

# OhioLawyer

THE OHIO STATE BAR ASSOCIATION MEMBER MAGAZINE

OCT-DEC 2019

VOL. 33, NO. 4  
[www.ohioabar.org](http://www.ohioabar.org)

## The Modern Courts Amendment *at* 50

---

Introducing the 2019  
Economics of Law Study

---

Meet the Candidates for  
OSBA President-Elect

---

IP Attorneys Give Back  
Through Patent Pro Bono  
Program

# The difference between covering a claim and caring for you.

**oblic**

Ohio Bar Liability Insurance Co.

SERVING OHIO'S LAWYERS AND  
LAW FIRMS FOR 40 YEARS

When it's your responsibility to protect the interests of others, your own interests can quickly get left behind. We're here to ensure they don't – we focus on you, so you can stay focused on your clients. We're OBLIC – the only professional liability insurance provider exclusively devoted to leading the effort of protecting Ohio's lawyers and law firms.

**Let's talk. Call 800.227.4111 or visit [oblic.com](http://oblic.com).**

# Table of Contents



4

## President's Perspective

*By Eleana Drakatos*

Effective OSBA lobbying means no tax increase for lawyers in 2020



6

## Meet the Candidates for OSBA President-Elect

Learn more about your president-elect candidates David Lefton and Victor Perez



10

## The Modern Courts Amendment at 50

*By Justice Patrick Fischer, Judge David Hejmanowski, Kylie Conley, Paul Kerridge & Ronald Wadlinger*

A look back at a major overhaul to Ohio's judicial system, and a glimpse at the future of the practice of law



16

## Introducing the New Study of the Economics of Law Practice in Ohio

The OSBA's newest study to help attorneys navigate the business of law in the state

### Ohio Lawyer Staff

Editor: Annie Yamson  
Graphic Designer: Laura Donovan

### OSBA Officers

President: Eleana Drakatos, Columbus  
President-elect: Linda Teodosio, Columbus  
Executive Director: Mary Amos Augsburg

### Advertising Sales and Editorial Offices

Ohio State Bar Association  
P.O. Box 16562  
Columbus, Ohio 43216-6562  
(800) 282-6556; (614) 487-2050  
Advertising: advertising@ohiobar.org  
Editorial: Editor@ohiobar.org  
Printing: Hopkins Printing

### Content Advisory Board

Judge David Hejmanowski, Chair,  
Delaware  
Bradley Adams, DeGraff  
Carly Edelstein, Columbus  
Alicia Graves, Cleveland  
Paul Hervey, Canton

Chris Hollon, Dayton  
Jasmin Hurley, Columbus  
Angelica Jarmusz, Columbus  
Joe Ludovici, Chester, W.Va.  
Michael Miller, Columbus  
Judge James Stevenson, Sidney

# Table of Contents

- 18 Defeating Healthcare Plan Denials**  
*By Robert Armand Perez Sr.*  
Claim denials require prompt action for successful outcomes
- 22 Access to Justice**  
New USPTO program gives IP attorneys a unique opportunity to give back
- 24 Ohio Law Firms Suffer Cyber Breaches**  
*By Steve Couch*  
Lessons learned and how to limit risk
- 29 CLE Calendar**
- 30 Two Bites at the Same Apple**  
*By D. Michael Crites, Jennie Ferguson & Micaela Taylor*  
Supreme Court rules that defendants can be prosecuted by federal & state governments for the same crime  
*On the Blockburger Test by Carly Edelstein*
- 33 Legal Leaders**  
In memoriam, awards and community involvement of OSBA members
- 34 Movie Review: Two Views on "Dark Waters"**  
*By Chris Tavenor & Rob Brundrett*  
Two attorneys review the new Mark Ruffalo film with decidedly different takes
- 36 Ohio Courthouse Series**  
The OSBA travels to Logan County
- 40 Foundation News**  
Nominate an OSBF Fellow today
- 42 The Movement**  
OSBA members improve and advance the legal profession
- 44 Member Spotlight**  
Meet Stefan Thomas

## Editorial Offices

Ohio Lawyer (issn 1097-6493) is published quarterly by the Ohio State Bar Association, P.O. Box 16562, Columbus, Ohio 43216-6562. Phone: (800) 282-6556 or (614) 487-2050. Periodicals postage paid at Columbus, Ohio and additional offices. Ten dollars of dues pays your required subscription to Ohio Lawyer.

Ohio Lawyer is published as a service to members of the Ohio State Bar Association through their dues and is not available to nonmember attorneys. Governmental agencies and educational and legal research organizations may subscribe annually for \$35. Single copies to members and qualified subscribers are \$7.

©Copyright 2019 by the Ohio State Bar Association. All rights reserved. Any copying of materials herein, in whole or in part, and by any means, without

written permission, is prohibited. Requests for reprint permission should be sent to the Ohio Lawyer editorial offices.

Editor reserves the right to reject any advertising submitted for publication. While advertising copy is reviewed, no endorsement of any product or service offered by any advertisement is intended or implied by publication in Ohio Lawyer. Statements or expressions of opinion herein are those of the author and not necessarily those of the Ohio State Bar Association, its officers, staff or the board of editors.



**OHIO STATE BAR  
ASSOCIATION**  
Connect. Advance. Succeed.

## Artwork Credits

©shutterstock.com/g/randall+vermillion: Cover, 1, 10  
©shutterstock.com/g/aceshot: 1, 4  
©shutterstock.com/g/3dfoto: 1, 6, 7  
©shutterstock.com/g/quinky: 1, 16, 17  
©shutterstock.com/g/kucherav: 18  
©shutterstock.com/g/artfriday: 8  
©shutterstock.com/g/stockbroker: 8  
©shutterstock.com/g/sebra: 13  
©shutterstock.com/g/nivens: 22  
©shutterstock.com/g/alexander+geiger: 24  
©Shutterstock.com/g/grublee: 29  
©shutterstock.com/g/billionphotos: 30  
©shutterstock.com/g/ostill:34  
©shutterstock.com/g/redtbird02: 34  
©shutterstock.com/g/scott+book: 35  
©shutterstock.com/g/photobyphotoboy: 40  
©shutterstock.com/g/blankstock: 41  
©shutterstock.com/g/milos+cirkovic:42, 43  
©shutterstock.com/g/stockyimages: 45  
©shutterstock.com/g/gaudilab:45  
©shutterstock.com/g/jaririyawat: back cover



If you joined the Ohio State Bar Association's

— **Membership VP+ Plan** —

you're eligible for a no-cost, 30-minute

— **Practice Coaching Call™** —

with a Certified Atticus Practice Advisor.

Request your annual consultation at  
[AtticusAdvantage.com/OSBA](http://AtticusAdvantage.com/OSBA)

*"Atticus helped me take control of my practice and changed my life. They helped me to focus my efforts and implement best practices. My practice has tripled in size since I began working with Atticus. **I can't recommend them enough.**"*

OSBA Member - Attorney Timothy J. Moore, Bixler | Moore, Canton, OH



**SECURE YOUR CLIENT'S  
FINANCIAL  
FUTURE**

- Agreement Language & QDROs drafted by an ERISA Attorney
- Calculation of the Marital Portion of Pension & 401(k) Plans
- Litigation Support & Expert Testimony

*Their work is top notch and they are extremely responsive and always eager to discuss complex issues and provide straight-forward and expert answers and advice.*

Carl Murway, Taft Stettinius & Hollister  
Cleveland, OH



**QG | QDRO GROUP**

**(844) 721-6500**  
[qdgroup.com](http://qdgroup.com)

# Eleana Drakatos

President, Ohio State Bar Association



## Effective OSBA Lobbying Means No Tax Increase For Lawyers In 2020

If you are one of the countless OSBA member attorneys who answered our emergency dispatches in recent months and contacted your local state senator or state representative, THANK YOU!

Together, we defied the odds. We got policymakers from both political parties and two branches of government (the legislature and the executive) to reverse themselves on a policy they had implemented fewer than four months prior. And fortunately, because they listened to our concerns and were willing to work with us, we didn't need to involve the third branch of government (the judiciary) to get it done.

### **An Unfair Compromise**

I had quite a baptism into my term as OSBA President. Just 17 days after taking office, leaders in the Ohio House and Senate and the Governor's office were struggling to pass a state budget. They had missed their July 1 deadline by a couple of weeks and found themselves at an impasse over the administration of and eligibility for the state's business income deduction (BID). Many OSBA members take advantage of this deduction, along with accountants, real estate agents, retailers, and a variety

of other small business professionals. The BID provides a 100% income tax deduction on the first \$250,000 of business income derived from pass through entities, such as LLCs or LLPs in Ohio. Any income earned above \$250,000 is taxed at a flat 3% for those eligible.

The House wanted to lower the deduction across the board; the Senate did not. Mere hours before the two chambers finalized the bill, an unfair compromise was crafted: They would single out lawyers and lobbyists as just two professional groups that would no longer be able to take advantage of the BID. Why target lawyers? No real reason has been given, but the compromise bill advanced and the OSBA immediately went to work.

### **E Pluribus Unum**

The Board of Governors voted to invest in a comprehensive strategy with three components: a litigation strategy, a legislative strategy and a grassroots campaign. We set up an advocacy support fund and posted a toolkit to our website with talking points and sample letters. Even OSBA members who do not philosophically support the concept of the BID agreed that singling out

attorneys was unacceptable and no way to create sound tax policy.

In the end, E Pluribus Unum was the key to our success – we mobilized our membership, contacted law firms across the state and asked local, metro, affinity and specialty bars to rally their troops as well. There is no question, lawmakers heard from us in droves and it made an impact. On Nov. 6, the Governor signed a bill into law which reversed the budget amendment that caused all the trouble.

### **Silver Lining**

There is a silver lining in that the threat of the BID gave us an opportunity to demonstrate for policymakers, the good work we do for our clients, our communities and Ohio's economy. Over the last year, OSBA members have hired fellow associates and support staff, invested in office space and technology and given countless hours in pro bono service, nonprofit endeavors and through tours on local boards. Each letter and email sent improves the reputation of our profession and is an important reminder that lawyers are natural leaders in their communities, not political punching bags.

