

# SHAMBERG, JOHNSON & BERGMAN

## —TRIAL ATTORNEYS—

Fall 2011 – Issue 31

## Unnecessary Labor Induction Leads to Missouri Settlement

An unnecessary and ill-advised induction of labor resulted in cerebral palsy. The ensuing litigation, handled by Vic Bergman and David DeGreeff, resulted in the adoption of new hospital policies and procedures, and a large Missouri settlement.

Pregnant for the first time, Kelsey and Jeff Bair were surprised when their obstetrician, Cheryl Fogarty, M.D., suggested that they come into the

hospital for induction of labor at 39 weeks. There was no medical reason. Dr. Fogarty told the Bairs she was going to be out of town on vacation and probably would not be there to deliver the baby when Kelsey went into natural labor. But if the Bairs wanted her to be there, she could induce labor that evening and the Bairs could have their baby that night or the next morning.

Dr. Fogarty reassured the Bairs that their baby, Brock, was healthy and ready to be delivered, that the procedure was safe two weeks

before term – even safer than spontaneous labor, because Kelsey would be in the hospital on a monitor and any problems could be taken care of. Dr. Fogarty said the induction would eliminate the possibility of the Bairs having to come to the hospital in the middle of the night.

Jeff Bair asked but was misinformed that there were no significant risks. The idea excited the Bairs, who

checked into Freeman Hospital in Joplin, Mo., that afternoon. Little did

*Unnecessary Labor Induction Continued on Page 4*



## Welcome

New technologies are rapidly changing how we present cases to juries – with animations, electronic and digital data, and various types of presentation devices. Technology also provides many new evidentiary sources for the modern trial attorney. For example, we have reported before on the many types of data contained in electronic medical records, with another example reported in this issue. Vehicular accidents of all types are now captured in many different devices built into vehicles. Traffic signal systems, which have always been a source of important data in accident reconstructions, have modernized. We are now surrounded by surveillance devices. We have access to the results of sophisticated investigations by savvy public officials. The cases reported in this issue illustrate what we have been able to accomplish by extending our investigations to the new sources of information.

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# Finding New Sources of Data in Vehicular Accident Cases

Attorneys investigating automobile accidents have long known about “black boxes,” particularly in trucking cases. These event data recorders, or “EDRs,” can shed critical information on a vehicle’s speed, throttle and braking in the moments leading up to a collision. Starting next year, cars equipped with EDRs will have to meet federal regulations controlling the type and accessibility of data.

Recent technological advances and consumer electronic devices have opened up a new field of possible accident data and should be a part of the investiga-

tion, evaluation and discovery requests in vehicular cases. Unlike traditional “black boxes,” which typically store only seconds of information prior to a collision, the newer devices can provide data spanning back several trips.

Portable GPS devices, such as those mounted on dash boards, contain a trove of information about speed, distance and time travelled. GPS programs and mapping software in cell phones can contain similar information. Some systems will track information for several trips, not just the current or most recent trip. The key to obtaining such data is to request it early and find the software necessary to download it.

Onboard video cameras are another source of critical accident information. Advances in camera data storage and lower costs have led to increased use in buses and in some fleet vehicles. Inquiries should be made to see if vehicles involved in an accident were equipped with a video camera. Similarly, counsel should check if law enforcement who responded to an accident used onboard cameras. Many

cameras are automatically activated when a cruiser’s lights and sirens are turned on. Some law enforcement can now easily store the digital video from these cameras for months to years.

Another new source of accident data are vehicle detection and avoidance systems. That helpful (or annoying) beep your car might make can do more than tell you if you’re about to back into the garage door. Advanced systems, sometimes used in commercial trucks, can track the speed and location of multiple vehicles. If downloadable, the data from such detection and avoidance systems can create a map of the vehicles involved in an accident.

And don’t forget the myriad and ubiquitous surveillance cameras that may have captured the event, and the handheld devices that witnesses or passers-by may have used.



