THE OHIO STATE BAR ASSOCIATION MEMBER MAGAZINE

Ohio Lawyer

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THERE'S A NEW KOPP AT THE OSBA

Assisted living facilities vs. nursing homes

Are flat fees earned or unearned?

Ohio legislative update

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Ohio Lawyer

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Letters to the editor

Dear Editor:

I just finished reading the President's Perspective column in the March/April issue of *Ohio Lawyer* and it reminded me of how thankful I am for John Holschuh's leadership of the Ohio State Bar. By making access to justice the cornerstone of his presidency, he has shined a bright light on what I think should be a profound concern for all lawyers.

As I witnessed at the district meetings I attended, John has been articulate and consistent in sending the right message. I am doubly excited that Ron Kopp will continue to be outspoken on the access to justice issue.

I hope that John reads this while sitting on a beach somewhere, recuperating from the last couple years of his service. He has done a great job! Thanks.

Bill Dowling, Akron

Dear Editor:

I have been a member of the Ohio State Bar Association for a number of years and have enjoyed reading the various articles that appear in the *Ohio Lawyer* periodical that we receive as members. I have never written an attorney regarding any article that has been published in this periodical. However, after reading John Holschuh's article entitled "Are you a successful lawyer?" I could not resist writing this letter to tell you how impressed I was with that article.

In today's world, you hear so much about lawyers and their successes in either the number of cases they have won, the amount of fees they have collected, the reputation they claim to have gained for any number of reasons. You also hear and read about some who fall by the wayside for all the wrong reasons.

This article should be added as required reading in some of our ethics and professionalism seminars. I commend John for one of the best articles I have ever read in *Ohio Lawyer*, and he has put out a guideline that I hope others will read and follow.

Clem Pater III, Hamilton

Member News

Ada

Emily Kerber, Ohio Northern University Pettit College of Law, received the 2016 Law Student Diversity Scholarship from OACTA.

Akron

Emily Wilcheck, Roetzel & Andress LPA, was nominated to the Ohio Women's Bar Association Board of Trustees.

Karen Adinolfi, Roetzel & Andress LPA, was nominated to the Ohio Women's Bar Association Board of Trustees.

Columbus

Kelsey M. Schiffer, Capital University Law School, received the 2016 Law Student Diversity Scholarship from OACTA.

Melissa Hoeffel, Roetzel & Andress LPA, was inducted into the Association of Ohio Commodores.

Cincinnati

David A. López-Kurtz, University of Cincinnati College of Law, received the 2016 Law Student Diversity Scholarship from OACTA.

Alex Shumate, Squire Patton Boggs, was named Chairman of The Ohio State University Board of Trustees.

Florence, KY

Michael Nitardy, Frost Brown Todd, earned the Certified Information Privacy Professional/United States (CIPP/US) credential, the global standard in privacy certification.

In Memoriam

2016

John T. Kalnay, 54
Cleveland, Feb. 4, 2016

Judge W. Don Reader, 88
Massillon, Feb. 5, 2016

Steven Eugene Yuhas, 56
Kettering, Feb. 22, 2016

Theodore J. Froncek, Jr., 60
Loveland, Feb. 29, 2016

Frank H. Bennett, 91
Fremont, March 10, 2016

Richard G. Kastner, 71
Blanchester, March 25, 2016

Michael Paul Morrison, 65
Blacklick, March 28, 2016

Jeffrey L. Routson, 61
Findlay, April 1, 2016

William F. Schenck, Jr., 71
Dayton, April 8, 2016

Albert J. Ortenzio, 89
Canfield, April 17, 2016

William A. Lavelle, 91
Athens, May 15, 2016

This list is not all inclusive. To see a complete list of OSBA Member News, visit ohiobar.org/membernews.

OSBA Member News in *Ohio Lawyer* magazine is limited to awards and civic duties. The news listed above is edited from press releases that are sent to the OSBA. Other submitted member news, such as promotions and new positions, is featured on the OSBA website.

To keep up to date with the most recent member news, visit ohiobar.org/membernews.

To submit an announcement for consideration in Member News, please email it to the editor at membernews@ohiobar.org.

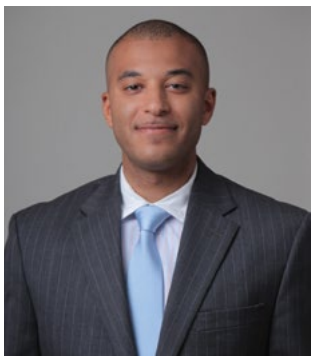
Welcoming our new Board of Governors members

Victor Perez

Victor Perez, a child protection attorney for the Seneca County Department of Job and Family Services, has been appointed to serve as District 5 representative on the Board of Governors. He is a recipient of the Honorable Abraham Lincoln Marovitz Public Interest Law Award, and was also recognized as the Ohio Public Children's Services Attorney of the Year in 2010. Perez currently serves as an appointee to both the community corrections board and the Seneca County Law Library Resources Board. Since 2013, he has volunteered as a trustee for Legal Aid of Western Ohio and Advocates for Basic Legal Equality. He is also a volunteer attorney for Operation Legal Help Ohio and a volunteer judge for the National Moot Court Competition in Child Welfare and Adoption Law at Capital University Law School. Perez is a past president of the Seneca County Bar Association.

R. Benjamin Franz

Attorney R. Benjamin Franz of Delaware has been elected to serve a three-year term as District 3 representative on the Board of Governors. Franz currently serves as in-house counsel for Findlay-based Marathon Petroleum Company LP, where he provides environmental legal support for the company's network of seven petroleum refineries in the Midwest and Gulf Coast regions. He earned his undergraduate degrees from The Ohio State University and his law degree, cum laude, from Capital University Law School. Before joining Marathon Petroleum Company, he served as an Assistant Attorney General in the Environmental Enforcement Section of the Ohio Attorney General's Office. Franz currently serves as vice chair of the OSBA's Environmental Law Committee. His wife, Andrea M. Salimbene, is a partner in the law firm of McMahon DeGulis LLP and currently serves on OSBA's Council of Delegates. They welcomed their first child in April.



Aaron O'Brien

Aaron O'Brien, an associate in the Cleveland office of BakerHostetler, has been elected to serve a three-year term as District 12 representative on the Board of Governors. O'Brien assists and advises clients with respect to strategic business transactions, and he focuses his practice in the areas of corporate governance, mergers and acquisitions, private equity and capital formation, commercial contracts and other key corporate transactional plays. He is a frequent speaker on capital raising and other securities matters and serves on BakerHostetler's Diversity Committee. A self-described "chronic volunteer," O'Brien mentors young people and serves on the Board of Directors for the Legal Aid Society of Cleveland, the United Black Fund, the Friends of the Cleveland Public Library and the Greater Cleveland Morehouse College Alumni Association. He also is the founder of Just Community, a non-profit law enforcement and legal process awareness and education program.

Judge Dean L. Wilson

Judge Dean Lyle Wilson of Perry County Court has been elected to serve a three-year term as District 9 representative on the Board of Governors. After having earned both his bachelor's and master's degree from Ohio University, Judge Wilson received his law degree from Capital University Law School. Before becoming a judge, he practiced in the areas of domestic and criminal law. Since his election to the bench, the Perry County New Direction Drug Court was founded under his leadership. In addition to the OSBA, Wilson belongs to the County and Municipal Judges Association, the American Bar Association, the Muskingum County Bar Association, the Perry County Bar Association, and the American Judges Association. Judge Wilson's wife, Lisa, works in accounting and operations for a Wendy's franchise. They have two children: Angela and Austin.

Michael Lewis Barr

Michael Lewis Barr, partner in the Pomeroy firm of Little, Sheets & Barr, LLP, has been elected to serve a three-year term as District 17 representative on the Board of Governors. He earned his law degree, with honors, from Capital University Law School. In addition to his general practice, he serves as a solicitor for the villages of Pomeroy and Middleport. He is also a member of the Meigs County Law Library Board of Trustees, the Meigs County Community Corrections Local Planning Board, and the Meigs County Chamber of Commerce. Barr's wife Danielle is an MRI/CT technologist. They have one son: Nolan. In his free time, Barr enjoys golf, travel, fishing, shooting and being outdoors.

Stuart W. Cordell

Stuart W. Cordell, partner in the Ashtabula firm of Warren and Young PLL, has been elected to serve a three-year term as District 18 representative on the Board of Governors. Cordell's practice focuses on business and corporate law, nonprofits, real estate law, and estate planning and probate administration. He serves on the Andover Bancorp., Inc., Board of Directors and as a trustee for several other Ashtabula County nonprofit organizations and foundations. His wife, Kimberly A. Cordell, is a retired elementary school teacher. They have three married daughters: Elisa, Bethany and Hannah.

Judge Denise L. Moody

Judge Denise L. Moody, Clark County Municipal Court in Springfield, has been elected to serve a three-year term as the District 6 representative on the Board of Governors. Judge Moody earned her undergraduate degree from Bowling Green State University, and her law degree from the University of Toledo College of Law. In her community, she serves on the Supreme Court Board of Commissioners of Character & Fitness, is a trustee of the Clark County Law Library Board, and is a past vice president of the Clark County Bar Association. She also serves as a high school mock trial team coach and volunteers as a school-based mentor through Big Brothers Big Sisters of Springfield.

Amanda M. Leffler

Amanda M. Leffler, partner in Brouse McDowell's Akron office, has been elected to serve a three-year term as an at-large member of the Board of Governors. She focuses her practice in the areas of commercial litigation and insurance recovery, and chairs the firm's Litigation Practice Group. Leffler currently serves as vice president of membership for the Akron Bar Association, and as vice chair of the United Disability Services Board of Directors. She is also a 2015 graduate of Leadership Akron, Class 31. Her husband, Daniel, is an attorney for the Ohio Patrolmen's Benevolent Association. They have two children: Abigail (6) and Avery (4).