### Future Tax Changes on the Horizon

We want to keep this message and your stories at the forefront and maintain our momentum in the months and weeks ahead because all signs point to future efforts to reform the tax code. In fact, while the bill signed by the Governor restored the ability of lawyers to claim the BID, one change you will notice when you file your taxes is that you will be required to provide the tax department information about your occupation. This is the Ohio General Assembly's effort to collect more data and get a clearer picture on who benefits from the deduction and what it means for Ohio's economy.

This data will be scrutinized as there is still a desire among key lawmakers to reform the BID and to explore even broader tax policy changes that could impact our profession.

We could see future efforts to limit the BID, including lowering the income threshold, raising the flat rate percentage, limiting eligibility or adding requirements to claim it. We could also see a rehash of previous proposals to expand the sales tax to legal services, which as you know, the OSBA has vehemently opposed for many years.

### Strong, Engaged Membership = Our Best Defense

Our best defense is a strong, engaged membership. By now you should have received your membership renewal applications in the mail for 2020. Please be sure to renew and when you do, please also continue to support LAW PAC our political action committee.

We are also going to continue to maintain our advocacy support fund,

which we established in the wake of the BID situation. We are grateful to all who went above and beyond to contribute so that we could increase our lobbying efforts at the Statehouse as well as retain counsel to prepare for potential litigation had the legislative approach not gone our way. If you are interested in continuing to support that effort, you can still contribute online at [OhioBar.org/getinvolved](https://OhioBar.org/getinvolved).

I am grateful for your membership and your support. It gives the OSBA the muscle we need to effectively stand up for our profession against any future threats, legislative or otherwise. 🇺🇸

## — INTRODUCING —



# Ohio Notary Services

- Become an Online Notary
- Earn or Renew Traditional Notary Commission
- Order Supplies

Visit [www.BecomeanOhioNotary.com](http://www.BecomeanOhioNotary.com) to get started.



### About Ohio Notary Services

Ohio Notary Services, LLC is a unique, joint venture by the Akron, Cincinnati, Cleveland, Dayton, Toledo and the Ohio State bar associations to help you meet all your notary training and testing requirements under the new law. We bring extensive notary expertise and experience, statewide reach and unmatched convenience.



# Meet the Candidates for OSBA President-Elect



## DAVID H. LEFTON

I am excited to be running for President-Elect of the OSBA. Many years of membership, participation, and leadership in the OSBA

have taught me to serve the profession while working with other members, many of whom have become close friends. I have loved my experience and now I seek the opportunity to lead the OSBA.

### Lefton For Leadership

I have spent significant time during my 32-year career volunteering to serve attorneys across the country. Some of the highlights of my experience include:

- Current member of the OSBA's Board of Governors (BOG) and Council of Delegates;
- Chair of the ABA Solo, Small Firm and General Practice Section, which serves as the national voice for our nation's solo and small firm practitioners;
- Two-time Chair of the OSBA Solo, Small Firm and General Practice Section;

- Chair of the OSBA Economic Study, which under my direction won the ABA Solo Small Firm and General Practice National Bar Project of the Year award;
- Current Chair of the OSBA BOG Membership, Public and Media Relations and Publications Committee (Membership Committee).

I will use my OSBA and ABA experience to further serve you as President of the OSBA, which has a great tradition of success and is admired by bar associations across the nation.

Nevertheless, challenges face the Association. My primary focus, as President of the OSBA, will be directed toward stabilizing the OSBA's membership loss. To address this challenge, we need to listen to attorneys, be creative, nimble and quick to adapt. More and more attorneys are reluctant to join organizations unless they find affordable, valuable, easy to access benefits and leadership opportunities included with membership. Under my leadership, as Chair of the Membership Committee, the OSBA is exploring several new initiatives and I am ready to tackle this challenge.

Nobody does member benefits better than the OSBA, and I will help develop even stronger benefits for the 21st century lawyer.

### About Me

I was born and raised in Cincinnati and obtained my law degree at the University of Dayton School of Law. I have been a private practitioner my entire career and I am an equity partner at Barron Peck Bennie & Schlemmer, in Cincinnati. I have earned a peer-based AV rating by the Martindale-Hubbell Directory, and I am an Ohio Super Lawyer in the area of Estate Planning.

I am married, have two daughters and a son-in-law. Outside of work and the bar association I have been actively engaged in the community serving on the boards of several charitable organizations throughout the Cincinnati region. In my free time, I enjoy golfing, working out, traveling, spending time with family and friends and attending sporting events (I am an avid Buckeye fan).

### Conclusion

I will represent a forward-thinking Association that will continue to ensure OSBA members have a positive membership experience, just as I have. I humbly ask for your support of my candidacy.

For more information about me, please visit my campaign website at <https://www.leftonforosba.com/>.



Visit [OhioBar.org/Election](http://OhioBar.org/Election) to learn more about the candidates and the 2020 OSBA election.



## VICTOR H. PEREZ

Sixteen years ago, I appeared in my first Ohio Courtroom. I'll never forget the welcome I received. I was in one of my first pre-trial

negotiations with several well-established attorneys in my small county, Seneca.

However, an out-of-town attorney took over the discussions belittling the "small town country lawyers" in the room. Instinctively, I pointed out that until a week before that I was practicing in the small town of Chicago. Further, I pointed out that in the few days I had been here, it was clear that this local bar and Court were second to none.

That year, I also attended the OSBA's Convention for the New Lawyer Training in Columbus. There, I joined what was then known as the Juvenile Justice Committee. The comradery and class that I had experienced in Tiffin, was multiplied at that gathering. I was proud to be among those lawyers and I am proud to still be a member of this association.

Despite being from a smaller county, this association has provided me with the opportunity to serve two years as the chair of

the Juvenile Law Committee, a term on the Advisory Committee on Diversity Initiatives, several terms as a Delegate for District 5, and a current term on the Board of Governors for that same district that includes Seneca, Morrow, Wyandot, Marion and Delaware County. Now it offers me a chance to run for the officer of president-elect of the best bar association in the country.

As an OSBA member I have not only met many great people that happen to also be great lawyers, but I also have been able to learn much from them. This knowledge has ranged from the practice of law and questions of jurisdiction and procedure, to the history of Ohio's first female and minority lawyers, to the art of playing guitar.

In my practice, I have also learned that the privilege of our profession has been constant across generations, from 50 year practitioners to our young lawyers. All are important to maintaining the honor of this profession.

While my first duty is to my family, I like many lawyers serve my community. Whether it is coaching little league baseball, singing in the church choir, or sitting on the boards of the local school board or acting as voluntary lawyer for legal aid. Unashamedly, I was a Boy

Scout. Duty to God; Duty to Country and Duty to Others..

It is my belief that public service is how we best combat the caricatures that have long dogged our profession. It is as counselors at law that we improve our society, one client at a time. It is our advice that is our product of value.

Last summer, a lawyer from a county further west stopped me while I was at a local flea market with my family. He recognized me from our last convention and the OSBA tee shirts my son and I were wearing. He said I should run, and so I do - to continue the tradition. 

# 2020 OSBA Election

The OSBA will host an electronic election for the office of OSBA president-elect, April 27 – May 1, 2020.

OSBA members will receive an email ballot on April 27th with instructions on how to vote securely online.

Paper ballots will be sent only to those OSBA members who do not have an email address on file.

The deadline to vote electronically is May 1, 2020 by 5 p.m., and mailed ballots must be postmarked by May 3rd.

For more information about both candidates visit [OhioBar.org/Election](http://OhioBar.org/Election).



OHIO STATE BAR  
ASSOCIATION  
*Connect. Advance. Succeed.*

SAVE THE DATE

OSBA Annual Meeting  
May 7-8, 2020

Including:

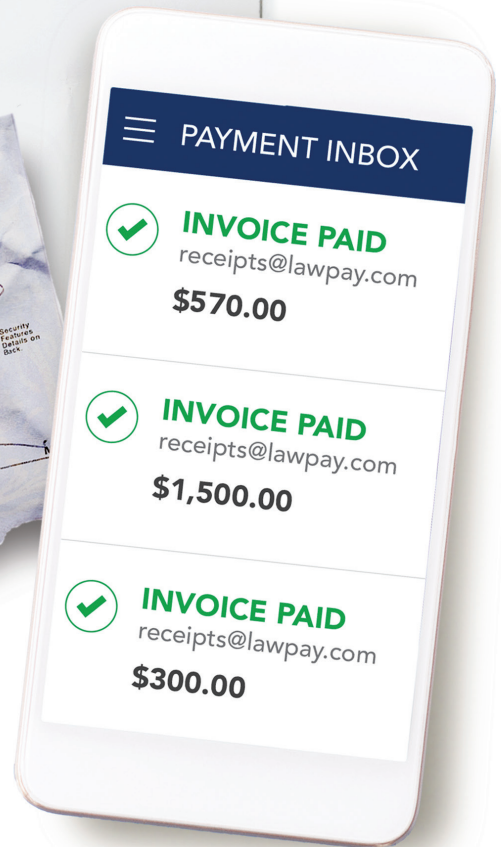
- President's Reception & Dinner
- Council of Delegates Meeting
- General Assembly Meeting
- OSBA Awards Luncheon

Visit [OhioBar.org/annualmeeting](http://OhioBar.org/annualmeeting) for more information.

Kiss paper checks goodbye

You deserve a payment solution that doesn't leave you waiting and wondering.

xxxx LawPay



Paper checks are notoriously unreliable. They get lost in the mail, they get tossed in the laundry, and they carry a lot of sensitive information around with them wherever they go.

LawPay changes all of that. Give your clients the flexibility to pay you from anywhere, anytime. Most importantly, we ensure you stay in compliance with ABA and IOLTA guidelines.

It's easy to get started

866-612-8178 or visit [lawpay.com/osba](http://lawpay.com/osba)

Proud Member Benefit Provider



**LAWPAY**<sup>®</sup>  
AN AFFINIPAY SOLUTION



**The  
Modern Courts  
Amendment  
*at* 50**

By: Justice Patrick Fischer,  
Judge David Hejmanowski,  
Kylie Conley, Paul Kerridge,  
Ronald Wadlinger



Fifty years ago, William Milligan and James Pohlman, the co-chair and secretary of the Ohio State Bar Association's (OSBA) Modern Courts Committee, put pen to paper to explain to the lawyers of Ohio why they had proposed, and voters had approved, the first major overhaul to Ohio's judicial system in more than a century. In so doing, they noted:

"The judicial reform of 1968 was distinctly not a result of an outraged citizenry battering down the doors of the State House. Dissatisfaction with the present system existed, but had not reached the point of being a major issue. The reform was primarily the result of efforts by thoughtful legislators, judges, lawyers, editors and laymen who recognized that real problems existed and cooperated to work out rational solutions before major surgery became necessary."