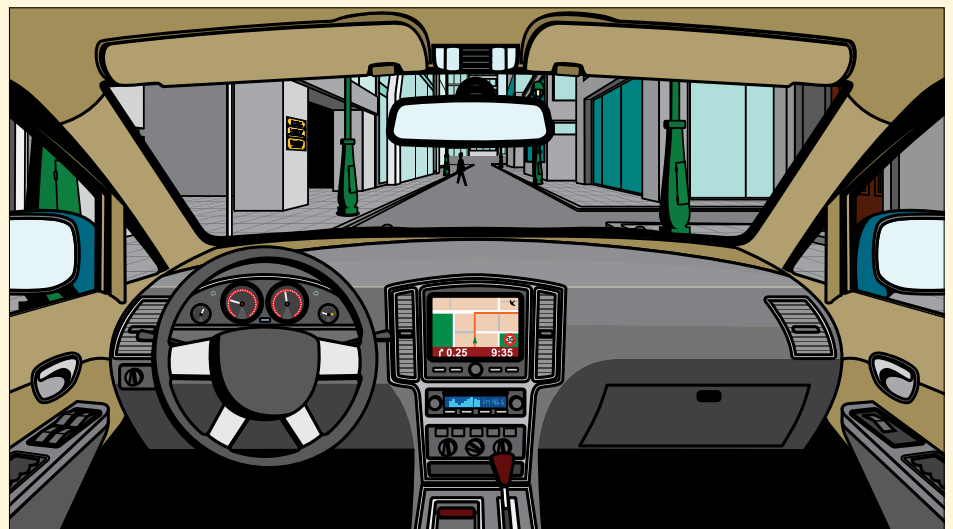
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## Traffic Light Pattern Provides Key to Auto Accident Case

Red light/green light collisions make for textbook tort cases. But a recent collision in Overland Park, Kan., was anything but typical after the defendant failed to appear and the plaintiff was rendered unable to remember the wreck due to a severe head injury. With no independent witnesses to the accident, the case came down to the timing and triggering of the intersection's traffic lights.

Our client, an engineer, was driving to work at about 6 a.m. when another car slammed into him near the right front

wheel. No independent witnesses were found. Our client was taken by ambulance to the hospital with a fractured left clavicle and was later diagnosed with a traumatic brain injury.

At the scene, the defendant told police that our client had run a red light. The investigating officer said that without any witnesses, he could not determine who had the green light. Our client had driven through the intersection each morning on his way to work and had no prior accidents or citations for running red lights.

Lynn Johnson and David Morantz pursued a claim against the defendant driver and against our client's insurance carrier, which had a sizeable uninsured/underinsured policy. The defendant driver did not appear for a deposition, so the case proceeded without any admissible account from either party about who had the green light.

The intersection was not part of the City of Overland Park's coordinated traffic system, meaning the timing of its lights was not tied into other intersections. Rather, traffic approaching

*Traffic Light Pattern Continued on Page 6*



*Based on traffic light data and an accident reconstruction, video animations were created for use at trial to depict the scene and the views of the drivers. For more information, please visit <http://www.sjblaw.com/CM/Custom/TOCTrial-Innovations.asp>.*



## Informed Consent for Induction of Labor

Many significant risks are associated with elective induction of labor, particularly for women pregnant for the first time. Use of the drugs required for induction doubles the risk for caesarean section. Once a caesarean section is done, additional risks are created for later pregnancies.

The average length of induced labor is longer than that of spontaneous labor. The average length of hospital stay is increased for induced labor compared with spontaneous labor. Induction of labor also increases the risk for complications related to hyperstimulation and abnormal fetal heart rate patterns.

If these complications are not recognized and managed properly, there is a direct risk of injury to the baby. Any time an induction of labor occurs, there should be patient education and informed consent obtained by the physician, meaning that all of the above risks should be disclosed and discussed.

Our firm has seen many tragic cases of cerebral palsy and neurological injury to newborns as a direct result of mismanaged complications of induction of labor. Most of the time, the parents were not informed of the true risks.

*Unnecessary Labor Induction Continued from Page 1*

they know that Dr. Fogarty had admitted numerous other patients to the hospital for delivery that same day, her “on call” day, to the point that she delivered



five babies in 19 hours, including three by “unscheduled” caesarean sections. This patient load directly interfered with Dr. Fogarty’s ability to act on the Bair pregnancy when needed.

Discovery of the electronic medical record, specifically the “audit trail,” revealed that the nurses in attendance returned the next morning and worked for hours changing many of the key entries.

The induction was hyperaggressive, with very high doses of misoprostol (Cytotec) followed by high-dose oxytocin (Pitocin), which was increased despite hyperstimulation (too many uterine contractions). When the fetal heart pattern became abnormal, the Pitocin was increased even more instead of being turned off as it should have been.