Law & Media Conference 2016 – Oct. 14, 2016

The 2016 campaign season has been interesting so far, but you haven't heard everything until you've heard from prominent members of the bar, bench and press at this year's Law & Media Conference. The opening plenary session, moderated by attorney Dan Trevas, will explore how "dark money" and "legalized lying" have shaped this year's campaign season. The conference, which will be held at the Ohio State Bar Association in Columbus on Friday, Oct. 14, will bring together journalists, lawyers, academics and students for a day of stimulating discussions about current media law topics. Session topics will include anti-SLAPP laws, FERPA, body cameras, the First Amendment right to anonymous speech, public records, student privacy vs. access to records, social media's effect on copy editing, and the Open Meetings Act.

For details and registration information as it becomes available, visit ohiobar.org/lawandmedia

Foundation News

Ohio State Bar Foundation announces Spring grantees

It takes the work of many dedicated individuals to help people maneuver through the justice system with confidence. That's why the Ohio State Bar Foundation (OSBF) is proud to partner with nine law-related organizations across the state to promote the pursuit of justice and help citizens understand their rights.

$212,477 total funding statewide

- $50,000 to the **Capitol Square Foundation** to develop law-focused lesson plans for iCivics Ohio, a program that provides educators with engaging digital resources.
- $15,000 to **Disability Rights Ohio** to produce videos in American Sign Language that teach deaf populations about self-advocacy and their legal rights.
- $10,600 to the **Equality Ohio Education Fund** to educate Ohioans about legal protections available for transgender individuals.
- $25,980 to the **Ohio Military/ Veterans Legal Assistance Project** to increase lawyer outreach to veterans, hosting legal advice clinics and presenting two CLE courses for lawyers on military law and the Federal Code of Regulations.

Ohio State Bar Association (OSBA) Districts 5, 6, 7, 8, 9, 10, 14, 15 and 17

- $22,363 to the **Ohio State Legal Services Association** to design, produce and distribute legal brochures in Spanish, Somali, Bhutanese, Nepali and Russian.

OSBA District 1

- $30,000 to **Housing Opportunities Made Equal** to develop videos and training materials on housing law for Spanish-speaking populations, new and college renters and the LGBT community.

OSBA District 7

- $26,730 to **CASA of Franklin County** to train guardians ad litem for their work serving abused and neglected children in Franklin County and surrounding areas.
- $20,000 to **Homes on the Hill** to support the Landlord Engagement Action Network (LEAN), a program where landlords and tenants learn about their rights and responsibilities.

OSBA District 12

- $11,804 to **Towards Employment** to analyze the current process of applying for and receiving a Certificate of Qualification for Employment.

Contact **Kate Clements** at **(614) 487-4450** to find out how we can help in your community.

Thanks to OSBF Fellows, partners and friends for making these grants possible.

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Assisted living facilities vs. nursing homes: Defining regulations and liabilities

Although assisted living facilities are often preferred over nursing homes, their standards and regulations are lesser and vary by state.

by Nancy C. Iler

It's all over the news: Our population is getting older. Doctors, politicians and businesspeople are scrambling to figure out where all the baby boomers will live and who will care for them. Regardless of whether you're a part of this generation, this issue will most likely affect your life in some way—through your practice, your family, maybe even your own care. This rapid population shift is drawing increased attention to the laws that govern the health and residential care our seniors receive.

The number of Americans over the age of 65 is currently less than 13 percent of the U.S. population, but that number is expected to balloon to 19 percent by 2030.[1] The business of long-term care is booming just in time for baby boomers. Long-term care is not just limited to traditional nursing homes that provide skilled nursing care. As the demand grows, so do the choices of facilities, all offering a range of services and range of supervision. Assisted living facilities are a growing choice for many. They help residents with daily living tasks such as bathing, eating and medication dispensing, and they might even provide some limited skilled nursing care.

Many of us perceive assisted living as a more dignified, less institutional version of nursing care. But is it the right place for everyone, given specific medical conditions and abilities? Many families tell a similar story: "I promised my mom I wouldn't put her in a nursing home, so we chose assisted living instead." Many of these families are seeking help because they're surprised to learn, often after an injury or death, that the care provided to

their loved ones was not the care they expected, or the care was substandard.

The assisted living industry is big business and getting bigger. In fact, assisted living facilities make up the fastest-growing segment of long-term care. From 1998 until 2015, the number of facilities in the U.S. grew from approximately 11,000 to 40,000.[2] The "typical" residents in assisted living or residential care in 2010 were mostly female, white and 85 years or older. Residents had a typical stay or tenure of approximately two years.[3]

This industry's growth is most likely due to a combination of several factors: It's not only the large number of aging Americans, but also the fact that assisted living companies are moneymakers for investors. That's because these facilities predominantly serve private-pay residents, whom they can charge large monthly fees. By contrast, nursing home care is almost entirely paid for by government programs, including Medicare and Medicaid.

It is necessary to know the differences between assisted living and nursing homes, then review the theories of liability against assisted living in Ohio.

Defining assisted living

If you ask people to describe a nursing home, many would picture poor lighting, dirty linoleum floors, air that smells like urine and residents crying out for absent family members. Assisted living conjures up very different images. First and foremost, many families say that it is not a nursing home. They envision residential care facilities as new construction with

bright lighting, upbeat music and residents playing cards in the day room.

These widely held perceptions convince many families that assisted living always offers a better quality of life for its residents. But more important than looks and smells is the care and supervision provided. It's critical to consider which setting is the best fit for residents and families, and that includes the legal obligations and liabilities.

The nursing home industry continues to be highly regulated. Beginning in 1987, the Omnibus Budget Reconciliation Act, or OBRA, ensured a minimum level of care delivered to our seniors living in nursing homes under government funding (Medicare and Medicaid).[4] Not only do these regulations define what is a nursing home, but also they cover every aspect of care in nursing homes from the temperature of the food to the prevention of pressure ulcers.

Mandatory annual inspections determine whether the nursing home is complying with these regulations; further, state inspectors respond to any complaint of elder abuse or neglect. In such cases, an onsite inspection determines whether abuse has occurred and which specific regulations have been violated. The home must then submit a plan of correction.

All nursing home annual inspections and substantiated compliant inspections or surveys are public record. You can review these records at medicare.gov/nursinghomecompare under the specific nursing home's name. This is a valuable resource in determining whether the care delivered complies with the federal regulations and offers an "apples to apples" comparison among nursing homes.

You might expect that assisted living facilities would be subject to the same comprehensive federal regulations that govern care and life in nursing homes. Surprisingly, this isn't the case. There is not even a standardized definition for what qualifies as an assisted living facility. The assisted living industry has lobbied strongly against such regulations, so it is left up to each individual state to define assisted living facilities and even what to call them. This lack of regulation makes it more difficult for families and consumers to evaluate quality of care indicators and compare one facility to another.

In general the rules and regulations governing the establishment, licensing and monitoring of assisted living facilities are found in the Ohio Administrative Code §3701.17, which implements Ohio Revised Code Chapter 3721. In Ohio, these types of senior housing are called "residential care facilities," and the law defines them as follows:

> [A]ny home that provides accommodations for 17 or more unrelated individuals and supervision and personal care services for three or more of those individuals who are dependent on the services of others by reason of age or physical or mental impairment; or accommodations for three or more unrelated individuals, supervision, and personal care services for at least three of those individuals who are dependent on the services of others by reason of age or physical or mental impairment, and … provides to at least one of those individuals any of the skilled nursing care authorized by section 3721.011 of the Revised Code.[5]

That means assisted living facilities are authorized to care for catheters, change wound dressings, supervise special diets and observe changes in the resident's condition to determine further medical treatment and administer medications.[6] This skilled nursing care may be provided for up to 120 days on a part-time, intermittent basis.[7] If a facility has a specialty unit such as an Alzheimer's wing, it is subject to some additional requirements.[8]

The differences between nursing homes and assisted living or residential care facilities do not end there. Another difference involves staffing: both the types of caregivers and the hours they are required to work. The traditional nursing home staff has requirements for the hours that registered nurses, licensed practical nurses, and state certified nursing assistants may work. The state of Ohio has minimum staff hours; in other words, a nursing home resident must receive two and a half hours of direct care per day.[9] The state requirements for staff hours at residential care centers are much lower and much less specific. For example, an assisted living center is required to employ a registered nurse to provide supervision only for "sufficient time each week" to manage the skilled care provided.[10] Without federal regulations, centers can decide for themselves how much nursing staff is required, which may concern families who mistakenly believed that an RN was required to be in the facility 24 hours a day.

Major differences also occur in the types of personnel who staff each of these entities. The staff members providing bedside care at a nursing home are state-certified nurse aides (STNA), licensed practical nurses (LPN), and registered nurses (RN). All of these professionals must be licensed by the state of Ohio. The staffing in assisted living is much different. Staff providing personal care services must be at least 18 years of age (16-year-olds are allowed but must have onsite supervision by someone at least 18 years old). They must understand English if assisting residents with self-administered medications, and they must complete first aid training within two months of hire. Additional training is required for staff members who assist residents with cognitive impairments. Both types of facilities are required to keep resident care records, but the specific requirements differ dramatically. Federal regulations require nursing homes to keep much more extensive and detailed records of care and assessment of

the resident. Meanwhile, the state requirements for resident records are minimal for assisted living.[11]

All nursing homes and most residential care facilities are required to be licensed in Ohio. Residential care centers require licensure when residents receive personal care services or skilled nursing care. The state's definition of "personal care services" includes assistance with daily living, assistance with self-medication, and preparation of a special diet pursuant to the direction of a licensed health care professional.[12] Licensure is not required for facilities that provide personal care services to fewer than three residents. It's also not required for facilities that provide only services that are not considered personal care such as housing, housekeeping, laundry, meals, social or recreational activities, maintenance, security and transportation.[13]

Another major difference is who pays. In nursing homes, most care is paid by the government programs Medicaid and Medicare. Assisted living facilities are mostly paid for privately, although Ohio does allow some government benefits via a Medicaid waiver that pays for only the cost of care, not room and board.[14] Other general similarities between these two entities include that both are required to comply with the Residents Rights as set forth in the Ohio Revised Code.[15]

Legal remedies

When people living in residential care experience neglect that causes injury or death, many families explore the possible legal remedies to hold the facility accountable. Whether you represent the plaintiff or the defense, it is crucial to determine the duty an assisted living facility owed to the resident so you can analyze liability. The facility's obligations are closely tied to the level of services for which a resident has contracted. There are many questions to consider:

- Did this resident require a higher level of care than the

facility could provide?