Approved by the voters in a ballot initiative by a margin of 62 percent to 38 percent, the Modern Courts Amendment (MCA) made changes to the structure of Ohio's court system, the training and education of judges, the tracking and policing of caseload management, the access of the public to court records, and empowered the Ohio Supreme Court to be the ultimate arbiter of the functioning and supervision of the courts of Ohio.

In their explanation in the *Ohio State Law Journal*, Milligan and Pohlman quoted the 1964 OSBA Commission on Judicial Candidates, which concluded, "Regardless of the quality of the judges, a state must have a workable constitutional and legislative pattern so that the abilities of the judges can be used to their maximum."

Now, another half-century having passed, the time has come again to ask whether the current structure of Ohio's court system is serving citizens efficiently, and whether the current constitutional and legislative patterns are workable such that the abilities of Ohio's judges and court

employees can be used to their maximum in the 21st century.

## Judicial Selection

As Milligan and Pohlman detailed in their article, early versions of the proposal that became the MCA included provisions for the "Missouri plan" of judicial selection. Pursuant to that provision, a statewide, bipartisan commission appointed by the governor would recruit and nominate three candidates for a judicial vacancy. The governor would then appoint one of the nominees for a six-year term, after which the judge could run for "re-election" to retain that seat. Benefits of the Missouri plan noted by Milligan and Pohlman include allowing judges to spend more time on judicial duties and less time on political activities.

The Ohio House of Representatives decided against putting the Missouri plan before the voters. In response, the Modern Courts Committee of the OSBA stated that, while it accepted the House's decision, "in the course of time, when the advantages of the appointive elective system are better understood ... the legislature and the public will be willing to adopt this plan." Fifty years later, however, our "pure" elective system for selecting judges remains intact.

Although our elective system has remained unchanged, reform efforts have been considered. In 1987, a proposed constitutional amendment, listed on the ballot as Issue 3, served as an opportunity for Ohio voters to adopt a version of the Missouri plan. Despite receiving a number of endorsements, including those of the OSBA, the Ohio Chamber of Commerce, and the League of Women Voters, Issue 3 ultimately failed, with more than 64 percent of voters rejecting its adoption.

More recently, the General Assembly presented voters with an opportunity to modify the composition of the judiciary by raising the age limit for judges in Ohio. Adoption of Issue 1, which was on the ballot in November 2011, would have raised the maximum age for assuming

elected or appointed judicial office from 70 to 75. Proponents of Issue 1 asserted that advances in life expectancy and quality of life called for a re-evaluation of the judicial retirement age, which was last addressed when the MCA was adopted, and that the majority of states have either judicial age limits higher than 70 or no mandatory age limit. Once again, however, voters chose to retain the system established by the MCA, and more than 62% of voters rejected adoption of Issue 1.

## Leadership by the Supreme Court

While Ohio voters have twice decided against adopting constitutional amendments to reform the selection and retention of the state's judges, the Supreme Court of Ohio has provided leadership aimed toward maintaining a high-quality judiciary.

First, the Chief Justice has used the inherent and symbolic authority of that office to generate conversation about how judicial selection may be improved. In 2002, for example, Chief Justice Thomas J. Moyer, speaking at the annual meeting of the OSBA, presented an eight-point plan in which he called for actions such as raising the statutory minimum qualifications to serve as judge, lengthening the judicial term of office to at least eight years, and eventually moving away from election of judges in order to ensure the independence and perceived impartiality of the judiciary.

Twelve years later, Chief Justice Maureen O'Connor, acknowledging the public's commitment to maintaining judicial elections in Ohio, offered her own three-point plan to strengthen judicial elections. Pursuant to that plan, Chief Justice O'Connor called for moving judicial elections to the top of the ballot and holding those elections in odd-numbered years, educating voters and increasing basic qualifications for judges.

In keeping with Chief Justice O'Connor's focus on educating the electorate, a second way in which the court has promoted the goal of a high-quality judiciary



is through its regulation of the legal profession, particularly in connection with its authority over judicial candidates. For example in *Disciplinary Counsel v. Tamburrino*,<sup>1</sup> the court suspended an attorney for making a false factual declaration and for implying that his opponent in a judicial election had violated public records laws. In issuing the sanction, the court explained that the attorney's misconduct "impugned the integrity of his opponent as a jurist and as a public servant" and "endangered the independence of the judiciary and lessened the public's understanding of public records and the protections of the Fourth Amendment."<sup>2</sup> Decisions such as this highlight the court's collective sense of the importance of ensuring that the public has a well-developed understanding of both the judicial branch and candidates for judicial office. Thus, even in the absence of any further amendments to the Ohio Constitution, the court seeks to carry out the goal of ensuring that the judicial branch is responsible to the public, a key principle of the MCA.

## Reforming Judicial Practice and Procedure

Prior to the MCA, the Ohio Practice Code, a compilation of statutory enactments, governed practice and procedure in Ohio courts.<sup>3</sup> Yet, Ohio courts lacked organization and management, with then over 400 judges operating without much guidance.<sup>4</sup> The MCA unified Ohio's court system under the supervision of the Ohio Supreme Court and conferred authority to the court to promulgate rules that govern practice and procedure.<sup>5</sup>

This change was significant. Article IV, Section 5(B) struck a balance between the judicial and legislative branches to meet the needs of the judiciary, providing the Supreme Court of Ohio with the power to promulgate strictly procedural rules and granting the General Assembly the power to reject the proposed rules upon concurrent resolutions of disapproval.<sup>6</sup>

However, the Ohio Supreme Court and the General Assembly grappled with

the boundaries of the court's new rule making authority. In the 1970s, the General Assembly rejected the Supreme Court's proposals for the promulgation of the Ohio Rules of Evidence because the legislature believed that it, not the Supreme Court, had the authority to codify the law of evidence.<sup>7</sup> Eventually, after meaningful discussion and study, the Rules of Evidence were promulgated and approved in 1980.<sup>8</sup>

---

**“The court held that if a rule conflicts with a statute, ‘the rule will control for procedural matters, and the statute will control for matters of substantive law.’”**

---

But even after the General Assembly and the Ohio Supreme Court worked through the new rule making process, the application of those rules, especially in conjunction with newly enacted statutes, caused further contention. Article IV, Section 5(B) is clear on how to deal with rules conflicting with prior statutes: “All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” Still, the Supreme Court had to resolve conflicts between rules and newly enacted statutes. The court held that if a rule conflicts with a statute, “the rule will control for procedural matters, and the statute will control for matters of substantive law.” The court noted that the legislature, however, cannot simply declare that a law is substantive.<sup>9</sup> To be constitutional, a statute, when in conflict with a rule, must actually impact a substantive right, “that body of law which creates, defines[,] and regulates the rights of the parties.”<sup>10</sup>

Richard S. Walinski and Mark D. Wagoner asserted that this analysis is easier said than done. The two attorneys proposed an amendment to the Ohio Constitutional Modernization Commission in 2016 that would have allowed the General Assembly to change the promulgated rules by passing a bill that states the legislature's purpose to create a substantive right that is enacted into law.<sup>11</sup> The OSBA and the Ohio Supreme Court's Administrative Director at the time, Michael L. Buenger, opposed the amendment, arguing that the amendment would render the Court's rulemaking power superficial at best.<sup>12</sup> Walinski and Wagoner withdrew the amendment in 2017 without discussion by the Commission.<sup>13</sup>

While there is criticism surrounding Article IV, Section 5(B), this section of the MCA has promoted the overall improvement of the Ohio judicial system. The rules promulgated by the Supreme Court of Ohio have allowed for consistent application of the law across the state by providing guidance to judges and practitioners. Further, Article IV, Section 5(B) provides an opportunity for the Ohio Supreme Court, working with the General Assembly, to respond timely and effectively to the needs of the judicial system.

## Supreme Court Authority

The passage of the MCA also added Article IV, Section 2(B)(1)(g) to the Ohio Constitution, which provides that the Ohio Supreme Court has original jurisdiction over the “[a]dmission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.” Significantly, there is no limiting phraseology in Article IV, Section 2(B)(1)(g), as that provision features broad — indeed, completely encompassing — language: “all other matters relating to the practice of law.”<sup>14</sup>

While the MCA provided the Ohio Supreme Court with expansive authority to regulate matters relating to the practice of law, there have been some limited indications that this constitutional

mandate may be far less encompassing than the clear text dictates.

In the Ohio Supreme Court's line of disciplinary cases addressing the unauthorized practice of law, the court has interpreted Article IV, Section 2(B)(1)(g) to confer "exclusive jurisdiction over all matters related to the practice of law."<sup>15</sup> The court has further noted that it "has *exclusive* power to regulate, control, and define the practice of law in Ohio."<sup>16</sup>

Thus, *all* "practice-of-law" determinations must be made by the Ohio Supreme Court, and only that court, because the Ohio Supreme Court alone has jurisdiction; however, there is more than one line of cases in which the constitutional mandate appears to have been overlooked.

Seemingly at odds with this precedent, courts of appeals have held that when a filing constitutes the unauthorized practice of law, the court is deprived of jurisdiction to rule on that filing.<sup>17</sup> For a determination to be made by a court that a filing constitutes unauthorized practice of law, that court must necessarily make the determination of whether the practice of law occurred. Surely this is a "matter relating to the practice of law," raising the question of whether lower courts have the authority to determine whether unauthorized practice of law has occurred in these cases.

There are also statutory exceptions that permit nonattorneys to file on behalf of a party.<sup>18</sup> Those statutes cannot supersede the Ohio Supreme Court's exclusive constitutional authority to decide whether a person has engaged in unauthorized practice of law. Thus, while a filing may be permitted under the statute, there may be a question of whether the filing constitutes the unauthorized practice of law and is therefore impermissible under the Ohio Constitution.