Brock was not tolerating labor. He was in trouble. Delivery by caesarean section was urgently needed, but Dr. Fogarty

was busy with other patients. The hyperstimulation and the abnormalities continued for several hours, until baby Brock was permanently and severely injured by lack of oxygenated blood to his brain.

As a consequence, Brock has hypoxic-ischemic encephalopathy (HIE), cerebral palsy, and spastic quadriplegia. He will always have severe limitations in movement, intake of food, and vision. He will always need multiple therapies, close medical attention, and 24-hour care. Cognitively, Brock is very much with it. He has had excellent care from his parents, including some alternative therapies that have proven to be successful.

The case was settled with Freeman Hospital and Dr. Fogarty for a total of \$5,000,000. In addition, Freeman Hospital agreed to make changes in its policies, procedures and standing orders pertaining to induction and augmentation of labor. Please visit <http://www.sjblaw.com/CM/Custom/TOCBriefs.asp> to view the new policies.

The plaintiffs named experts in obstetrics, pediatric neurology, neonatology, neuroradiology, labor and delivery nursing, physical medicine, life care planning, and economics. This was another tragic, completely unnecessary injury as a result of inappropriate and overly aggressive induction of labor. Our firm has seen a trail of similar catastrophes over the past several years as the result of elective inductions of labor. ■

## Surgical Negligence Causes Lumbar Cage to Fail

A workplace accident that required lumbar surgery resulted in a significant medical negligence settlement.

Our client, a 57-year-old woman, was driving a box truck when the truck left the roadway and violently bounced her. The vertical load placed on her spine caused her to suffer a compression fracture of her L2 vertebrae. She was taken to an area hospital where she was seen by a neurosurgeon. It was unclear whether she had any neurological deficits, but it appeared that her spine was unstable and thus, surgery was planned.

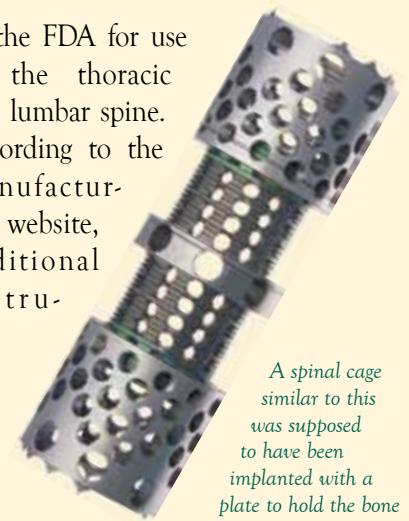
The physician elected to remove the fractured vertebrae and implant an expandable "VBR Cage." The physician had never used this particular cage before. Initially, the plan was to place the cage along with an anterior plate to fixate the spine in place while bone fused around the cage. At surgery, however, the surgeon elected not to utilize any rods or plates to stabilize the spine in addition to the cage. According to the surgeon, the patient's bones appeared stable and he felt the align-

ment of the spine without supplemental fixation was acceptable.

Furthermore, the surgeon intimated in a note in the chart that the patient may someday need pedicle screw surgery to deal with the normal degenerative changes in her spine and that this would not be feasible if an anterior plate was used. Following surgery, the patient's spine "failed" as the cage telescoped into the vertebral body below the level of the surgery. In addition, the cage rotated and caused a rotational deformity of the patient's spine. After a follow-up surgery by another surgeon in an attempt to salvage some stability, the patient required a walker and was permanently disabled.

Matt Birch and John Parisi of the firm were retained to explore the possibility of a claim. Investigation into the cage used in the initial surgery revealed that: 1) the VBR cage had not been approved by the FDA for use without supplemental fixation; and 2) according to the manufacturer's product literature, the cage was intended to be used with supplemental internal spinal fixation systems cleared

by the FDA for use in the thoracic and lumbar spine. According to the manufacturer's website, additional instru-



*A spinal cage similar to this was supposed to have been implanted with a plate to hold the bone in place while it fused around the cage.*

mentation was required to prevent dislocation of the cage.

