biographies, court clerks, judges, attorneys

— Donna Walter, Allison Reka

Sotomayor's opinions reveal work of a moderate

BY KIMBERLY ATKINS
Delmar Media Newspapers

Supreme Court nominee Sonia Sotomayor was selected by a Democratic presidential candidate and already has come under conservative groups' fire.

But her record on the 2nd U.S. Circuit Court of Appeals, and the opinions of some of the cases she has decided, are lauded by members of a moderate jurist who isn't afraid to rule on either side of a criminal, civil rights and business cases. And in some cases, Sotomayor, selected by President Barack Obama to replace retiring Justice David Souter, isn't afraid to change her mind.

Though she is a former Manhattan assistant district attorney, as an appellate judge she doesn't automatically vote in favor of government actors.

In the 2006 case Papineau v. Parmley, Sotomayor explained an opinion reversing the denial of a summary judgment motion in favor of police, who were accused of violating street protesters' First and Fourth Amendment rights.

The police moved for summary judgment on the plaintiffs' claims that the officers impeded their free speech and used excessive force in stopping the demonstration.

But Sotomayor's majority disagreed. In an opinion that systematically addresses the elements of each argument without flashy language or hyperbole, like most of her writings, Sotomayor wrote that the claims could proceed.

"Because the excessive factual record reveals that material issues already exist concerning the excessive force claims which the district court did not dismiss, we see no reason to remand this issue here, where as a matter of law, defendants would not be entitled to qualified immunity on the facts as alleged by plaintiffs," she wrote.

But in the 1999 case U.S. v. Sotomayor, Sotomayor wrote an opinion affirming a ruling in favor of police in a criminal case, aligning herself with the Supreme Court's conservative bloc, which would consider a similar issue a decade later.

The defendant supposed to suppress drug evidence found during a police search and arrest. The arrest was based on a warrant that had been vacated months before but erroneously remained in the computer system.

Finding the admission of the evidence proper based on the Supreme Court's standard in Arizona v. Evans, Sotomayor wrote that the error was the fault of a court clerk, not the police.

"We ... are troubled by the [court officials'] repeated errors in this case," she wrote. "The outcome in Evans, however, did not turn on the particular type or magnitude of the error but on the identity of the individuals responsible for the error."

Earlier this year, the U.S. Supreme Court held 5-4 that evidence gathered from a search is admissible if the police reasonably thought the warrant was valid and the error was a clerical mistake. In Herring v. U.S., the court's more liberal justices — Justices John Paul Stevens, Ruth Bader Ginsburg, Stephen Breyer and David Souter — all dissented.

Discrimination claims

Sotomayor's vote with the majority in an unsigned 2nd Circuit opinion received fast attention. The opinion barred plaintiffs' claims of racial disparity in the results of a promotion test for New Haven firefighters, and it is under Supreme Court review.

But Sotomayor has written opinions favoring both employees and employers in bias cases.

Norville v. Staten Island University Hospital involved a disabled black woman who claimed she was fired after her employer failed to make adequate accommodations, even though they were provided for younger white employees.

The jury ruled for the plaintiff on the disability bias claim, but the trial court granted judgment as a matter of law for the employer on the disability, race and age bias claims. Affirming the ruling, Sotomayor wrote that the plaintiff didn't meet her burden.

"Because [the plaintiff] produced insufficient evidence at trial to show that the hospital treated similarly situated white employees more favorably, she failed to establish a prima facie case," she wrote in the fact-driven opinion.

Yet in the 2001 ruling in Ranioa v. Bratton, Sotomayor wrote an opinion reversing a dismissal of a hostile work environment and retaliation claim brought by a female police officer.

"[The plaintiff] was subjected to offensive sex-based remarks, disproportionately burdensome work assignments, workplace sabotage and one serious public threat of physical harm," Sotomayor wrote. "A reasonable jury could find that these incidents were sufficiently continuous and concerted to have altered the conditions of [the plaintiff's] work environment."

Reversing herself

In the 2001 case In re Visa Check./ MasterMoney Antitrust Litigation, Sotomayor wrote an opinion that established a relatively low standard for certification of a class action under Federal Rule of Civil Procedure 23.

"Given the strong commonality of the violation and the harm among the merchants, this is precisely the type of situation for which the class action device is suited," she wrote of the class of merchants alleging antitrust violations by Visa and MasterCard.

But five years later, in In Re Initial Public Offering Securities Litigation, she voted with the court's majority in adopting a stricter certification standard, in effect overturning herself. —