Further, in the Ohio Supreme Court's line of cases concerning what constitutes



"practice of law" for purposes of determining whether a judicial candidate may appear on a ballot, the court has (perhaps improperly) allowed a board of elections to determine what the term "practice of law" means.<sup>19</sup> This line of cases grew out of several decisions that predate the MCA and thus predate the addition of Article IV, Section 2(B)(1)(g) of the Ohio Constitution.<sup>20</sup> Because these decisions may authorize a member of the executive branch to define "practice of law," it is possible that they are contrary to the language of the Ohio Constitution.

#### **Who would have the Power to Institute a Unified Bar?**

A majority of states in the United States, such as Wisconsin and Oregon, have a unified bar, which requires membership to the state's bar association in order to practice. Ohio does not have a unified bar. While the benefits and detriments of a unified bar are beyond the scope of this article, how such a mandate could be instituted is relevant to the constitutional powers provided to the Ohio Supreme Court under the Ohio constitution.

Wisconsin and Oregon chose separate paths to create a unified bar. The Wisconsin Supreme Court created its unified bar by judicial order in 1957 and the order of the court can be changed by that court at any time.<sup>21</sup> If Ohio created a unified bar, the Wisconsin procedure

would seem to be perfectly in keeping with the Ohio Constitution, Article IV, Section 2(B)(1)(g).

In Oregon, however, the state legislature provided the mandate for a unified bar in 1935.<sup>22</sup> It appears that Ohio could not follow Oregon's lead without creating a significant constitutional problem. If a unified bar were to become part of the plan in Ohio, the people or the Ohio Supreme Court would be the authority that should create the rule.

#### **Can the legislature tax legal services?**

In 1983 and again in 1997, the issue of whether legal fees should be taxed was debated by Ohio's legislature. The proposition was again put forward, and again defeated, in 2013.<sup>23</sup> It is not clear, however, under Article IV, Section 2(B)(1)(g), that taxing legal services in Ohio would be constitutional.

As noted above, the Ohio Supreme Court has ruled that it has exclusive power to regulate, control, and define the practice of law in Ohio. If the legislature can enact a law to tax legal fees, then the legislature is exerting considerable control over the legal profession. After all, the power to tax is the power to destroy. This is not to say that a tax on legal fees is unconstitutional, but there is an argument to be made that such taxation is unconstitutional.



## Efficiency of the Court System

Ohio's judicial system is a creature of early 19th century legal practice. Created initially by the 1802 Constitution, it has undergone two major reforms, first with the adoption of the Constitution of 1851 and then the MCA of 1968. Neither of those periods of drastic change anticipated the crisis of funding or the technological advancements that are presently facing the judiciary.

In an effort to reduce costs and ease their funding crises, several states have gone beyond internal changes and have dramatically redesigned or re-engineered their state court systems.<sup>24</sup> In many states, these changes have been highly successful. The Conference of State Court Administrators reports that 60% of state court administrators say their courts are in a better position to provide access and timely justice because of restructuring and technology enhancements.<sup>25</sup>

Thus, following the 50th anniversary of the amendment, it is appropriate to ask the question: If Ohio were being formed as a new state today, what would our judicial system look like? How would we build a cost-efficient and effective judiciary from the ground up?

To answer that question we must first examine what inefficiencies, if any, the current structure presents. Criminal and civil cases are divided into multiple trial courts within each county and/or municipal corporation, with dividing lines in civil cases based not upon the nature of the proceeding but rather upon arbitrary financial thresholds. The separation of criminal functions into multiple courts results in duplication of probation departments, jail transports, and other criminal related processes. The division of similar functions amongst multiple municipal courts in urban counties results in significant replication of data

processing, supervision, and clerical functions. The separation of child support, parenting time, and custody proceedings between domestic relations courts in divorce matters and juvenile courts in

non-divorce matters may unnecessarily complicate already difficult family law proceedings and engenders significant confusion amongst the public. The current structure inhibits state-level intervention in court costs collection, unified court funding, and attempts to address funding shortfalls.

The National Center for State Courts, in its 25 principles for judicial administration, notes that “[t]he court system should be organized to minimize the complexities and redundancies in court structures and personnel. Removal of barriers such as multiple courts with similar or overlapping jurisdiction enhances citizen access while also reducing taxpayer costs.”<sup>26</sup>

Michigan and Vermont are among the states to have restructured their court systems to improve operation. Such a restructuring in Ohio could take many forms, and could only be enacted after extensive input from stakeholders in the courts, the legislature, law enforcement, the bar, and other areas. The following includes some ideas, raised by various groups in the past, to consider in the hope that it will not be yet another half century before Ohio takes an in-depth look at how best to bring justice to its citizenry.

### 1. Restructure Ohio's trial courts based upon subject matter jurisdiction.

Divide Ohio's trial level courts not by amount in controversy or level of criminal offense, nor by whether the parties had previously been married or not, but rather by the nature of the proceeding. Each county would then have a civil court, a criminal court, and a probate court. Larger counties may then further divide out juvenile matters and domestic relations matters (either separately or together) depending on their population and the number of judges.

Add in some specialized dockets, and the new structure would eliminate unnecessary duplication of services, remove arbitrary divisions within similar cases, erase cumbersome and

archaic procedural maneuvers, and significantly reduce public confusion about the operation of courts.


### 2. Unify, though not necessarily eliminate, the divisions currently created by multiple municipal courts and mayor's courts.

Multiple small municipal courts in large urban communities can result in significant duplication of expenses and effort. But these courts can provide for significant ease in large urban centers and sparse rural communities in that they make the resolution of some of the more common intersections between the public and judicial system more convenient based upon their close proximity to the litigant.

Ohio should, therefore, allow each county and its constituent communities to decide whether to maintain these smaller court divisions. If they are maintained, however, they should be maintained with the newer, more logical divisions of the trial level courts, with shared clerical, court costs collection, case management and administrative functions.

### 3. Centralize functions at the state level for efficiency

The Minnesota judiciary centralized the collection of court costs in 2008 through a virtual center that accepts payments 24 hours a day, seven days a week. In so doing, the total court revenue from collections increased from \$4.68 million in 2009 to \$20.23 million in 2012.<sup>27</sup> Minnesota also addressed the crushing increase in pro se litigants through a statewide initiative by centralizing assistance to those litigants. The state provides a web-accessible self-help center that includes statewide forms and tutorials. Each courthouse also has a public access terminal. The self-help center was accessed 693,000 times in 2011.<sup>28</sup> The New Hampshire statewide call center, physically located in the state capital,

handles 2,600 calls per day, only 30% of which require transfer to the individual trial courts.<sup>29</sup> 

## About the Authors

This look back at the 50th anniversary of the Modern Courts Amendment, and ahead at the next 50 years of the practice of law in Ohio, was a cooperative effort of five authors. Justice Pat Fischer began a six-year term on the Supreme Court of Ohio in January of 2017. An honors graduate of Harvard Law School and Harvard College, he had previously served six years on the First District Court of Appeals and was president of the Ohio State Bar Association from 2012-2013. Judge David Hejmanowski began his service as Judge of the Delaware County Probate/Juvenile Court in February of 2015, following 12 years as a magistrate and court administrator. He is a past member of the OSBA Board of Governors and is currently chair of the OSBA's Content Advisory Board.

Paul Kerridge serves as a law clerk to Sixth Circuit Judge Chad A. Readler. Prior to that he was a judicial attorney for Justice Fischer. Ronald Wadlinger is a senior judicial attorney in Justice Fischer's chambers. Prior to that, he served from 2008 to 2016 as a judicial attorney in Justice Judith Ann Lanzinger's chambers. Kylie Conley is a judicial attorney in Justice Fischer's chambers at the Ohio Supreme Court. Prior to working for Justice Fischer, she worked as a staff attorney at the Ohio First District Court of Appeals.

**Editor's note:** *This article is meant to stimulate scholarly discussion, and does not represent the authors' views on any matters currently pending or that may in the future be filed in the courts at which they are employed.*

## Endnotes

<sup>1</sup> 151 Ohio St.3d 148, 2016-Ohio-8014, 87 N.E.3d 158

<sup>2</sup> *Id.* at ¶ 57.

<sup>3</sup> William W. Milligan & James E. Pohlman, The 1968 Modern Courts Amendment to the Ohio Constitution, 29 Ohio St. L.J. 811, 829 (1968).

<sup>4</sup> *Id.* at 821.

<sup>5</sup> Article IV, Section 5(A) of the Ohio Constitution.

<sup>6</sup> Article IV, Section 5(B) of the Ohio Constitution.

<sup>7</sup> Gianelli, The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking, 29 Case West. Res. L.Rev. 16, 21 (1978).

<sup>8</sup> Ohio Evid.R. 1102(A).

<sup>9</sup> See *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 479, 715 N.E.2d 1062 (1999).

<sup>10</sup> *Havel* at ¶ 16.

<sup>11</sup> Richard S. Walinski and Mark D. Wagoner Jr., *Ohio's Modern Courts Amendment Must Be Amended: Why and How*, 66 Clev.St.L.Rev. 69, 75 (2017).

<sup>12</sup> *Id.* at 112-121 citing Ronald Kopp Letter on behalf of the Ohio State Bar Association on March 8, 2017 and Ohio Supreme Court Administrative Director Michael L. Buenger Letter on January 10, 2017.

<sup>13</sup> Minutes of the Judicial Branch and Administration of Justice Committee, Ohio Constitutional Modernization Commission, April 13, 2017, p.10.

<sup>14</sup> Emphasis added.

<sup>15</sup> *Disciplinary Counsel v. Alexicole, Inc.*, 105 Ohio St.3d 52, 2004-Ohio-6901, 822 N.E.2d 348, ¶ 8.

<sup>16</sup> (Emphasis added.) *Cleveland Bar Assn. v. CompManagement Inc.*, 104 Ohio St.3d 168, 2004-Ohio-6506, 818 N.E.2d 1181, ¶ 39.

<sup>17</sup> See, e.g., *State ex rel. Hadley v. Pike*, 7th Dist. Columbiana No. 14 CO 14, 2014-Ohio-3310 (civil complaint filed by an attorney not licensed to practice in Ohio should have been dismissed for lack of subject-matter jurisdiction).

<sup>18</sup> See, e.g., R.C. 5715.19(A).

<sup>19</sup> See, e.g., *State ex rel. Kelly v. Cuyahoga Cty. Bd. of Elections*, 70 Ohio St.3d 413,

415, 639 N.E.2d 78 (1994), citing *State ex rel. Carr v. Cuyahoga Cty. Bd. of Elections*, 63 Ohio St.3d 136, 138, 586 N.E.2d 73 (1992).