After negotiating with the patient's workers compensation carrier, a lawsuit was filed in Jackson County, against the neurosurgeon and his employer. The case proceeded through discovery with most of the focus being on the propriety of a "stand-alone" cage construct for the surgery. Following depositions, including the deposition of plaintiff's expert neurosurgeon, and mediation, the defendant settled for \$1,137,500.00. ■

## Firm Welcomes Daniel Singer

The firm is pleased to announce the addition of Daniel Singer. Daniel joined the firm last summer after graduating from Duke University School of Law. While in school, Daniel was an articles editor for *Law and Contemporary Problems* and competed on Duke's moot court and mock trial teams. He was recognized as the best oral advocate at the 2010 National First Amendment

Moot Court Competition. He earned his undergraduate degree in political science from the University of Kansas, graduating with honors and highest distinction.

Daniel is licensed to practice in both Kansas and Missouri, and focuses his practice on medical negligence, automobile/trucking accident, and qui tam litigation. ■



the intersection triggered changes in the lights. The street our client was driving on was considered the primary of the

two streets, so the lights dwelled on green for our client as the default setting unless traffic from the cross street triggered a change.



*The collision spun our client's car into a utility pole, resulting in severe head injuries.*

Based on damage to the two vehicles and where they ended up after impact, our accident reconstruction expert was able to determine that both vehicles were travelling more than 30 mph when they entered the intersection, indicating that neither car had been stopped at the intersection during a red light.

If there were no other vehicles at the intersection when the accident occurred – as indicated by the lack of witnesses – the speeds of the vehicles and the timing of the traffic lights meant that the defendant would have entered the intersection on a red light, because the lights were set to default to green for our client.

Despite his injuries, our client was able to return to work and continue a promising career. The case settled for \$755,000.00 in uninsured/underinsured funds. ■

## Security Video Establishes That Records Were Inaccurate

Being thorough is a cornerstone of a successful plaintiff's practice. Recently, Matt Birch and John Parisi took on a tough case that, based on the facts as initially presented, would have scared many attorneys away.

Our client's father committed suicide while an inpatient at a mental health facility. He was unemployed and had a history of suicide attempts. He had frequently expressed suicidal intentions. After meeting with the man's very impressive and resilient lone surviving heir – his teenage daughter who lived with her mother – our firm felt motivated to investigate the matter.

In addition to collecting the records associated with the man's inpatient treatment, a request was forwarded to a state agency seeking any information available regarding the man's death. These types of requests rarely lead to useful information, but every once in a while there is a smoking gun.

In response to an anonymous complaint about the subject incident, a state investigation had been undertaken. A detailed report, along with a lengthy appendix, provided a minute-by-minute accounting of the actual events surrounding the man's suicide. Information uncovered by the investigating agency included a

security video of the suicide, which established that certain records were inaccurate.

To the mental health facility's credit, the individuals involved in the wrong doing were terminated immediately following the investigation. Then, soon after suit was filed, an early resolution was reached. The settlement included payment of \$775,000.00 to the firm's teenage client.

This case demonstrates the importance of seeking public information on all cases. Many times, such requests yield little helpful information. But they occasionally produce the key to the case. ■



## PRACTICE TIP

## Foreign Subpoenas in State and Federal Courts

When a case is pending in one jurisdiction and a deponent resides in another, attorneys must follow special procedures to secure subpoenas that will have legal effect in the deponent's home state or district. Most states have adopted one of four schemes for honoring "foreign subpoenas," and the deponent's state determines the scheme to be used. The federal procedure is uniform across all jurisdictions. Below is a description of each scheme and a list of the jurisdictions that have adopted at least some parts of that scheme. Some states incorporate components from multiple schemes and are accordingly listed in multiple places.

#### State scheme one: the Uniform Foreign Depositions Act (UFDA)

(Calif., Fla., Ga., La., Md., Neb., Nev., N.H., N.Y., Ohio, Okla., R.I., S.D., Tenn., Texas, Va., Wyo.)

An attorney seeking to have a foreign subpoena honored by a UFDA state files in that state the same Notice of Deposition that would be used in the attorney's "foreign jurisdiction." The foreign jurisdiction then issues its typical subpoena, which is served in the deponent's jurisdiction. The deponent's jurisdiction honors the foreign subpoena as if it had been issued locally.

#### State scheme two: notice/agreement

(Ala., Del., D.C., Idaho, Minn., Mont., N.M., N.C., N.D., Ohio, Ore., S.C., Tenn., Utah)

In these states, an attorney files a notice of deposition in his home state and then provides a copy to the deponent's state court. The attorney then asks or petitions the deponent's state court to issue a local subpoena, which is served in the deponent's state.