- Did the resident's condition deteriorate to the point where he or she should have been transferred to a facility that provides a higher level of skilled nursing care?

- Did the facility breach contract by violating the resident care agreement?

- Was the facility negligent for failure to assist the resident with the bathroom, eating or other nonprofessional tasks? Or was it negligent for other professional malpractice or medical malpractice due to a failure of the nurses?

- What was the care, skilled or not, that was contracted to be provided? What level of supervision was promised?

- What was the care or lack of care that caused the injury? And was that specific care contracted for?

Answering these questions begins with a careful review of the written resident agreement that the residential care facility is required to enter into prior to beginning residency.[16] Certain items must be included in the written agreement, such as billing rates, explanation of services offered, types of skilled nursing care provided or permitted and discharge policies.[17] A resident and facility may also enter into a written risk agreement, where the parties agree to share responsibility for making and implementing decisions affecting the scope and quantity of services provided to the resident.

Also included in the admission packet may be a mandatory arbitration clause or agreement, which residents and their families should reject if they want to retain their right to sue the facility. The use of mandatory arbitration clauses to limit liability has been the subject of much litigation lately.[18] When working on this type of case, you need to examine all agreements to determine the care for which the resident contracted.

Review of recent cases

In Corsaro v. ARC Westlake Village, Inc.,[19] the executrix of the estate of a former resident at an independent living facility brought an action alleging negligence and breach of contract claims. The plaintiff alleged that the facility failed to escort the resident from the dining hall to her room, resulting in her falling and fracturing her wrist. The plaintiff also alleged that the facility was negligent in its training and supervision of employees.

Regarding the claimed breach of contract, the evidence established that the resident had refused any contractual services offered to provide her an escort.[20] Although the resident's daughter had expressed a desire to contract for an escort, the resident resisted that offer. Thus, there was no contractual agreement to escort the resident to and from the dining hall upon which a breach could be maintained. The Corsaro court also upheld summary judgment in favor of the facility on the executrix's claim for negligence. Summarily, the court concluded that the facility did not owe any legal duty to the resident. Without an independent legal obligation, the executrix could not maintain a negligence cause of action.[21]

Some courts have found liability based on negligence. In Radous v. Emeritus Corp.,[22] the personal representative of a deceased resident's estate sued the assisted living facility where the decedent resided and died. The decedent was found in a spa tub after being left unattended by a resident aide. The representative alleged breach of contract, wrongful death, medical malpractice and punitive damages. The breach of contract claim was dismissed as subsumed in the malpractice claim. The decedent chose the defendant facility because it could provide her with bathing assistance, a service specifically mentioned in her resident agreement. She paid extra money each month for the bathing supervision. On the night in question, the decedent was left unattended and drowned in the tub.

In ruling on the facility's motion for summary judgment on the negligence and malpractice claims, the Radous court concluded that the claims could proceed without the necessity of expert testimony. As the court explained, the plaintiff alleged that "Defendant breached its duty of care by leaving an infirm resident alone in a spa tub in a locked room for well over an hour late at night, provided its staff deficient training . . . and had an inadequate number of staff members on duty the night in question."[23] A jury "could certainly comprehend" the theory of liability without the need for expert testimony.[24]

> *You might expect that assisted living facilities would be subject to the same comprehensive federal regulations that govern care and life in nursing homes. Surprisingly, this isn't the case.*

In Washnock v. Brookdale Senior Living, Inc., the representative of the estate of a deceased resident brought a negligence action against the senior living facility where the resident was staying.[25] The plaintiff alleged that the facility failed to adequately monitor the ingress and egress at the facility. The resident, who suffered a level of dementia, had wandered out of the

facility in freezing temperatures, became locked out when the self-locking door closed and was found dead the following morning. Unlike the Corsaro case, the Washnock court concluded that the facility did owe an independent legal duty to its residents to monitor the self-locking door. As the court cogently explained:

> [F]or all practical purposes, [defendant] appear[ed] to serve the same core constituency; namely, elderly individuals seeking "protection from the ordinary risks of everyday life." Businesses that deliberately market and cater to a specific group of "at risk" individuals carry a significantly higher degree of moral blame when they fail to provide the most basic of protections to the persons whom they serve. Indeed, [defendant] has no qualms about demanding a substantial premium from those elderly individuals who have expressed a desire to live in their "independent" communities, but argues that the law should treat their facility no differently from the landlord of a single-family home.[26]

Likewise, other courts have held that ordinary negligence was the basis of liability. See also Carte v. The Manor at Whitehall,[27] in which ordinary negligence, not medical malpractice, principles applied to claim that a resident sustained injury while receiving assistance to and from the bathroom, and Eichenberger v. Woodlands Assisted Living Residence, L.L.C.,[28] in which a negligence claim against a facility when a resident fell from a wheelchair and struck his head while being transported to a dining hall was not a "medical" claim, subject to the one-year statute of limitations.

As the foregoing cases instruct, determining the duty owed to a resident of an assisted living facility for purposes of liability analysis is crucial and is closely tied to the level of services for which a resident has contracted.

Growth of remedies

As Ben Franklin said, there are only two certainties in life: death and taxes. The former might be a long time coming, but then we're certain to grow old. We are experiencing just the beginning of the expansion of long-term care facilities, and with that expansion we will continue to see many types of care facilities. Will the state legislature expand the regulations or will the long-term care lobby be able to hold that off? With that explosive growth will come the expansion of legal liabilities and remedies.

Author bio

Nancy Iler is the founding member of Nancy C. Iler Law Firm LLC, which is dedicated to representing injured people and their families with a focus on nursing home and assisted living abuse and neglect. She began her professional life as a registered nurse: advocating for patients before advocating for clients later as an attorney. She is a member of the Elder Law and Special Needs Section of the OSBA. Nancy can be reached at (216) 696-5700, nancy.iler@ilerlawfirm.net or www.ilerlawfirm.net

Endnotes

[1] *Legal Considerations for Assisted Living Facilities,* 28 J.L. & Health 308 (2015) by Y. Tonly Yang

[2] Ibid.

[3] U.S. Department of Health and Human Services, National Health Center for Health Statistics No. 91, April 2012 "Residents living in Residential Care Facilities: United States, 2010."

[4] Those federal regulations are set forth in the 42 CFR§ 483.1-480.

[5] O.A.C. Ohio Administrative Code §3701.17.50 (FF).

[6] O.A.C. §3701.17.50 (HH).

[7] CITE.

[8] O.A.C. §3701.17.52 (C) & (D).

[9] O.A.C. § 3701.17.08 (C).

[10] O.A.C. §3701.17.54(D)(1).

[11] O.A.C. §3701.17.58.

[12] O.A.C. 3701-17-50(Z).

[13] O.A.C. 3701-17-51 (B)(2).

[14] See www.aging.ohio.gov/services/assistedliving/.

[15] O.R.C. §3721.10-17.

[16] O.A.C. 3701-17-57.

[17] Additionally, prior to admission or on request from a resident, the facility shall provide copies of and explain certain policies: rights and procedures, pursuant to R.C. 3721.2; smoking policy; policy on advance directives; definition of skilled nursing care; if applicable, care policy for special care unit; policy on ability to accommodate disabled residents; and any other facility policies. Also included must be explanation of charges, including security deposit; statement that all charges assessed are included in the agreement; statement that basic rate shall not change without thirty days written notice; explanation of refund process; explanation of services provided; and statement that resident must be discharged or transferred when skilled nursing care is required beyond the limitations of the facility. See O.A.C. §3701.17.57 (**NCI CHECK CITE).

[18] See *New York Times series on arbitration at http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?*

[19] 2005-Ohio-1982 (8th Dist.)

[20] *Id. at ¶19.*

[21] *Id. at ¶27.*

[22] N.D. Ohio Case No. 1:12-CV-319, 2013 W.L. 1283903 (Mar. 27, 2013).

[23] Id. *at p. *3.*

[24] Id.

[25] E.D. Mich., Case No. 12-11607, 2014 W.L. 495414 (Feb. 6, 2014).

[26] (Id. at p. *5).

[27] 10th Dist. No. 14AP-568, 2014-Ohio-5670 (Dec. 23, 2014).

[28] 2014-Ohio-5354 (10th Dist.)

FLAT FEES:
EARNED, UNEARNED OR BOTH?

In February the Board of Professional Conduct of the Ohio Supreme Court released an advisory ethics opinion on whether a lawyer may enter into an agreement requiring a client to pay a flat fee in advance of representation and on whether a lawyer must deposit such a fee into a client trust account.[1] Because these questions are addressed in the applicable Rules of Professional Conduct or in their comments, the opinion does not actually add much to the current state of the law. Unfortunately, however, the state of the law is based on a confusing inherent contradiction within the applicable rule.

By simply repeating that confused doctrine without criticizing it, the board missed the opportunity to propose a much-needed change in the rules. As a result, the board's opinion merely reiterates a faulty analysis that leads to confusion and defeats the purpose of providing clear guidance to lawyers. Ohio lawyers need a better approach to help them understand the issues they face when handling flat fees paid in advance.

The current state of Ohio law

The comment to Ohio Rule of Professional Conduct 1.5 defines a flat fee as "a set amount [charged] for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed."[2] There are three important elements in this definition. The first one is that the amount of the fee is determined before the work is performed.[3] Obviously, this is what defines the fee as "flat." Second, the fee may or may not be paid in advance. This is important because the issues addressed by the Board of Professional Conduct's opinion only present a problem if the fee is paid in advance.

Finally, the third element in the definition of flat fees is that they are not earned until the work is performed.[4] This is important because if the fee is not earned until the work is performed and a client pays the lawyer in advance, the money still belongs to the client, and the lawyer has an obligation to keep the amount paid in a trust account until the fee is actually earned.[5] This is to protect clients because if the lawyer does not complete the task the fee is supposed to pay for, the lawyer is obligated to refund the client the portion of the fee that was not earned.[6] Otherwise a lawyer could claim that a fee is earned upon receipt and then abandon the representation, but retain the amount of the fee as if the work had been completed.