<sup>20</sup> See *State ex rel. Flynn v. Cuyahoga Cty. Bd. of Elections*, 164 Ohio St. 193, 129 N.E.2d 623 (1955).

<sup>21</sup> See *Report of Committee to Rev. the State Bar*, 334 N.W.2d 544, 555 (Wis.1983)

<sup>22</sup> Oregon State Bar, *Unified Bar Q & A*, <https://www.osbar.org/resources/unifiedbar.html> (accessed July 17, 2019)

<sup>23</sup> See Sub H.B. 59

<sup>24</sup> William T. Robinson III, *Rising to Historic Challenge: Funding for State Courts, Preserving Justice*, 51 Judges' J. 8, 9 (2012).

<sup>25</sup> National Center for State Courts, COSCA Budget Survey (2012).

<sup>26</sup> *Principles for Judicial Administration*, National Center for State Courts (2012) at 5.

<sup>27</sup> Laura Klaversman & Lee Suskin, *A Case Study: Reengineering Minnesota's Courts*, National Center for State Courts 18 (2012) at 16.

<sup>28</sup> *Report to the Community: The 2011 Annual Report of the Minnesota Judicial Branch* (2011) at 6.

<sup>29</sup> *New Hampshire Judicial Branch Quarterly Report to Fiscal Committee* (2011) at 3.

# Introducing the New Study of the Economics of Law Practice in Ohio

In 1990, the Ohio State Bar Association (OSBA) surveyed its membership in order to gain a clear picture of the legal profession in the first-ever Economics of Law Practice in Ohio. Seven subsequent studies have been conducted since then, up until the last edition in 2013. Today, the OSBA introduces the ninth study of its member attorneys with data based on responses to a survey conducted in the spring of 2019. Much has changed in almost 20 years.

Hourly rates have doubled and marketing practices have certainly shifted. (In 1990, 72 percent of respondents used the Yellow Pages as their primary marketing vehicle.) According to study data, in-house counsel has gone paperless while

private practitioners have adopted cloud computing and billing software more than any other group.

Today, we still measure attorney income by years in practice and geographic area, as we did back in 1990, but also by gender. We know that OSBA female attorney members are overwhelmingly drawn to government and public interest law, while men tend to be solo practitioners and in-house counsel. In some areas, women lawyers are close achieving wage parity or even outearn their male counterparts, while in others, they still have a long way to go.

This is the first year that law school debt was taken into account, revealing a stark

gap in debt owed from one generation to the next. We learned that debt is long-lived, with millennial private practitioners expecting to be paying their almost-\$100,000 law school debt for the next two decades.

The objective of this study in 1990 and today has been to create a usable reference for attorneys. From salary negotiations as an associate, to hiring a legal assistant, to determining hourly billing rates — the study of the economics of law in Ohio helps attorneys determine where they stand among their peers and how to better navigate the business of the profession at every stage in their careers.

## ATTORNEYS: A STUDY

Private practitioners and government attorneys are more optimistic with current and future economic conditions when compared to 2013 data.

**3-5**  
YEARS IN PRACTICE  
**DEBT: \$80,000**



### GOVERNMENT ATTORNEY SALARY

2018 \$51,000 | \$51,000  
2012 \$46,000 | \$50,000



### PRIVATE PRACTICE SALARY

2018 \$73,500 | \$78,000  
2012 \$70,500 | \$57,500



### IN-HOUSE SALARY

2018 \$90,000 | \$42,000  
2012 \$83,000 | \$62,500



### HOURLY RATE

2018 \$200/HR.  
2012 \$175/HR.

Figures represent median values. Values are based on OSBA member survey responses.

● = Male    ● = Female

# 11-15

YEARS IN PRACTICE

DEBT: \$60,000



## IN-HOUSE SALARY

2018 \$130,899 | \$100,000

2012 \$150,000 | \$118,000



## HOURLY RATE

2018 \$250/HR.

2012 \$200/HR.



## GOVERNMENT ATTORNEY SALARY

2018 \$69,990 | \$84,500

2012 \$65,000 | \$59,500



## PRIVATE PRACTICE SALARY

2018 \$120,000 | \$82,000

2012 \$135,000 | \$100,000

More than 70% of attorneys report using a firm website and networking at their bar association as marketing tools for their practice.

In 2019, 27% of private practitioners reported using a flat fee as an alternative fee arrangement, and data suggests that those in private practice are driving a trend away from the billable hour.



## GOVERNMENT ATTORNEY SALARY

2018 \$100,500 | \$81,500

2012 \$102,000 | \$83,500

# 26-35

YEARS IN PRACTICE

DEBT: \$15,000



## IN-HOUSE SALARY

2018 \$300,000 | \$228,000

2012 \$150,000 | \$152,500



## HOURLY RATE

2018 \$250/HR.

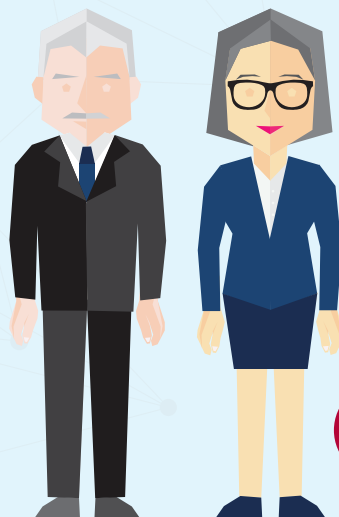
2012 \$225/HR.




## PRIVATE PRACTICE SALARY

2018 \$150,000 | \$85,000

2012 \$140,000 | \$90,000



Access the report in its entirety at [OhioBar.org/EconomicsofLaw](http://OhioBar.org/EconomicsofLaw) to learn more, including data based on geographic location, legal assistant hourly rates and technology trends.



# **Defeating Healthcare Plan Denials**

*By Robert Armand Perez, Sr.*

Healthcare costs are rising in the United States and there is no consensus on funding. Premiums and out-of-pocket costs continue to increase while healthcare payors have incentives for denying claims.

Most employer-based healthcare plans are governed by the Employee Retirement Income Security Act (ERISA).<sup>1</sup> State law controls healthcare plans in the government employer sector<sup>2</sup> or for a church<sup>3</sup> employer. The claim process for appealing these denied claims is similar to that of an ERISA healthcare plan.<sup>4</sup> Ohio has statutory provisions for non-ERISA adverse determinations.<sup>5</sup>

### The Claim Denial

Healthcare denials beyond errors are frequently not appealed. If an ERISA claim is improperly denied payment and the appeal rights are not fully communicated, the improper denials will remain undisturbed. The ERISA statute requires a “full and fair review” of a denial of payment after a written notice of the reason(s) for the denial is provided.<sup>6</sup> The related claim regulations structure the process with procedural and substantive requirements.<sup>7</sup> Health insurers and self-insured plans usually fail to fully comply. In contrast, the financial incentives to violate the regulations and avoid paying the claims are great. ERISA based plans, whether insured or self-funded, and non-ERISA plans have similar incentives.

Generally, the patient<sup>8</sup> assigns the payment of benefits to his/her medical provider who files the claim with the healthcare plan. However, many healthcare plans prohibit assignment of the rights to the benefits, including the right to appeal the denial. These anti-assignment plan provisions are generally enforceable.<sup>9</sup> Plans have a recognized conflict of interest when paying claims.<sup>10</sup> The claim administrator may obscure the appeal process to the patient.

A core principle of ERISA is that the employee benefits must be administered according to a written plan.<sup>11</sup> When a claim is denied, a written notification must be provided to the patient that complies with the claim regulation requirements.<sup>12</sup> The typical explanation of benefits (EOB) sent to the patient does not.

The regulations set times for action. Different time frames for appeals exist. They are related to the type of claim whether a pre-service claim, i.e. a pre-authorization, a post-service claim or an urgent care claim.<sup>13</sup>

### The ERISA Appeal Process

In an ERISA healthcare claim, the denial notification to the patient triggers the due process rights of the patient.<sup>14</sup> The claim administrator has a fiduciary duty to the patient.<sup>15</sup> These basic claim regulations are applicable to all benefit claims, including healthcare claims.<sup>16</sup> The denial notice must include:

- “(i) the specific reason or reasons for the adverse determination;
- (ii) reference to the specific plan provisions on which the determination is based;
- (iii) a description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary, and
- (iv) a description of the plan’s review procedures and the time limits applicable to such procedures, including a statement of the claimant’s right to bring a civil action of the act following an adverse benefit determination on review.”<sup>17</sup>

In addition to these core regulatory notice requirements for all ERISA claims including non-healthcare claims, there are additional requirements for group healthcare plans. A group

healthcare plan must provide the guideline, the protocol, or other criteria relied upon to the patient or state that a copy of it will be provided to the patient upon request.

If the denial is based on lack of medical necessity or experimental treatment, there must be an explanation of the scientific or clinical judgment that applies the terms of the plan to the patient’s medical circumstances or states that the explanation will be provided upon request.<sup>18</sup> After the administrative appeal, the denial of benefits may be reviewed by a district court.<sup>19</sup> However, the participant *must exhaust* all of the administrative remedies under the plan *before* an action can be filed in federal court under ERISA.<sup>20</sup>

Healthcare claims are subject to additional Affordable Care Act (ACA) regulations.<sup>21</sup> Scrupulous compliance with the regulations is required with stated exceptions.<sup>22</sup> When the healthcare plan administrator fails to follow the regulatory claim procedures, the patient will be deemed to have exhausted the appeal process. These ACA regulations mandate continued coverage and treatment during the appeal if the adverse determination or denial involves the reduction or termination of treatment.<sup>23</sup> The claim appeal must be timely processed and one extension may be obtained by written notice.<sup>24</sup> The statutory intent of ERISA is to assure that the patient has an opportunity for a full and fair review before litigation.<sup>25</sup>

### Due Process Protections

The Sixth Circuit holds that an insurer’s failure to comply with the procedural requirement to provide the specific reason(s) for the denial is error, which may require the claim denial be overturned. The remedy for a failure to provide appropriate administrative review is to have the district court “reconsider [the denial of benefits] after the [patient] has been given the opportunity to submit additional



evidence” rather than remand the benefit determination to the plan for further consideration.<sup>26</sup>

When the plan administrator fails to provide the specific reason(s) for denial, the patient does not know how to cure

## “When the plan administrator fails to provide the specific reason(s) for denial, the patient does not know how to cure the deficiency with additional evidence.”

the deficiency with additional evidence. If there is insufficient information to obtain a full review, the patient should be given the opportunity to submit additional evidence in litigation. The claim administrator should have safeguards designed to ensure that plan provisions are interpreted and applied consistently, in accord with the plan documents.<sup>27</sup> If the claim denial fails to adequately inform the patient and the patient does not make a timely appeal, the patient is bound in litigation with the record lacking favorable evidence.