#### State scheme three: letters rogatory

(Ala., Ark., Ky.)

In these states, an attorney obtains documents (often called "letters rogatory") from his home court that ask the deponent's state court to issue a subpoena, which is then served in the deponent's state.

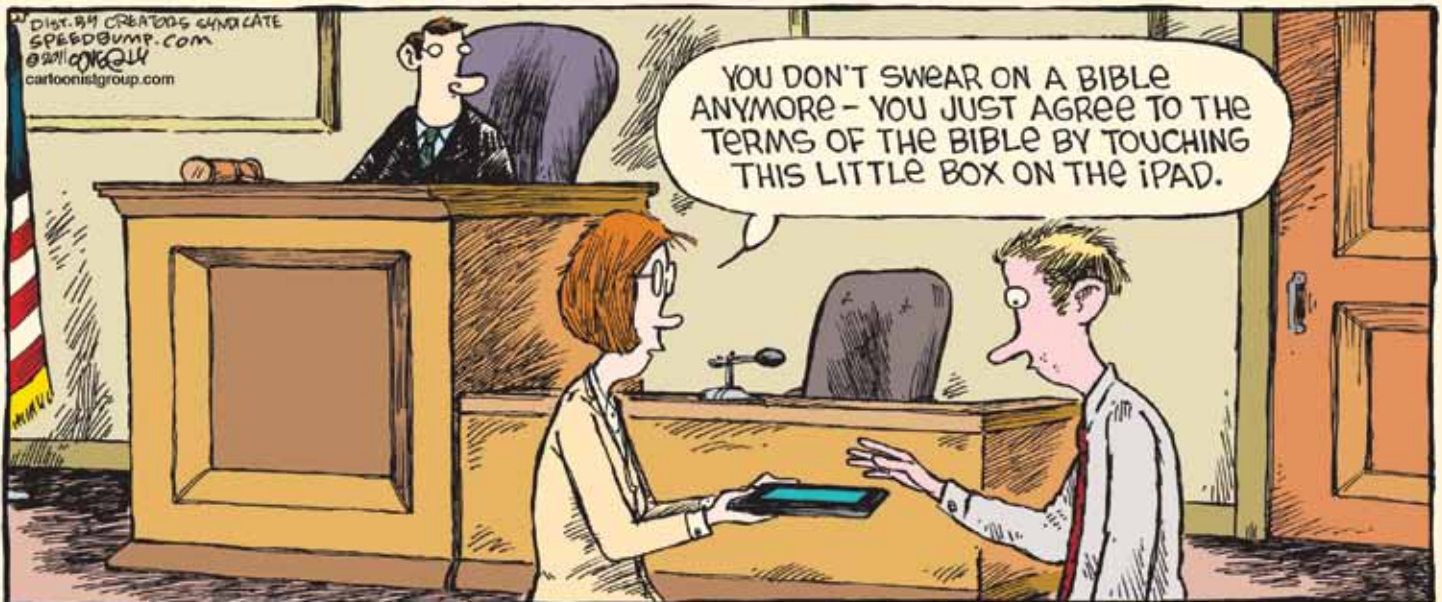
#### State scheme four: miscellaneous actions

(Ala., Alaska, Ariz., Ark., Conn., D.C., Hawaii, Ill., Kan., Ky., Mich., Mo., N.J., N.M., N.C., Okla., Pa., Vt., Wash., W.Va.)

In these states, an attorney files a "miscellaneous action" in the deponent's jurisdiction. After the action is commenced, the attorney files a motion asking the court to issue a subpoena.

#### The Federal scheme

Pursuant to Fed. R. Civ. Pr. 45 (a)(3), any attorney permitted to represent a client in one federal court may issue a subpoena from any federal court, including the deponent's.