This definition is logical and straightforward, but, unfortunately, the doctrine in Ohio does not end

there. Even though the comment to the rule states that flat fees paid in advance are not yet earned, according to Rule of Professional Conduct 1.5(d)(3), a lawyer can agree with a client to consider such a fee as "earned upon receipt" and non-refundable as long as the client is informed that the client may have a right to a refund.[7] This notion of a non-refundable fee that must be guaranteed to be refundable is an illogical inherent contradiction in terms at the heart of the confusion created by the Ohio rules.

One would think that agreeing that the fee is "earned upon receipt" means that the fee is earned and that the money belongs to the attorney. Yet, in Ohio, a fee that is earned upon receipt is actually not really earned, and although the attorney can place it in the attorney's own bank account as if the money belonged to the attorney, the attorney can't touch that money since it is possible the attorney may have to refund it. This makes little sense.[8]

Opinion 2016-1

In Opinion 2016-1, the Board of Professional Conduct accurately describes and applies the elements of the rule that lead to this inevitable result but does not address the contradiction they create.[9] The board points out correctly, for example, that if a fee is earned upon receipt, the money belongs to the lawyer and the lawyer can do with it as the lawyer pleases except leaving it in the trust account because leaving it in the trust account would result in commingling funds.[10] However, the board does not consider what happens once the money is moved from the trust account to the lawyer's general account.

After moving the money, the lawyer has deposited in the lawyer's general account an amount of money the lawyer can't touch since it is possible it may have to be refunded to the client. At that point, the account contains client money (the unearned amount to be refunded) and attorney money at the same time. In other words, by allowing a lawyer to consider a fee paid in advance to be earned, even though it really hasn't been earned, to avoid commingling funds within the trust account, the rules force the lawyer to commingle funds within the lawyer's operating account.

Thus, the board's conclusion (which is based on the text of the rules) inevitably leads to a violation of the rules. If the fee is considered earned, but some of it has to be refunded, it means that some part of the fee was technically not earned and the lawyer commingled by placing the full amount in the general account. On the other hand, if the fee is deemed earned, but the lawyer

Ohio's Rules of Professional Conduct pertaining to flat fees are confusing and contradictory, sometimes leaving lawyers in limbo.

By Alberto Bernabe

leaves even part of the amount in the trust account just in case a portion of the fee will have to be refunded, the lawyer has also commingled.

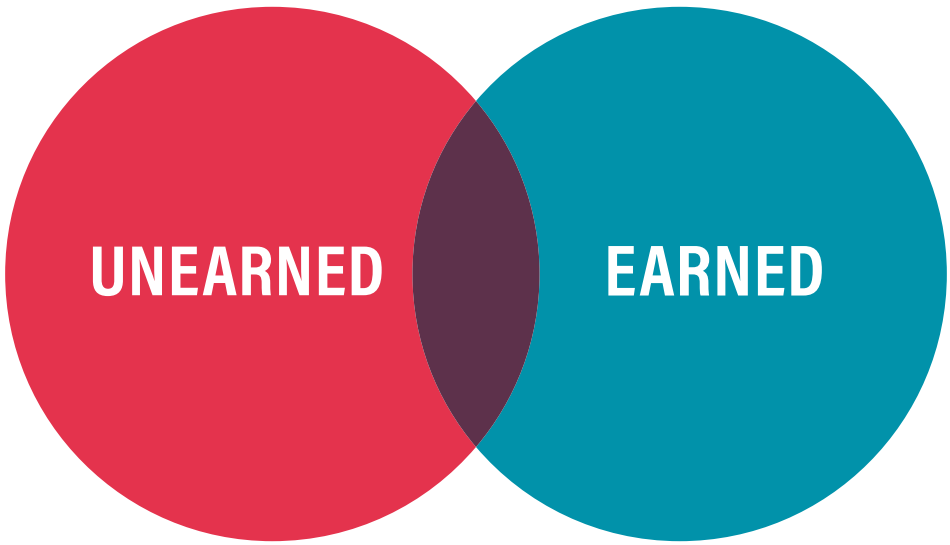
Moreover, in addition to the obvious violation of the principle against commingling, by allowing the client to agree with the lawyer to move what is in reality client money to the lawyer's account, the rules are in effect allowing the client and lawyer to hide money from the client's creditors, while making the client's funds vulnerable to the lawyer's creditors.

The idea behind the current approach is inadequate for a few reasons. First, it is based on the sophistry that the full fee has been earned when in reality it has not. Perhaps it can be argued that an initial portion of the fee is earned when agreed upon, but certainly not the full fee. Second, allowing lawyers to pretend the fees have been earned creates the opportunity for unscrupulous lawyers to trick unsuspecting clients to give up their rights.[11] Third, it does nothing to prevent the violations of the duty not to commingle funds. Finally, although it recognizes that the client might have a right to seek a refund, the client's right to compensation would depend on the client pursuing a civil action or a disciplinary action against the lawyer, both of which are options many clients will not know how to, or will prefer not to, pursue, and which may take a long time to complete.[12]

Is there a better approach?

Flat fee agreements offer both lawyers and clients certain advantages. For the client, a flat fee provides an attractive alternative to an hourly fee agreement because the client knows up-front exactly how much the attorney's services are going to cost, and once paid, the client does not have to worry about any more payments. The client also gets the benefit of the lawyer's efficiency because the lawyer knows that the value of the fee will diminish if the attorney is not efficient in providing the services. Thus, flat fees reward efficiency, enable clients to better control their budgets, eliminate conflicts with clients over bills and provide certainty of payment.[13]

On the other hand, when flat fees are paid in advance, they raise some ethical concerns; however, these concerns can be addressed in several different ways. One solution is to ban lawyers from asking clients to pay in advance. Another solution might be to stop requiring that lawyers use client trust accounts.[14] Yet, many reasons justify allowing the practice of asking for payment in advance and of requiring lawyers to keep separate trust accounts. The problems can be avoided without having to go that far.



A better alternative is to eliminate the possibility of "deeming" a fee "earned upon receipt," which is just a way to pretend that the amount of the fee belongs to the lawyer even though the work it is supposed to pay for has not been performed.[15] Instead of allowing this "legal fiction,"[16] lawyers and clients should agree on how (or when) portions of the flat fee are actually earned so that ownership of that portion of the money can be transferred to the attorney.[17] This way, the flat fee amount paid in advance is kept in the trust account, but the attorney can withdraw funds before the end of the representation.

Accordingly, the Ohio Rules of Professional Conduct should be amended to eliminate Rule 1.5(d)(3) and to rewrite paragraph 6A of the Comment to Rule 1.5 to read something like this:

Advance fee payments are of at least four types. The "true" or "classic" retainer is a fee paid in advance solely to ensure the lawyer's availability to represent the client and precludes the lawyer from taking adverse representation. ~~What is often called a~~ In contrast, a security retainer is ~~in fact~~ an advance payment to ensure that fees are paid when they are subsequently earned, on either a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. ~~An earned upon receipt fee is a flat fee paid in advance that is deemed earned upon payment regardless of the amount of future work performed.~~ If paid in advance, the amount of the flat fee is not yet earned and should be placed in a trust account, in accordance with Rule 1.15. The fee is earned

when the work for which the fee was paid is performed, at which point it should be placed in the attorney's general account. ~~When a fee is earned affects whether it must be placed in the attorney's trust account, see Rule 1.15, and may have significance under other laws such as tax and bankruptcy.~~ If the work is not performed, or if it is performed only partially, the ~~The~~ reasonableness requirement and the application of the factors in division (a) may mean that a client is entitled to a refund of an advance fee payment ~~even though it has been denominated "nonrefundable," "earned upon receipt," or in similar terms that imply the client would never receive a refund. So that a client is not misled by the use of such terms, division (d)(3) requires certain minimum disclosures that must be included in the written fee agreement.~~ This does not mean the client will always be entitled to a refund upon early termination of the representation [e.g., factor (a)(2) might justify the entire fee], nor does it determine how any refund should be calculated (e.g., hours worked times a reasonable hourly rate, quantum meruit, percentage of the work completed, etc.), but ~~merely requires that~~ the client must be advised of the possibility of a refund based upon application of the factors set forth in division (a). In order to be able to demonstrate the reasonableness of the fee in the event of early termination of the representation, it is advisable that lawyers and clients agree to set milestones at which point certain portions of the fee are to be considered earned, or, at least, to maintain contemporaneous time records for any representation undertaken on a flat fee basis.

This new language ensures that, unlike at present, a fee cannot be earned and unearned at the same time, and provides both clients and lawyers the protection and flexibility they need.

Author Bio

Alberto Bernabe is a professor of law at The John Marshall Law School in Chicago, where he teaches professional responsibility and torts. You can follow his professional responsibility blog at http://bernabepr.blogspot.com.