### Fair Notice is Crucial

Notification of rights is critical in the claim process. Unlike litigation under other statutes, the reviewing federal court is limited to the evidence that is presented to the claim administrator **prior to litigation**. Although an ERISA review is not a true administrative review, it is treated in an analogous way.<sup>28</sup> Because of the limitations on what the court can review, the requirement that the claim administrator give proper notice enables the patient to assemble and submit the evidence necessary to prevail on the claim.

The notice requirement is not merely a regulatory requirement, it is the keystone of the statutory requirement for a “full and fair review.”<sup>29</sup>

Unfortunately, some courts have adopted the concept of “substantial compliance”<sup>30</sup> with the regulatory

notice requirements. A regulatory violation tends to be conflated by the court with the accompanying improper denial of benefits. The plan’s failure to comply with the regulatory notice and procedural requirements can result in the patient losing his or her legal remedy.

### Ohio Statutory Procedure

The state of Ohio has a procedure similar to the federal regulatory scheme for ERISA claims.<sup>31</sup> This code section applies to insured healthcare plans that are not subject to ERISA<sup>32</sup> but subject to the insurance laws of the state of Ohio.<sup>33</sup>

Similarly, under the Ohio statute, any adverse benefit determination requires notice to the patient.<sup>34</sup> The time frame for these internal appeals must be within the time frames provided under the federal regulations.<sup>35</sup>

### External Review

An external review of a claim denial usually addresses the alleged lack of medical necessity or the efficacy of experimental treatment. The patient may voluntarily use this process. Under both federal and Ohio state law there

are provisions for external reviews by an independent review organization. This is required by the ACA<sup>36</sup> for plans that are not subject to state insurance laws.

Insurance companies that are subject to state law in states that have established an external review process must meet the consumer protection standards of the federal statute. In contrast, if the healthcare plan is not subject to state regulation,<sup>37</sup> the federal law controls the external review. If the healthcare benefits are insured, they are subject to the state insurance law. Ohio provides for an external review process similar to the federal review process.<sup>38</sup> Both the external review under the federal and the Ohio external review require exhaustion of the internal appeals.

The external review can be valuable if there is active participation by the patient to assure that the external review entity is properly informed of the policy/plan provisions and has relevant adequate evidence to make an informed decision. Unfortunately, many times this is not the case. The Ohio statute states what an independent review organization should consider when conducting the review. Those mandated considerations are extensive.<sup>39</sup> The external review may be binding on the healthcare plan or insurer, but the patient may have other options available under applicable federal or state law.<sup>40</sup> An external review under both Ohio and federal law is voluntary. The strategy of whether to elect this external review varies according to the facts and the type of denial. There are benefits and pitfalls for the patient in this external review process. Without experienced representation, the external review may not result in the objective determination that was contemplated in the design of the external review.

### Judicial Review

A patient may obtain judicial review of the adverse determination. ERISA defines who may bring an action. A healthcare provider may bring an action

if there is a valid assignment of benefits and the plan does not prohibit it.<sup>41</sup> Sometimes the healthcare provider is given more information on the denial than is the patient. The patient may only receive an EOB, which is usually insufficient to inform or meet the notice requirements. Although a patient assignment of benefits is common, the plan may contain an anti-assignment of benefit clauses.<sup>42</sup> This precludes the healthcare provider from bringing a claim for treatment. Only the patient may bring the action in court.

After the appeal process, the district court's review is limited to the administrative appeal evidence previously considered.<sup>43</sup> The standard of review, depending on the language of the plan, may be the difficult to meet "arbitrary and capricious" standard of review.<sup>44</sup> This standard and the limitation to the record before the claim administrator mandates early involvement by experienced counsel. If it is a non-ERISA matter brought in state court, the procedures are different and not subject to these limitations.

### General Considerations

Healthcare providers do not have access to the plan/policy documents. Providers may not know how to appeal complex claims or have the time. The patient must act on high dollar claims, such as experimental treatment and denials based on lack of medical necessity. Many health insurance carriers and third-party administrators of self-insured plans do not understand their obligations, follow the claim regulations, or their own plan/policy documents. Claim administrators routinely violate the claim procedures and regulations. Tight regulatory time limits require immediate attention after the denial. The patient must initiate a timely appeal.

### Conclusion

Wrongful denials of payment shift costs. The ever-climbing cost of healthcare creates a struggle on

payment. There is an incentive to deny payment and shift the cost to patients and physicians. The consumer paying for a denied claim dwindles household savings. A patient should promptly seek legal counsel when a high-dollar claim is denied. Relying on the healthcare provider is ill-advised. A claim denial requires prompt action and time deadlines are set when a denial is sent. The failure to take timely action is fatal to a successful outcome.

### About the Author



Robert Armand Perez, Sr. limits his practice to representing individuals with disability, health, life insurance and pension issues mostly under ERISA. He earned his

J.D. from the Indiana University School of Law and his B.A. and M.S. in health administration from the University of Cincinnati. He is a member and former trustee of the Ohio Association for Justice and a member the American Association for Justice where he served as chair of the insurance section. He is a member of the American Bar Association, the OSBA, the Federal Bar Association and the Cincinnati Bar Association.

### Endnotes

- <sup>1</sup> 29 U.S.C. § 1001, *et seq.*
- <sup>2</sup> 29 U.S.C. § 1002(32).
- <sup>3</sup> 29 U.S.C. § 1002(33)(A).
- <sup>4</sup> For consistency, the term "plan" is used for ERISA Plans and non-ERISA policies.
- <sup>5</sup> O.R.C. § 3922.
- <sup>6</sup> 29 U.S.C. § 1133; 29 C.F.R. § 2560.503-1(g).
- <sup>7</sup> 29 C.F.R. § 2560.503-1.
- <sup>8</sup> For purposes of this article, we will refer to plan participants, plan beneficiaries, claimants and patients as the "patient." There are occasions where the patient may be someone other than the plan participant or claimant, as is the case in treatment of minor children. However, for purpose of consistency, we will use the term "patient."

<sup>9</sup> *Brown v. Blue Cross Blue Shield of Tennessee, Inc.*, 827 F.3d 543 (6th Cir. 2016). *Children's Hospital Medical Center of Akron v. Youngstown Assoc. in Radiology, Inc.*, 2018 W.L. 4539282 (N.D. Ohio September 21, 2018).

<sup>10</sup> *Univ. Hosps. of Cleveland v. Emerson Elec. Co.*, 2002 F.3d 839, 844 (6th Cir. 2000).

<sup>11</sup> 29 U.S.C. § 1004(a)(1)(D).

<sup>12</sup> 29 C.F.R. § 2560.503-1.

<sup>13</sup> 29 C.F.R. § 2560.503-1(f)(2), *et seq.*

<sup>14</sup> *Vanderklok v. Provident Life and Accident Insurance Co.*, 56 F.2d 610 (6th Cir. 1992).

<sup>15</sup> *Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 438 (6th Cir. 2006).

<sup>16</sup> 29 C.F.R. § 2560.503-1(g)(i-iv).

<sup>17</sup> 29 C.F.R. § 2560.503-1(g)(i-iv).

<sup>18</sup> 29 C.F.R. § 2560.503-1(g)(v)(A) and (B).

<sup>19</sup> 29 U.S.C. § 1132(a)(1)(B).

<sup>20</sup> *LaRue v. DeWolff, Boberg, & Assocs.*, 552 U.S. 248, 259 (2008).

<sup>21</sup> 29 C.F.R. § 2590.715-2719(b).

<sup>22</sup> 29 C.F.R. § 2590.715-2719(b)(2)(ii)(F)(2).

<sup>23</sup> 29 C.F.R. § 2590.715-2719(b)(2)(iii).

<sup>24</sup> 29 C.F.R. § 2560.503-1(f)(2)(iii)(A) and (B).

<sup>25</sup> 29 U.S.C. § 1133; 29 C.F.R. § 2560.503-1(h)(1).

<sup>26</sup> *Vanderklok v. Provident Life and Accident Insurance Co.*, 56 F.2d 610, 617 (6th Cir. 1992).

See also, *Univ. Hosps. of Cleveland v. S. Lorain Merchants Ass'n. Health & Welfare Benefit Plan & Tr.*, 441 F.3d 430, 434 (6th Cir. 2006).

Uniquely, the claimant has due process rights that devolve from the statutory and regulatory requirements.

<sup>27</sup> 29 C.F.R. § 2560.503-1(b)(5).

<sup>28</sup> *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609 (6th Cir. 1998).

<sup>29</sup> 29 U.S.C. § 1133.

<sup>30</sup> *Kent v. United of Omaha Life Ins. Co.*, 96 F.3d 803, 807 (6th Cir. 1996).

<sup>31</sup> O.R.C. § 3921, *et seq.*

<sup>32</sup> O.R.C. § 3921.01(L).

<sup>33</sup> O.R.C. § 3922.01(P).

<sup>34</sup> O.R.C. § 3922.03(E).

<sup>35</sup> O.R.C. § 3922.04(B); 29 C.F.R. § 2560.503-1.

<sup>36</sup> 42 U.S.C. § 300gg-19(2010).

<sup>37</sup> 29 U.S.C. § 1002(i).

<sup>38</sup> O.R.C. § 3922.05.

<sup>39</sup> O.R.C. § 3922.07(A)-(G).

<sup>40</sup> O.R.C. § 3922.12(A)-(B).

<sup>41</sup> *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1277 (6th Cir. 1991).

<sup>42</sup> *City of Hope Nat'l. Med. Ctr. v. Healthplus, Inc.*, 156 F.3d 223, 229 (1st Cir. 1998).

<sup>43</sup> *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609 (6th Cir. 1998).