Down: 1. Paper 2. Washburn 3. Nebraska 4. Barn 6. Duke 7. Fingerprints 10. UMKC 12. Cardozo 13. Green 14. Yale  
 Across: 5. Harvard 8. Berkeley 9. BYU 11. Michigan 15. Texas 16. Jesuit 17. Iowa

*Past results afford no guarantee of future results.  
Every case is different and must be judged on its own merits.  
The contents of this Newsletter do not constitute legal advice.*

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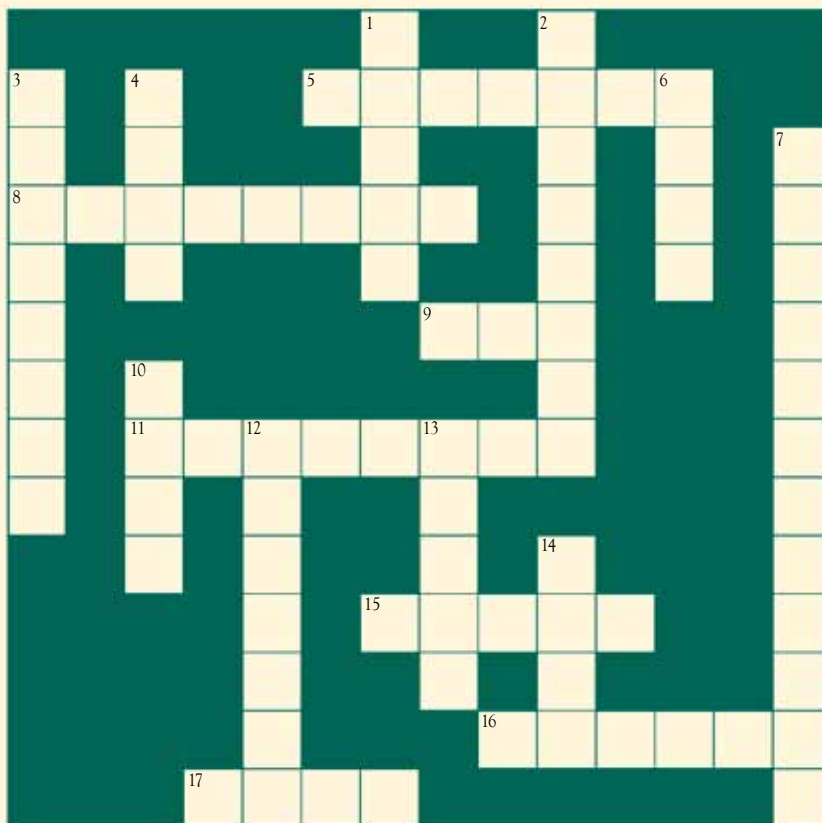
## LAW SCHOOL TRIVIA PUZZLER

### Across

5. Scott Turrow authored "One L", a memoir of his first year at this law school.
8. Along with Stanford, Boalt Hall at UC \_\_\_\_\_ is one of the only schools in the western United States to receive top-ten honors in most law school rankings.
9. The honor code of this university's law school (initials) forbids the consumption of alcohol, tobacco, coffee or tea.
11. The Supreme Court's landmark *Grutter v. Bollinger* case in 2003 upheld the admissions process at this state's law school.
15. Consistent with the phrase "Everything is Bigger in \_\_\_\_\_," this state's law school is among the largest with more than 1,400 students.
16. Creighton University School of Law is one of 14 \_\_\_\_\_ Catholic law schools in the United States.
17. This state law school is the oldest in continual operation west of the Mississippi River.

### Down

1. Fictional professor Charles Kingsfield taught contracts in the 1970s novel, movie and television series "The \_\_\_\_\_ Chase" about Harvard Law School.
2. Bob Dole, Dennis Moore and television journalist Bill Kurtis graduated from this law school in Kansas.
3. General John J. Pershing attended law school at this Midwestern state university.



4. In the early part of the 20<sup>th</sup> Century, the University of Missouri School of Law was housed in the Law Department Building, better known as the "Law \_\_\_\_\_."
6. Richard Nixon, Quinn Snyder and Jay Bilas graduated from this law school.
7. Starting in 1973, those taking the LSAT were required to have \_\_\_\_\_ taken on the day of testing after imposters were discovered to have taken the test.
10. President Harry Truman attended this area law school (initials).
12. The law school at Yeshiva University is named after influential Supreme Court justice Benjamin N. \_\_\_\_\_.
13. Graduating law students at the University of Kansas make annual treks up the hill to visit the statue of the law school's first dean, "Uncle" Jimmy \_\_\_\_\_.
14. Since 2008, Harvard and this law school have placed the most clerks on the U.S. Supreme Court.