Endnotes

[1] Board of Professional Conduct of the Supreme Court of Ohio, Opinion 2016-1 (Feb. 12, 2016), available at www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2016/Op_16-001.pdf.
[2] Ohio Prof. Cond. R. 1.5, Cmt. [6A].
[3] Opinion 2016-1, supra note 1, at 3 (flat fees are based on factors independent of the actual number of hours involved in a representation).
[4] Ohio Prof. Cond. R. 1.5, Cmt. [6A].
[5] Opinion 2016-1, supra note 1, at 4.
[6] Ohio Prof. Cond. R. 1.16(e) (a lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned).
[7] Ohio Prof. Cond. R. 1.5(d)(3); Opinion 2016-1, supra note 1, at 4.
[8] Alec Rothrock, *The Forgotten Flat Fee: Whose Money is it and Where Should it be Deposited?*, 1 Fla. Coastal L. J. 293, 347 (1999) ("It simply makes no sense to permit lawyers to enter into fee agreements with clients stating that an advance payment such as a flat fee is earned upon receipt, when such payments are subject to being refunded to the extent unearned.").
[9] The opinion concludes that lawyers are allowed to charge flat fees in advance but they must deposit those fees in a trust account unless the fees have been designated "earned upon receipt." If designated as such, clients must be advised that they may be entitled to a refund. Opinion 2016-1, supra note 1, at 5.
[10] See Ohio Prof. Cond. R. 1.15(a); Opinion 2016-1, supra note 1, at 4 (earned fees should not be placed in a trust account because it is impermissible to commingle a lawyer's own funds with those of a client).
[11] Rothrock, supra note 8 at 347 (many clients, believing that their flat fee is non-refundable and unaware of the ethical obligation to the contrary, will not ask for a refund even if they are entitled to one).
[12] Id.
[13] Rothrock, supra note 8 at 354; Tyler Moore, "Flat Fee Fundamentals: An Introduction to the Ethical Issues Surrounding the Flat Fee After In Re Mance," 23 Geo. J. Legal Ethics 701, 701-702 (2010); Douglas R. Richmond, "Understanding Retainers and Flat Fees," 34 J. Legal Prof. 113, 114 (2009).
[14] See, for example, Carolyn Elefant, "Want to Lower the Cost of Legal Services? Let's Ditch Trust Accounts," My Shingle, May 27, 2014, myshingle.com/2014/05/articles/setting-and-collecting-fees/want-lower-cost-legal-services-lets-ditch-trust-accounts/; Carolyn Elefant, "If Lawyer Trust Accounts Don't Keep Clients' Money Safe, Isn't It Time to Get Rid Of Them," My Shingle, Jan. 27, 2016, myshingle.com/2016/01/articles/ethics-issues/if-lawyer-trust-accounts-dont-keep-clients-money-safe-isnt-it-time-to-get-rid-of-them/.
[15] Rothrock, supra note 8, at 347-48 ("Since flat fees are always subject to refund, they are not "earned" until corresponding services are performed. Unless and until such services are performed, they are unearned fees, however solemnly the fee agreement states otherwise."); Richmond, supra note 13, at 134 (scheme that allows attorney to designate fee as earned but to inform client of right to refund "makes little sense . . . because it effectively enables commingling and it deprives the client of the protections that attend the deposit and maintenance of funds in a trust account.").
[16] Rothrock, supra note 8, at 346 (scheme that allows unearned fees to be considered earned results in an "inconsistent legal fiction").
[17] Moore, supra note 13 at 710; Richmond, supra note 13, at 134.

LAWYER. VOLUNTEER. KOPP.

By Nina Corbut

It's no surprise that Ron Kopp was elected President of the Ohio State Bar Association. He knew he wanted to be a lawyer since he was in government class when he was 13 and his teacher assigned the class to write a paper on what they wanted to be when they got older. Ron wrote about his interest in the law and government, and that he really wanted to help people. When he got to college, his aspirations were confirmed as he "got the bug" and went to law school.

It's obvious that Ron enjoys helping people. He has been volunteering for community organizations for his entire career, beginning as a trustee of the Summit County Historical Society in 1984, an appointment that he kept until 1997. Also during that time span, Ron graduated from Leadership Akron in 1987 and chaired its Media Day Committee until 1997, while also serving as a trustee for the United Disability Services (1987-1993) and the Akron General Medical Center Foundation (1988-1994) and as secretary of the John S. Knight Memorial Journalism Fund (1989-present). He also led the Akron Bar Association as president in 1996-1997.

His service to the community did not end in the '90s, though. Ron was trustee (again) of the United Disability Services from 1999-2005 and secretary and later chair of the Leadership Akron Board of Trustees from 2006-present. In 2004, he volunteered on the Akron Bar Foundation Board of Governors (of which he was a founder) until 2012, and joined the OSBA Board of Governors that same year. After two years on the OSBA Budget and Headquarters Committee, one year as chair of that committee, one year on the Audit Committee and one year as president-elect, Ron will spend this year as OSBA President.

Ron thanks his mentors, who taught him early in his career that giving back to the community is important and fulfilling. Ron believes that "We all should try to leave our community better than we found it."

When Ron is not spending time in his volunteer leadership roles, he spends his days practicing as a partner in business litigation at Roetzel and Andress, the firm he has worked for since 1979.

We recently had a chance to visit Ron at his law office in Akron, where he showed us around his office and sat down for an interview.

What is rewarding about practicing law?

RK: The intellectual challenge and learning about new things, especially in business litigation. Every case involves a new subject area, whether it be engineering, chemical formulations or shareholder disputes. I also enjoy the opportunity to help people. I love meeting people, working with them and occasionally feeling that perhaps I made someone's life a little bit better.

Practicing law gives me the opportunity to be out in the community. Our firm encourages lawyers to engage in activities that benefit the community and the bar. As a result of that, I've been able to do a lot more than if I had chosen another line of work.

When did you first get involved with the OSBA?

RK: I sat on a panel for the Law and Media Conference many years ago. Over time, as I stayed involved with that conference, I had the opportunity to be elected to the Council of Delegates and was on the council for a number of years. Through my local bar association work, I had the opportunity at state and national conferences to work with people at the state bar and grew to know them and like and respect them. When I was invited to run for the Board of Governors in 2012, I agreed to do that and happily was elected and have continued in a deeper way my long affiliation with the state bar association.

If you could change one thing about the OSBA, what would it be?

RK: I would love for every lawyer in the state of Ohio to be a member of the state bar association. I think that it is such an important organization for lawyers in our state. Not every lawyer is a member, and those folks are really missing an opportunity for themselves and also to improve the profession.

What do you wish other people knew about the OSBA?

RK: I think a lot of people don't understand the span of coverage that the OSBA has: our constant work with the Ohio Supreme Court, our consistent and constant work with the Ohio Legislature, our work on behalf of Ohio citizens, whether it be addressing school to prison issues, or sentencing reform issues, or issues pertaining to taxes on legal services—those kinds of issues are all around us. We tend to sometimes work a bit in the background and I think that the public and our members don't always know that.

If you were trying to convince a non-member to join, what would you say?

RK: If a legal professional is considering joining the OSBA, I would say a couple things. First, you will receive tremendous benefits from our organization, whether you need help with legal research, whether you need help finding a job, whether you need some breaks in getting your CLE, whether it would be member benefits; there are many reasons personal to you to become a member. But there's something that I think is more important, and that is to join the cause to move the process of justice forward, to be involved with improving our profession and making our system of justice better for those who live in Ohio.

How do you see the legal profession changing over the next five years?

RK: Our largest issue will relate to the computer. The computer continues to be, in many ways, I think, in its infancy. What we are seeing in the legal profession with respect to companies like LegalZoom, RocketLawyer and Avvo, I believe is only at its beginning. Anticipating changes that will come through the computer and how people will be able to use the computer—lawyers and clients and courts—that's going to be our biggest issue to contend with for the next several years.

What do you do when you're not working or volunteering?

RK: I love to play golf during nice weather. It's probably too time consuming and I'm way too bad at it, but I enjoy it very much. Some of the best friends I've made in my life have been as a result of golf. I also love to read. I'm constantly reading or listening to a book—almost every moment when I'm not with family, working or golfing. I also spend time with my wife Jean, three wonderful kids and four grandchildren, including twins born just this summer.

Why did you want to be president of the OSBA?

RK: Some might think I'm a little crazy, which I am, but as I became more involved with the state bar association, I became more aware of the wonderful work that the state bar does. And I will tell you that I probably would not have agreed to do this were it not for the fact that we have such an excellent staff at the OSBA. I really just thought that I might be able to make a difference for a couple of years. I think I have some skill in leadership, and I'm trying to exercise whatever skill I have in that regard to see if I can help our organization and our members move forward.


WE ALL SHOULD
TRY TO LEAVE
OUR COMMUNITY
BETTER THAN
WE FOUND IT.

What issues do you intend to work on during your term?

RK: **The first is to work very closely with the Futures Commission**, researching how our profession will change over the next few years and how we want to respond to those changes. One of the items that we'll be looking very closely at is organizations that, through the Internet, have come into our state and have begun competing with lawyers in our communities, whether those organizations be Avvo or LegalZoom or RocketLawyer or others, we are looking at ways those organizations may help the public, but at the same time, looking at ways that we may want to recommend to the Ohio Supreme Court or state legislature that those organizations be regulated.

The Ohio State Bar Association also will continue to be deeply involved in Ohio's struggle with the opioid epidemic. That epidemic has been described as one of the largest legal and medical challenges we've had in at least a generation. Ohio is the epicenter of that epidemic, so we will be talking with the Ohio Supreme Court, the Ohio Legislature, the Attorney General and others about ways our members and the state bar can be involved in solving those issues, especially on the legal side because it's pretty clear that harsh sentences are not the answer. We need to educate, inform and collaborate with leaders across the state to get this epidemic behind us.

I would like to continue past president John Holschuh's work on access to justice, but this is not my effort, and not solely John Holschuh's effort. It is the effort of the Ohio State Bar Association and the entire legal community to find ways to increase access to justice for those who have not had access or sufficient access. Not only for people who fall below the poverty line, but also for people of modest means. We are working closely with the Ohio Supreme Court, the Ohio Legal Assistance Foundation, the Ohio State Bar Foundation and many others across the state. I intend to make sure that our bar association continues working on those issues.

I would also like to see us redouble our efforts in diversity. We've done a terrific job in diversifying our board and our staff. I recently met with leaders of the African-American Bar Associations across the state. We all agreed to continue talking with one another to strengthen our relationships and find ways in which we can collaborate. We will also be meeting with leaders of other minority bars, such as the women's bar associations, LGBT bars, Pan-Asian Bar, and Latino bar associations, looking for ways to collaborate with one another to better serve the public and their various audiences.

Can you tell us about a rewarding case you handled?

RK: The most rewarding cases I've handled have been those related to resolution of disputes between shareholders of closely held companies. The disputes often involve family members or friends, and they can be very painful—not unlike domestic relations matters. Assisting individuals with disputes such as those generally helps preserve the company, maintain

CAPTIONS

Left Page

*(Bottom left)*Ron celebrating his OSBA presidency with his family. *(Bottom right)* Ron having fun with fellow Board of Governors members Randall Comer and Kris Burkett.