<sup>44</sup> *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 552 (6th Cir. 1998).



# New USPTO Program Gives IP Attorneys a Unique Opportunity to Give Back

The biggest challenge facing inventors today often isn't inventing the next big idea – it's protecting it. Local inventor and arcade game designer, Adam Wray, can affirm that securing a patent can be one of the more daunting endeavors associated with entrepreneurship, due to the time-consuming and costly nature of the process. This hurdle became even greater when the Leahy-Smith America Invents Act (AIA) was passed into law in 2011. This legislation sought to reconcile the differences between the US and other international patent system by changing the owner of an invention from “first to invent” to “first to file” a patent application.

The enactment of the AIA ushered in some of the most significant changes to the patent system to date, which some critics theorize could effectively disenfranchise average and low-income inventors. As a result of the act, an inventor stands at a significant disadvantage in protecting his idea if he does not have the means to quickly hire an attorney. The cost and time required

for the preparation and prosecution of a patent application is expensive and lengthy, averaging 33 months from start to finish with attorney's fees ranging from \$5,000 to more than \$20,000, depending on the complexity of a patent application.

Recognizing this risk, the USPTO sought to operationalize some of the aspirational language of the AIA, launching the Patent Pro Bono Program – a nationwide network of independently operated regional programs that match volunteer patent attorneys with financially under-resourced inventors and small businesses for the purpose of securing patent protection. Working with the local intellectual property bar, faculty members at the Case Western Reserve University School of Law agreed to launch and administer a Patent Pro Bono Program for the state of Ohio.

“The people who apply to this program are often garage inventors and makers – grassroots people living

in our community – but they lack the financial resources to retain patent counsel,” said Ted Theofrastous, OSBA member and chair of the Ohio Patent Pro Bono Program. “The program's most important job when we first bring them in is to put key barriers like patentability or venture financing aside while we just see whether there is a good idea there.”

Wray was one of the first inventors to secure a patent through the Ohio Patent Pro Bono Program after he was matched with volunteer attorney, Robert Schmidt of Tarolli, Sundheim, Covell & Tummino LLP.

“With the help of the Ohio Patent Pro Bono Program and Robert Schmidt, I was able to secure a patent for my ‘game integrated beverage sensor’ technology used in my Retro Racoons’ arcade game,” Wray said. “Acquiring this patent was essential to taking my idea to the next level. In fact, I recently entered into a partnership with the kings of the bar arcade scene, Incredible



Technologies, to produce 100 units of my game. I'm happy to say that these games will be manufactured in Ohio."

The Ohio Patent Pro Bono Program now operates independently as Ohio Invents, a non-profit 501(c)(3) organization serving the entire state. Ohio Invents and its volunteers have secured six patents, 224 invention screenings and volunteer attorney matches and has provided an estimated \$530,000 in legal services since its inception in 2015.

At its inception, the program was the result of an active collaboration among the USPTO, The Cleveland Intellectual Property Law Association (CIPLA) and the IP Venture Clinic at The Case Western Reserve University School of Law. Theofrastous, who is also managing attorney of the IP Venture Clinic, saw a unique opportunity at the School of Law to launch the Ohio Patent Pro Bono Program simultaneously alongside the IP Venture Clinic, which was also slated to pilot that same year.

For administrative and logistical advantages, the Ohio Patent Pro Bono Program was an ideal program to incubate in conjunction with the IP Venture Clinic. The clinic consists of third-year law students working under the supervision of law school faculty to represent inventors and startup companies working to develop and cultivate their intellectual assets. The IP Venture Clinic works with emerging (often student) entrepreneurs across a wide range of corporate and intellectual property issues, from startup to venture finance.

Funding from the Burton D. Morgan Foundation, Tarolli, Sundheim, Covell & Tummino LLP and CIPLA played a key role in establishing this program. It empowered the School of Law to employ staff, design application intake and client management systems and construct new office space.

The program's volunteer attorney-inventor matching process is intended to ensure volunteer attorneys are matched only with inventors ready to enter the patent application process. The application screening and case management system gauges potential for patentability, client-preparedness and maintains case continuity.

"The program is match.com for entrepreneurship which can now supply services for a demand that was always there. We had three volunteers (and over 200 applications) initially and now have 63 volunteers with a goal of 100 as we expand across Ohio," said Theofrastous. "The dozens of lawyers who have stepped up simply because they believe giving back is the right thing to do, deserve all the credit for this program and it's many achievements."

With the administrative infrastructure in place and inventor applications funneling in from across Ohio, the next hurdle was building up the volunteer base.

The Ohio Patent Pro Bono Program has received favorable results in recruiting volunteer attorneys which can be largely attributed to the commitments from a group of firms who were the first to commit pools of billable hours exclusively for pro bono case work. These firms include Benesch Friedlander Coplan & Aronoff LLP, McDonald Hopkins, Renner Otto, Tarolli Sundheim Covell & Tummino LLP, Squire Patton Boggs and Emerson Thompson Bennet.

The program provides patent attorneys with pro bono opportunities within their subject matter expertise.


"The Ohio Patent Pro Bono program allowed me to serve inventors in need of legal assistance. When I met Adam, I could see he was an entrepreneur with a can-do attitude." Schmidt stated. "I was excited for Adam after his patent application received a notice

of allowance on the first Office action, without any claims being rejected. He got to feel what few inventors do, an encouraging 'yes' without years of having to fight against the discouraging 'no's' that are so typical of the patent application experience."

This past January, Ohio Invents announced that it secured malpractice insurance to cover volunteer attorneys through donations from Lincoln Electric and Parker Hannifin. In April, the Ohio Patent Pro Bono Program, CIPLA and the USPTO held its second annual Ohio Patent Pro Bono Program Award Ceremony to honor the firms, corporations and individuals who donated time and funding to assist program inventors.

"An organization such as Ohio Invents, is only as good as the people that run it, and we have an excellent partner in Ted Theofrastous." said Damian Porcari, Director of the Elijah J. McCoy Midwest Regional United States Patent and Trademark Office. "Ohio Invents, and its predecessor Case Western Reserve University, have consistently been one of the highest performers when it comes to the critical metric of matching inventors with volunteer practitioners. Nearly one of every 10 matches nationwide between a practitioner and an inventor comes from Ohio Invents."

Theofrastous says the future is bright for the Ohio Patent Pro Bono Program, which is poised for continued growth due to the unique and mutually beneficial opportunities offered by the program.

"This program can help organically bridge the gap in Ohio's economic continuum," said Theofrastous. "Assisting these inventors not only offers the patent bar an opportunity to give back to their communities in a way that's in their wheelhouse, but it also provides younger attorneys precious client-facing responsibilities that they don't always get. Everyone benefits." 





Yes, it's true. Ohio law firms of all sizes can and do suffer all sorts of cyber breaches. OBLIC began providing complimentary cyber breach protection in 2014 and almost immediately began assisting Ohio law firms respond to and recover from cyber breaches. Since OBLIC began providing cyber breach insurance protection, it has helped respond to 23 cyber breach claims against Ohio law firms, with the two largest claims incurring notification costs exceeding \$23,000 each. In all, OBLIC has helped Ohio law firms save out of pocket costs (not covered by a typical insurance policy) exceeding \$117,500 in dealing with these nasty claims. Unfortunately, these claims are just the tip of the proverbial iceberg.

### How Did This Happen?

The practice of law traditionally poses plenty of challenges — knowing and keeping abreast of the latest case law and statutory developments, honing your craft and improving your skills, complying with procedural and professional rules, finding and selecting desirable clients, collecting a reasonable fee and many, many others. Until just a few short years ago, protecting attorneys and their firms—whether as an owner, manager or insurer—was largely focused on helping them avoid, manage, repair and respond to the occasional mistake committed while navigating these traditional challenges.

Enter computers, digital storage, the internet, emails, the “cloud” and ever-increasing innumerable ways to conduct business faster and easier, and then add the widely unexpected, or at least underappreciated, cybercriminal. Most law firms were not, and many still are not, truly prepared to defend themselves against the intentional actions of these unseen criminals. Unfortunately, customary loss prevention programs practiced by even the most sophisticated law firms were not designed to address this new risk.

Cryptomining. Ransomware. Business email compromise. Spear phishing. This is the new language of business risk.

The highly publicized cyber breaches at Marriot (500 million records), Equifax (143 million records), Target (110 million records), JP Morgan Chase (76 million records), eBay (145 million records) and Yahoo (two breaches, 500 million and then one billion records) get lots of publicity, but law firms are seen as treasure troves of low-hanging fruit by hackers.

### Law Firms as Targets

Hitting closer to home, do the breaches of the Cravath, Swaine & Moore and Weil, Gotshal & Manges law firms sound familiar? According to Fortune, these law firms were allegedly targeted by China because of the clientele of these firms and the potential gold mine of confidential information they maintained. The office of the U.S. Attorney for the Southern District of New York is apparently investigating.

And then there was the attack against Mossack Fonseca, a Panamanian law firm, widely referred to in the press as the “Panama Papers” story. More than 2.6 terabytes of data were stolen before the law firm realized there was a breach, and a crucial 11.5 million sensitive records were lost, leaving the law firm with difficult conversations to be had with some very unhappy clients.

Cyberattacks against law firms were first widely reported beginning in 2008, and the frequency of publicly known law firm breaches has steadily been growing. In fact, Cisco, in its 2015 Annual Security Report named law firms as the seventh highest target for cyber criminals in 2014. In its report on law firm cybersecurity, LogicForce revealed more than 200 U.S. law firms faced hacking attempts between 2016 and 2017, and 40 percent of the firms didn't even know the attack had occurred. The ABA recently reported that 25% of all U.S. law firms have experienced at least one data breach.

## Common Cyberattacks:

### Spearphishing

The most common cyberattack reported by law firms is “spearphishing,” an email that appears to be from a trusted individual or business that is known or familiar, but instead is from a criminal hacker who wants to gain access to your computer system or obtain information to enable the theft of financial, credit card or other confidential, valuable data. The email typically requests the addressee to click on an executable link that then “opens the door” to the hacker, launching spyware, malware or a Trojan Horse. Many times, the addressee opens this door without ever realizing anything untoward has occurred.

### Phishing

The kissing cousin of the “spearphishing” attack is the rather simple “phishing” attack. This email usually appears to come from a large and well-known company or website with a broad membership base, and like its cousin, asks the addressee to click on an executable link. Any law firm, no matter its size or sophistication, can fall victim to these types of attacks without proper loss prevention preparation and education.