Right Page

(Bottom left) Ron and Jean, his wife of 34 years. *(Top right)* Ron and past president John Holschuh Jr. *(Bottom right)* Ron with law partner Jeff Casto on a cruise ship in Germany.

jobs, and begin a healing process between people that probably should have started long before.

What advice would you give to a new attorney?

RK: As someone who has mentored new attorneys for most of my career, it is very important that you find older, more experienced bar members who are interested in helping you and giving you advice. Establish friendships and relationships with those people. Do not try to do it on your own. If you're going to hang out your shingle, it's absolutely essential that you make those friendships and connections. The best way to do that is to become involved in the Ohio State Bar Association and to be involved in your local bar associations.

How do you feel about your upcoming year as president?

RK: I am just absolutely delighted and thrilled to be the president of the state bar. I was going to say it's a dream come true, but really, it's a dream that was beyond my dreams. I had no idea that I would ever have this opportunity in my profession or my career. And to think that I am sitting here and able to work with such fine people with so many wonderful talents from across our great state is beyond anything I could have ever imagined. I look forward to meeting and working with our members.

Author bio

Nina Corbut is the editor of Ohio Lawyer at the Ohio State Bar Association.

8 THINGS YOU MIGHT NOT KNOW ABOUT RON KOPP

1 He's not always serious.

2 He used to train horses.

When we asked Ron to tell us something about him that others probably wouldn't know, he responded: "When I was a kid, I trained horses. My first job was cleaning out 60 horse stalls a day during the summer. Some people say that I've never really changed, and that I'm still shoveling it."

3 He's a gentleman.

Ron took us to the Summit County Courthouse so we could see the Court and get pictures of him in one of the hearing rooms. As we all filed into the elevator, the doors were almost closed, when Ron reached forward to hold the door open for a young mom who had her hands full with an infant in a carrier and a young toddler in tow. Ron held the door for her to step onto the elevator and also held the infant in the carrier for the elevator ride. The mom was thankful, but it was second nature to Ron. It was as if this was something all people do.

4 He is a family man.

Ron and Jean, his wife of 34 years, have two daughters, one son and four grandchildren.

5 He loves to travel.

Ron loves to travel with his wife, sometimes for business, sometimes for pleasure. Among many other places, he has traveled to all parts of western Europe, Scandinavia and Peru.

6 He likes America.

The band.

7 He knows his ancestry.

When he was in his 20s, Ron took an interest in trying to understand his roots, so he started interviewing his grandparents and other family members to gather information about his heritage. As he got older and spent more time at his job and with his family, he took a break from his research, but picked it back up in 2006, when he could do more research online. Ron said that this opened up a whole new world. He discovered one line back to the 1500s, but the one brick wall that he could not get through was finding where the "Kopp" ancestors were from. After many years, in 2012, he discovered that his great great great grandparents were from southwestern Germany. He was able to contact someone in that area, who helped Ron find out more information about his ancestors, dating back to the 1500s. Ron discovered that his family was from the small town of Gultstein.

In 2015, Ron and his wife visited the town and reconnected. They found the address of his relatives, and visited the site, where part of the barn they owned was still standing. They also found the church where most of his Kopp ancestors were baptized, married, etc.

Ron also discovered that his third great grandparents eventually moved to Massillon, Ohio, with their eight children. After they arrived in Massillon, the mother, father and four of the children died from typhoid fever within 30 days of one another. Ron visited their graves in Massilon cemetery, and was moved by the experience, as these ancestors are the reason he is here today.

8 He loves Ohio colleges.

He graduated from Miami University, and then attended The Ohio State University Moritz College of Law.

WHAT EVENTS WILL RON BE INVOLVED IN DURING HIS TERM AS OSBA PRESIDENT?

- **Acts as the primary spokesperson for the OSBA on major issues or programs**
- **Visits newspaper editorial boards and other media people to discuss the OSBA's current issues**
- **Presides at all Board of Governors meetings**
- **Presides at all Council of Delegates meetings**
- **Appoints committee and section chairpersons**
- **Attends all 18 district meetings to deliver a "State of the OSBA" address**
- **Visits all Ohio law schools to meet with students and faculty to encourage their membership in the OSBA**
- **Speaks at two Ohio Supreme Court Induction Ceremonies**
- **Authors the "President's Perspective" in *Ohio Lawyer***
- **Attends two National Conference of Bar Presidents meetings**
- **Plans and presides over functions at the OSBA's annual meeting**
- **Attends the Great Rivers Bar Leaders' Conference**
- **Attends ABA Day in Washington, D.C.**
- **Selects the recipient of the Ohio Bar Medal**
- **Participates in the annual Bench-Bar-Deans Conference**
- **Sits on several OSBA affiliate boards**
- **Appoints OSBA members to task forces, special committees, advisory committees and commissions**

When are dismissals not reviewable when combined with an order to transfer?

By Thomas J. Intili, Esq.

It is hornbook law that a federal district court's case dismissal for lack of personal jurisdiction is a final judgment reviewable on appeal.[1] It is equally well settled that district court case transfers[2] for the convenience of the parties or the witnesses are not reviewable.[3]

Section 1631 of the U.S. Code authorizes district courts to transfer a case to another district court to cure want of personal jurisdiction. Until recently, it was an open question whether transfer for want of jurisdiction, as opposed to outright dismissal, was reviewable in the Sixth Circuit Court of Appeals. That question was answered in the negative in Kinder v. City of Myrtle Beach.[4]

In the late morning on Oct. 10, 2009, Deana Kinder, 45, of Middletown, Ohio, was vacationing in Myrtle Beach. Weeks earlier, she watched a television commercial promoting Myrtle Beach as a prime fall vacation destination. Moved by the advertisement, Kinder booked a Myrtle Beach vacation for herself and her family.

October 10 was a perfect beach day. After finding public parking, Deana and her children walked with arms full of beach gear from the parking lot, down a paved public walkway, to the beach, when suddenly, she stepped into a pothole and fell. On her way down, her foot became lodged in the hole, causing her left leg to twist, torque and fracture severely. She was taken by ambulance to the local hospital where surgeons attempted unsuccessfully to repair the fracture. Because the fracture was not healing, the University of Cincinnati Medical Center had to revise the surgery. The second operation was only partly successful. Today, Kinder can ambulate with a cane only short distances, otherwise she requires a walker. Additionally, she has a pronounced surgical scar on the top of her left leg from mid-thigh to her shin.

In October 2011, Kinder and her husband, Anthony, sued the City of Myrtle Beach in the U.S. District Court in Cincinnati for negligence and loss of consortium. The city quickly moved to dismiss for lack of personal jurisdiction. In its motion, the city argued that its contacts with the state of Ohio were so minimal that litigation against it in Cincinnati was both unfair and unconstitutional.

Recognizing that discovery would be necessary to test the city's arguments, the district court entered a pretrial order affording the Kinders the opportunity to procure evidence limited to the issue of personal jurisdiction. Soon thereafter, the Kinders served Myrtle Beach with interrogatories and document requests specific to personal jurisdiction. They also perused the Myrtle Beach Code of Ordinances.

Within the code are two tax ordinances: one promulgating a one percent sales tax, and another establishing a 0.5% accommodation tax. According to the express language of these two tax ordinances, all revenue collected pursuant to them must be spent out-of-state to advertise and promote the city as a travel destination. A third ordinance designates the Myrtle Beach Area Chamber of Commerce as the city's sole and exclusive agent for out-of-state advertising and promotion.

In response to the Kinders' document requests, the city produced more than 400,000 documents. Those documents proved that the city collected and remitted $19,000,000 of sales tax revenue, and $2,000,000 of accommodation taxes, to the MBACC *annually*. During the one-year period preceding the Kinders' Myrtle Beach vacation, the MBACC spent $419,000 just for television advertising in Ohio. It paid Ohio vendors another $411,000. It also spent $1,027,000 in nationwide print and online advertising, at least a portion of which was distributed or circulated in Ohio.

In addition to the foregoing financial records, the MBACC produced copies of its newsletters, one of which announced its engagement of Fahlgren Mortine, a Columbus-based public relations firm, as its out-of-state tourism agency of record. In explaining its selection of the Fahlgren firm, the MBACC explained that "they came out on top by every measure, including one unexpected factor: their location in the heart of one our top feeder markets."

Despite the city's continuous and systematic contacts with Ohio and the direct relationship between those contacts and the Kinders' presence in Myrtle Beach, the district court in Cincinnati held that it lacked personal jurisdiction over the City of Myrtle Beach.[5] Instead of dismissing the case, however, the court transferred the case to the U.S. District Court for the District of South Carolina, where the Ohio court felt the case belonged.

Not wishing to litigate in a forum far from its trial witnesses, both lay and expert, the Kinders appealed to the Sixth Circuit with the 30-day period allotted by the Federal Rules of Appellate Procedure. In the meantime, however, the Ohio district court physically transferred the case's original papers to South Carolina. According to the Sixth Circuit, this physical transfer deprived it of appellate jurisdiction. Quoting a Section 1404 case, the Sixth Circuit held that "[i]t has long been clear that physical transfer of the original papers in a case to a permissible transferee forum deprives the transferor circuit of jurisdiction to review the transfer."[6]

For federal civil practitioners, Kinder is both a landmark decision and a beacon for the unwary. It is a clear message to federal district judges that they can avoid appellate review of decisions regarding personal jurisdiction merely by affixing to those decisions a Section 1631 order of transfer. It also teaches federal practitioners desirous of preserving appellate review not to request transfer as an alternative to dismissal, particularly where the transferee court is likely to be beyond the territorial limits of the circuit court in which the transferor court sits.[7]

Look for Kinder to begin showing up in future decisions and in the legal literature soon. In all likelihood, it marks the end of appellate review of district court rulings on personal jurisdiction.

Author bio

Thomas is a founding member of Intili & Groves Co., LPA, in Dayton. He practices in the areas of medical malpractice, personal injury, complex litigation and more. Additionally, Intili volunteers for the Greater Dayton Volunteer Lawyers Project and is an avid CLE speaker. He can be contacted at tom@igattorneys.com.

Endnotes

[1] See, e.g., Intera Corp. v. Henderson, 428 F.3d 605, 614 (6th Cir. 2005), cert. denied, 547 U.S. 1070 (2006).

[2] See 28 U.S.C. § 1404(a), or to cure improper venue, see, 28 U.S.C. § 1406.

[3] See Lemon v. Druffel, 253 F.2d 680, 683 (6th Cir. 1958) (construing Section 1404(a)); Dearth v. Mukasey, 516 F.3d 413, 416 (6th Cir. 2008) (construing Section 1406).

[4] 6th Cir. No. 15-3480, 2015 U.S. App. LEXIS 12874 (July 20, 2015).

[5] Kinder v. City of Myrtle Beach, S.D. Ohio No. CV 11-712, 2015 U.S. Dist. LEXIS 39619 (Mar. 27, 2015).

[6] Kinder v. City of Myrtle Beach, 2015 U.S. App. LEXIS 12874, at *2.

[7] See Newberry v. Silverman, 6th Cir. No. 14-3882, 2015 U.S. App. LEXIS 8904 (May 29, 2015). (wherein the Sixth Circuit reviewed a transfer within the circuit from Kentucky to Ohio after finding a lack of personal jurisdiction under Kentucky's long-arm statute).

Punishing self-dealing fiduciaries

By John Lewandowski

A fiduciary is "a person having a duty to act primarily for the benefit of another."[1] In the probate world, a fiduciary relationship is usually found where there is a power of attorney (agent-principal) or a trust (trustee-beneficiary). Those bound by fiduciary ties are held to particularly high moral standards: It is a duty that encompasses not just honesty alone but is "the punctilio of an honor most sensitive."[2] The reason for this heightened standard is the "special confidence and trust" placed on the fiduciary results in a position of "superiority and influence" over the principal.[3]

Ohio law reinforces the heightened fiduciary standard. For example, the transfer of assets between a fiduciary and principal is viewed with great suspicion.[4] As such, case law has developed a burden-shifting paradigm that places on the fiduciary the onus of showing the fairness and honesty of any transaction in which the fiduciary benefitted during the course of the fiduciary relationship.[5]

Until recently, a principal's remedy for breach of fiduciary duty was—for all practical purposes—limited to getting made whole. But recent case law and changes to the Revised Code now authorize an award of attorney fees, and possibly even treble ("triple") damages, against a bad-acting fiduciary.

Attorney fees

In the ordinary course of events, each party is to bear its own litigation costs.[6] Affectionately known as the "American Rule," attorney fees are typically not awarded to the prevailing party.[7] An exception to the American Rule is a finding of conduct that amounts to bad faith.[8] Bad faith is what has traditionally been used to request an award of attorney fees against self-dealing fiduciaries.

The criterion for a finding of bad faith is unclear. The Supreme Court has said bad faith "imports a dishonest purpose or some moral obliquity"[9] The Supreme Court has also said what bad faith *is not*: It is not simply bad judgment, it is not merely negligence, and it has no restricted meaning.[10] Neither of those guideposts are particularly helpful. Further compounding the imprecise standard is that a finding of bad faith is at the mercy of a trial court's unfettered discretion.[11]

The ambiguity surrounding bad faith's

definition, combined with a trial court's complete discretion, has impeded the ability to assess attorney fees against self-dealing fiduciaries. It has also led to an inconsistent application of bad faith throughout the state.

The state legislature has cured this problem. Another exception to the American Rule is express statutory authorization allowing recovery of attorney fees and litigation-related costs.[12] In 2007, Ohio enacted its version of the Uniform Trust Code.[13] It has been interpreted to award attorney fees to trust beneficiaries who prevail in litigation against self-dealing trustees.[14] Ohio enacted the Uniform Power of Attorney Act in 2012,[15] which provides for the award of a principal's attorney fees and costs related to a successful breach of fiduciary duty claim against a self-dealing agent.[16]

Thanks to statutory authorization from Ohio's Trust Code and the Uniform Power of Attorney Act, the award of attorney fees against self-dealing fiduciaries is no longer subject to the vagaries of "bad faith." But that is just the statutory start. Recent case law goes much further.

Treble damages

Ohio Revised Code 2307.60 provides a civil action to those deprived of property due to a theft-related offense. It is often referred to as civil conversion. Ohio Revised Code 2307.61(A)(1)(b) awards treble damages for civil conversion, even if the property is recovered in full.

In Cartwright v. Batner, a civil conversion claim was brought against a self-dealing fiduciary.[17] The plaintiff sought an award of both attorney fees and treble damages.[18] The trial court dismissed the conversion claim, which also disposed of the treble damages remedy. The second appellate district reversed the trial court's dismissal of conversion, finding "no reason why R.C. 2307.61 would not apply to [situations of self-dealing fiduciaries]."[19] The appellate court then remanded the conversion claim to proceed *in addition to* the other breach of fiduciary duty claims brought against the bad actor (who was both a power of attorney and trustee).[20]

The upshot is this: Cartwright allowed remedies of *both* statutory attorney fees (Uniform Power of Attorney Act and Uniform Trust Code) and treble damages (civil conversion). The Supreme Court declined review of Cartwright in 2015 and has thus opened the door for the award of treble damages against self-dealing fiduciaries.[21]

That is quite the hammer. From a potential plaintiff's perspective, this is truly a game changer. Under the "bad faith" standard, it might not have been worth the hassle to pursue a fiduciary who misappropriated $20,000. But statutorily created attorney fees and the possibility of treble damages changes the economic analysis in deciding whether to take a case. Attorneys who counsel fiduciaries, conversely, should caution of the drastic penalties that await self-dealing. One would think the prospect of attorney fees and treble damages would serve a deterrent to bad conduct. Perhaps that is what is driving the evolution of Ohio law.

Author bio

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Endnotes

[1] Strock v. Pressnell, 38 Ohio St.3d 207, 216 (1988).

[2] Meinhard v. Salmon (1928), 249 N.Y. 458, 464 (J. Cardozo).

[3] Stone v. Davis, 66 Ohio St.2d 74, 78 (1981).

[4] In re Guardianship of Simmons, 6th Dist. No. WD-02-039, 2003-Ohio-5416, ¶ 26.

[5] Krischbaum v. Dillon (1991), 58 Ohio St.3d 58.

[6] Pegan v. Crawmer, 79 Ohio St.3d 155 (1997).

[7] Id.

[8] Id., at 156.

[9] State ex rel Bardwell v. Cuyahoga Cty. Bd. Of Commrs., 127 Ohio St.3d 22, 2010-Ohio-5073, ¶ 8 (Citations omitted.).

[10] Id.

[11] Sorin v. Warrensville Hts School Bd of Edn., 46 Ohio St.2d 177 (1976).

[12] Pegan v. Crawmer, 79 Ohio St.3d 155 (1997).

[13] (R.C. 5801.01 - 5811.03).

[14] Jakubs v. Borally, 8th Dist. No. 101756, 2015-Ohio-2696, ¶ 9-14.

[15] R.C. 1337.21-1337.64.

[16] R.C. 1337.37.

[17] Cartwright v. Batner, 2nd Dist. No. 25938, 2014-Ohio-2995

[18] Id.

[19] Id. at ¶ 97 (brackets supplied to summarize the nature of the case).

[20] Id.

[21] Cartwright v. Batner, 141 Ohio St.3d 1455, 2015-Ohio-239.

Law students depose doctors:

Capital University Law School's new depositions course pairs law students with medical residents from Grant Hospital

By Zachary Pyers, J.D. LL.M; Kevin Foley, J.D; Rachel Janutis, J.D. and Sarah Sams, M.D.

Legal education naturally lends itself toward an interdisciplinary approach, combining law with another academic discipline. Lawyers in practice are seldom called on to simply know or understand the law. Rather, they must apply it in the context of specific facts and circumstances and action on their parts. Whether a patent attorney with engineering issues, a business transactions attorney with corporate client needs, or a medical malpractice attorney with medicine, attorneys must also master critical non-legal disciplines to excel.[1]

It is no surprise that there has been a rise of interdisciplinary education within law schools. Law schools introduce other disciplines to help prepare students for practice. For years, many schools have offered joint degree programs, such as joint J.D./M.B.A. degrees, as well as courses studying the intersection of law and fields such as economics, philosophy and history.[2]

Likewise, in recent years, law schools have attempted to broaden their curricula to increase opportunities for professional skills training and professional ethics and values formation to help ensure that graduates are "practice ready."[3] Law schools have continued to grow their skills-based course offerings, an effort triggered by several factors. Influential organizations such as the Carnegie Foundation and the Clinical Legal Education Association (CLEA) have issued reports calling for change in legal education.[4] In March 2014, the Council of the Section on Legal Education and Admission to the Bar of the ABA adopted revised Standard 303, which mandates that, effective beginning in academic year 2016-2017, all accredited law schools must offer six credit hours of experiential learning as a requirement of graduation.[5] Additionally, structural changes in the market for legal services have resulted in more students entering small to medium law firms and solo practice.[6]

Extending its skills-based course offerings, Capital University Law School recently introduced an innovative course in depositions. While this movement is not entirely novel, Capital's course is unique because it uses an interdisciplinary approach to skills training and professional development. At the invitation of the Family Medical Residency Program at Ohio Health's Grant Hospital in Columbus, one of Capital Law School's downtown neighbors, Capital launched an interdisciplinary deposition course aimed at providing cross-training to medical residents and law students. The process is designed as an academic exercise not only for the law students, but also for the residents.

The course provides students with a developed knowledge and understanding of deposition strategies, as well as with the opportunity for hands-on application of the substantive and procedural law surrounding lay and expert depositions. Each student will be required to take and defend a lay and an expert deposition, prepare a deposition outline for those depositions they take, and prepare a deposition summary for all their deposition simulations. In conjunction with Grant Hospital's Medical Program, the final videotaped class will consist of expert depositions (taking and defending) employing Grant Medical Residents as deponents and expert witnesses.

Depositions course structure

In law school many students may not have even seen a deposition transcript, let alone witnessed a deposition. The course is designed to introduce law students to the process: identifying deponents, preparing deposition outlines, identifying goals of depositions, questioning tactics and strategies, defending the deposition, knowing the difference between lay and expert witness depositions and other common deposition issues. It also provides practical experience through numerous mock depositions. As in traditional law school skills courses and practicum, the students generally play the role of the attorney taking the deposition, the attorney defending the deposition and the witness. This process helps familiarize law students with asking deposition questions and defending depositions.

The final exam is what distinguishes this course from other law school skills courses. The final exam requires students to take and defend a medical expert's deposition in a mock medical malpractice case. The residents from Grant Hospital Family Medicince Residency Program play the role

of both the defendant doctor in the medical malpractice action, as well as the plaintiff's expert witness. The law students are required to meet with their witnesses prior to the exam, prepare them for the deposition process and anticipate the deposition questions. Then, after the students have had the opportunity to prepare their witnesses, they take and defend a deposition. Immediately following the final exam exercise, individual feedback is provided both to the law students and to the residents on the exercise.

Following the individual feedback sessions, the entire class of law students and residents further discuss the exercise and the deposition process. By meeting collectively, the law students are better able to understand the perspective of the resident as the deponent, and the residents are better able to understand the perspectives of the law students as lawyers.

Benefits to the students and residents

The greatest benefit to law students is a simulated experience that more accurately mirrors a live-client experience than most traditional law school skills courses and practicum. Above all, the law students depose real expert witnesses. Although the final exam is based on a mock case file, the medical issues are real. The case file from which the students work provides a richer experience because it has been jointly developed by lawyers and physicians to ensure authenticity in the medical and legal issues. Further, in responding to deposition questions and assisting in witness preparation, the residents are able to provide background medical knowledge that only comes from years of medical training and to provide responses to deposition questioning that more closely replicate responses a lawyer is likely to encounter during an expert deposition. This level of authenticity cannot be replicated by law students or other lay people as witnesses. Moreover, by providing this course as an opportunity for cross-training to medical residents and law

students, the residents become invested in the process in a way that ensures meaningful and authentic participation on their end. Medical residents participate in this course as part of the practice management component of the Grant Family Medicine Residency Program. They receive instruction on how physicians interact with the legal system during the practice management boot camp and practice management monthly sessions of the residency program. As such, by the time the residents participate in the cross-training exercise with the law students, the residents have an appreciation for the fact that—as physicians—they will likely be deposed at some point in their medical careers. Thus, residents have a context for the exercise and are likely to take the exercise seriously while being incredibly thoughtful as they prepare for it. In sum, allowing the law students to prepare the residents for the deposition process gives them a new professional client experience that is otherwise difficult to imitate in an academic setting.

The residents also benefit from this interdisciplinary process, and it allows them to interact with professionals from a different field. In the process of the deposition exercise, the residents become the experts on the medical issues, and in turn educate the law students on the relevant underlying medicine and factual background.

While the depositions course has a unique opportunity to offer both a skills-based interdisciplinary course for the law students, the interdisciplinary education also benefits the residents. With legal educators constantly trying to innovate the educational process for students, it is inevitable that such opportunities for additional skills-based interdisciplinary courses exist and likely will be used in the future.

Author bios

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Dr. Sarah Sams is the associate program director of the Grant Family Medicine Residency program at Grant Hospital, an OhioHealth facility.

Endnotes

[1] Kim Diana Connolly, *Elucidating the Elephant: Interdisciplinary Law School Classes*, 11 Wash. U. J.L. & Pol'y 11, 13 (2003).

[2] *The Future of the Law School Curriculum*, 69 Tex. B.J. 764, 766 (2006).

[3] Michele Mekel, J.D., M.H.A., M.B.A., *Putting Theory into Practice: Thoughts from the Trenches on Developing A Doctrinally Integrated Semester-in-Practice Program in Health Law and Policy*, 9 Ind. Health L. Rev. 503, 507 (2012).

[4] Roy Stuckey, et al., *Best Practices For Legal Education: A Vision and a Road Map* (CLEA 2007); Charles R. Foster, et al., *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007).

[5] See ABA Standard for Approval of Law Schools 303(a)(3);

[6] See generally "Employment Rate for New Law School Graduates Rises by More than Two Percentage Points—But Overall Number of Jobs Falls as the Size of the Graduating Class Shrinks," National Association for Law Placement, July 30, 2015, available at www.nalp.org/classof2014 (noting that "the number of jobs in small firms has generally been increasing in recent years, and for every job in a large firm taken by a Class of 2014 graduate, about two were taken in a small firm").

Legislative Updates

The legislative session as high drama

By Todd Book

It has been said that Washington, D.C., is Hollywood for common-looking people. It is where the less glamorous political types can be objects of media attention and sort of become famous. Ohio's state capital is a smaller version of Washington. In my humble opinion, however, all of the Ohio legislative members are above average looking. (Just in case one of them would happen to read this.)

So with Columbus being a mini-Hollywood, it shouldn't surprise us that the Ohio legislative session can be compared to a four-act theatrical production with a few intermissions. Like in a play, the First Act is focused on letting the audience know who the players are and what problems will be addressed. The session begins with the swearing-in ceremony, the election of caucus leaders, and the announcement of the competing legislative priorities. The majority House Republicans and majority Senate Republicans each have their own view of what should happen. Likewise, the minority House Democrats and Senate Democrats lay out their views of what Ohio should look like. The stage is set for these competing personalities and viewpoints to be developed over the coming acts.

The second legislative act, "the Budget," begins in February and lasts until June 30 of the first year of the two-year session. This is also when a major player is introduced into the plot line. The Governor introduces his version of the Budget. He normally ties the introduction to his State of the State address where he lays out his vision of how this play should proceed. As the House, Senate and Governor engage in their complicated dance, the questions of how we as a state are going to raise and spend our money are answered. After the Budget, we take our first intermission for summer break.

The third act begins in the Fall of the first year and lasts until Spring of the second year. The budget is approved and the members are focused on making law. It is my favorite part of the play because it is when many of the substantive bills move through the process. During this time all kinds of plot lines develop as different bills move or stall in the legislature. The second intermission is after act three and also coincides with the beginning of summer.

After the general election, the fourth act, known as the lame duck session, begins. Just like a good play, issues need to be resolved in the final act. Even though the lame duck session only comprises about a month and a half (6%) of the two-year session, it is where most of the high drama occurs.

Typically, one-third of all bills passed during the entire session are passed during lame duck. The winners and losers are decided during that period. Many commentators object to lame duck as a dangerous time when bad law is made; however, like it or not, the lame duck session—the final act—is here for the foreseeable future.

(cont. on page 35)

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So as act three concludes and we break for the second intermission, I am working to ensure passage of the Ohio State Bar Association's priority bills during the final act of the legislative play. Here is a scorecard of where our priorities stand and a foreshadowing of how the story may conclude.

Priority OSBA Bills

SB 181 – passed and signed into law.

Limited Liability Company Law (Obhof L). To prescribe the fiduciary duties of corporate and limited liability company officers, to specify that officers are not required for limited liability companies, to permit a written waiver or elimination of the fiduciary duties of limited liability company members, managers or officers, to clarify when a limited liability company manager's or officer's duties can be the same as a member's duties, to declare the policy of the Limited Liability Company Law generally to give maximum effect to freedom of contract, and to make other changes regarding corporations and limited liability companies.

HB 463 – rolled into HB 390; passed and signed into law.

Mortgage Foreclosure - Abandoned Property (Dever J). To establish expedited actions to foreclose mortgages on vacant and abandoned residential properties, to permit private selling officers to conduct judicial and execution sales of real property, to state the intent of the General Assembly regarding mortgage foreclosure actions, to revise the Commercial Paper Law relating to mortgages and lost instruments, and to make other changes relative to foreclosure actions.

SB 171 – passed and awaiting the Governor's signature.

Uniform Interstate Depositions-Discovery Act (Seitz B). To enact new section 2319.09 and to repeal section 2319.09 of the Revised Code to enact the Uniform Interstate Depositions and Discovery Act.

SB 232 – passed the Senate and the House Judiciary Committee; awaiting House vote during Act IV.

Death - Designation Deeds (Bacon K). To amend sections 5302.23 and 5302.24 of the Revised Code to amend the law related to transfer on death designation deeds and affidavits. Also added the Artificial Reproduction Technology (ART) Amendment in committee.

SB 257 – passed the Senate unanimously; beginning hearings in the House. Expect passage during lame duck.

Recorded Real Property Instruments (Seitz B). To create a presumption of validity of recorded real property instruments, reduce the time period for curing certain defects related to those instruments, and provide constructive notice for those instruments.

HB 432 – passed the House; beginning hearings in the Senate. Expect passage during lame duck.

Decedent - Estate (Cupp). To revise the law governing decedent's estates by making changes in the Ohio Trust Code, the Probate Law, the Uniform Principal and Income Act, the Transfers to Minors Act, and the Uniform Simultaneous Death Act.

HB 545 – beginning hearings in the House; recently introduced.

Benefit Corporation (Driehaus D). To allow a corporation to become a benefit corporation.

Follow me on Twitter to get updates @ToddBook.

Author bio

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July 29

Booze, Bullets & Bingo*
August 29

Elder Law

Elder Law Institute Highlights
July 28 (Multiple Locations)

Estate Planning, Trust & Probate Law

Nuts & Bolts of Wills & Trusts*
July 27

Nuts & Bolts of Wills & Trusts
September 9

Advanced Probate
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Family Law

9th Annual Practice Update for Family Law
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Juvenile Law
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Labor & Employment

Basics of Employment Law*
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Law Office Management

Law Office Management Affinity
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Litigation

Supreme Court Decisions
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View From the Bench
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Forensics Conference
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Taking & Defending Effective Depositions*
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(Multiple Locations)

Professional Conduct

Roger Hall Professional Conduct
August 17

Real Property

Commercial Real Estate
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