### Ransomware

In this scenario, the hacker gets someone within the firm (anyone with computer access) to click on a link which then launches a program that takes over the computer system, disabling it and holding the law firm's data and files hostage until a “ransom” of some sort is paid, often with bitcoin.

### Theft

In addition to the phishing attacks previously described, law firms also commonly experience cyber breaches due to the loss or theft of a laptop, thumb drive, smart phone, tablet or other mobile device. If the information on the device was not encrypted and contained or had access to files containing any of the personally identifiable information described below, a breach has likely occurred. With access to office email



and other law office networks, such theft can be an open door for cyber criminals to gain access to and steal confidential information.

Employee theft is also a significant risk within the law firm environment. Whether it is the theft of a laptop as described above, theft of the actual data itself or theft of user identifications and passwords, such can occur and often go undetected for a lengthy period of time. Such conduct can originate with an employee or through outside parties who “influence” an employee in a compromised position for various reasons, i.e., social engineering. Often, by the time such conduct is discovered, the stolen data has made its way to third parties for various nefarious purposes, usually including identity theft.

### Personally Identifiable Information

Cyber criminals are looking for all sorts of valuable information, from client confidential information to personally identifiable information (PII). PII can be used, directly or indirectly, or in combination with other information, to identify a particular individual. It includes:

- A name, identifying number, symbol or other identifier assigned to a person;
- Any information that describes anything about a person; and
- Any information that indicates actions done by or to a person, and any information that indicates that a person possesses certain personal characteristics.

Some examples of personally identifiable information, as defined by Ohio Revised Code (ORC) 1347.01, are names, social security numbers, resumes, correspondence, addresses, phone numbers, driver’s license numbers, state identification numbers, professional license numbers, financial account information, medical and health information, physical characteristics and other biometric information, tax information, education information, individuals’ job classifications and salary

information, performance evaluations, employment applications and timesheets. Does your law firm possess any of this type of data?

### Law Firms Can Be a Perfect Target

As law firms act as warehouses of client and employee data, they should recognize they are not immune to cyberattacks. Not only are they not immune, in many ways law firms are the perfect targets. Most, if not all, law firms possess some amount of the above-described personally identifiable information and, in many instances, vast amounts of such information, whether that of their clients, employees or parties and witnesses in litigation.

### Attorneys’ Responsibilities

Besides the common law duty owed by attorneys to protect the confidential information entrusted to them by clients, two additional sources of duties require attorneys to protect data: the Rules of Professional Conduct and federal and state law. Rule 1.6 of the Ohio Rules of Professional Conduct requires an attorney to maintain the confidentiality of information relating to representation of a client and Rule 1.9 requires the same for information of former clients. Rule 1.15 of the Rules of Professional Conduct requires that an attorney safeguard property of a client in his or her possession — a fiduciary obligation.

Most states and U.S. territories also have enacted data security breach notification laws. Ohio’s notification law, ORC 1349.19, applies to personally identifiable information of Ohio residents. It defines a “breach” as unauthorized access to and acquisition of unencrypted computerized data that compromises the security or confidentiality of personal information owned or licensed by a person and that results in, or is reasonably believed to cause a material risk of, identity theft or fraud to the person or property of an Ohio resident.

Pursuant to this law, a breach of security of the person’s or business’s data system must be disclosed to any resident of Ohio whose personal information was, or reasonably is believed to have been,

accessed and acquired by an unauthorized person, if the access and acquisition by the unauthorized person causes, or reasonably is believed will cause, a material risk of identity theft or other fraud to the resident. Disclosure is required to be made in the most expedient time possible, but no later than 45 days following its discovery or notification of the breach of the system, subject to the legitimate needs of law enforcement activities. Failure to comply with this notice requirement is subject to investigation and a potential civil action brought by the Attorney General.

### Costs Involved

The types of costs associated with a data breach can be many, beginning with the expenses associated with hiring a computer forensics expert to determine how much information was compromised, and most importantly, whose information was disclosed. This cost can range from a few thousand dollars to tens or even hundreds of thousands of dollars, depending on the breadth of the breach. Another typical cost is that associated with compliance with the notice requirements of the state(s) of residence for those persons whose information was disclosed, and depends largely on the number of records disclosed. This cost will also vary based on whether the notice can be sent electronically, whether it must be mailed, whether additional costs need be incurred to locate the persons whose information has been disclosed, and whether alternative notice or publication is necessary.

Once a breach is discovered, additional costs are often needed to repair any damage to the systems themselves, replace or restore software or data records that might be damaged or corrupted and block further access to the criminal(s) who obtained the personal information. These out-of-pocket costs do not include the potential damage to reputation caused by a breach, often occurring as a loss of trust of clients who entrusted their confidential information to the law firm. Most law firms will also experience some form of business interruption as a result of a data breach, as many hours will be devoted to



investigating, responding to and repairing the breach. Finally, if clients sustain damage as a result of the data breach, such as damage to their credit resulting from identity theft or loss of funds from financial accounts, they may articulate a claim for negligence or malpractice.


### 9 Ways to Limit Risks of Cyberbreaches

Develop a comprehensive information security plan designed to prevent data breaches. A great resource is the ABA Cybersecurity Handbook.

1. Conduct a risk assessment, which often can be aided by the services of knowledgeable, objective, independent IT vendors.
2. Use appropriate encryption technology on servers, desktops, laptops, and all mobile devices.
3. Limit access to its computer systems, email, and directories only to known and trusted users, and by implementing and following appropriate password policies.

4. Develop and follow a data retention and destruction policy, so that personal data is not at risk. It is important to sanitize and eliminate personal information that is no longer needed, and frankly, to avoid collecting personal data that is not essential. Law firms should carefully analyze where such data is kept, and limit the number of places where such data is retained.
5. Keep anti-virus and security software up to date, regularly applying recommended patches.
6. Educate employees about appropriate handling and protection of sensitive data, proper use of email, and use and protection of passwords is also a very important step in minimizing risk.
7. Implement and follow a written internet security protocol (WISP) to explain in detail how internet access and usage should be conducted on firm computers, and specifically, the limits on such usage. Not only

is this employee education process important, but management of this exposure should continue through employee exit strategies, realizing that unhappy former employees pose a significant risk for a potential data breach.

8. Develop a comprehensive breach preparedness plan, to enable decisive action and avoid operational paralysis when a data breach occurs. This will allow a firm to timely respond to a breach incident, perhaps limiting the scope of the breach and potential damages to those whose information has already been compromised, as well as limiting the amount of lost productivity and negative publicity that might result from a data breach. With careful thought and planning, law firms can significantly lower their exposure to a potential data breach and have a road map in place when and if such event occurs. 

## OBLIC Can Help

Although a client's claim for cyber breach-related damages based on negligence or malpractice may be covered under some legal professional liability insurance policies, most often "first party-related costs/damages" are not. Such first party costs/ damages can include most of those mentioned above: business interruption, privacy breach response costs, notification expenses, breach support and credit monitoring expenses, damage to data and computer programs, cyber extortion expenses, computer forensic and investigation fees, public relations expenses, legal expenses, etc.

It is with these risks in mind, and in recognition that the costs of a cyber breach to a law firm can be significant, that the Ohio Bar Liability Insurance Company (OBLIC) includes cyber breach insurance coverage, free of charge, in all of its legal professional liability insurance policies protecting Ohio law firms. This coverage

provides protection for the first party type damages described above, which are not ordinarily covered by a professional liability policy, with additional protection for defense costs and penalties incurred as a result of a regulatory investigation.

Such coverage provides limits of liability of \$50,000 per claim and in the aggregate for firms of ten attorneys and fewer, and \$50,000 per claim and \$125,000 in the aggregate for firms of eleven or more. OBLIC also offers cyber breach insurance with much higher limits and broader coverage at very affordable rates via its subsidiary, the OSBA Insurance Agency. Finally, OBLIC policyholders also receive complete complimentary access to an extensive treasure trove of cyber security loss prevention tools and resources.

We have cyber breach coverage for your firm, no matter the size, type of practice or scope of cyber security protection needed.

If you are not an OBLIC policyholder, or you are a policyholder but don't have adequate cyber security coverage, call or email an OSBAIA Agent:

### Rick Creel

Vice President, Sales  
and Business Development  
(614) 344-4157 | rcreel@osbaia.com

### Tammy J. Thornton

Senior Sales Executive  
(614) 572-0616 | tthornton@osbaia.com

### Danna Blackburn

Sales Executive  
(614) 572-0616 | dblackburn@osbaia.com

# Ohio Bar College *wants you!*

At OBLIC we value attorneys who go above and beyond in furthering their professional skills and excelling in their legal knowledge. This is why we are personally inviting all Ohio attorneys to consider joining the Ohio Bar College. Admission to the Ohio Bar College recognizes exceptional achievement by Ohio attorneys who have exceeded the required hours of continuing legal education by earning 24 hours of CLE in one calendar year.

**Ohio Bar College members will also receive special discounts on OBLIC insurance policies and will be publicly recognized each year in *Ohio Lawyer*. Visit [oblic.com](http://oblic.com) to learn more.**

The logo for oblic features the word "oblic" in a lowercase, sans-serif font. The letters "o", "b", and "l" are orange, while "i" and "c" are dark blue. A small dark blue square is positioned above the dot of the "i".

Ohio Bar Liability Insurance Co.



**LiveCLE**

**December 27**

**ACTL Winning at Trial Video Replay**  
Columbus, Cleveland, Fairfield,  
Perrysburg, Akron

**December 28**

**Saturday CLE: Decision-Making for  
Lawyers: Distraction, Deception and  
Drunkness Video Replay**  
Columbus

**December 30**

**Year-End Wrap Up**  
Columbus, Independence, Fairfield,  
Perrysburg, Live Interactive Webinar

**December 30**

**How to Better Manage Your  
Workload: Time, Task, and Email  
Management for Legal Professionals  
Video Replay**  
Columbus

**December 30**

**Marsy's Law: Implementation and  
Upcoming Changes Video Replay**  
Columbus, Independence, Fairfield,  
Perrysburg

**December 31**

**The Probate Omnibus Bill:  
HB 595 Video Replay**  
Columbus

**December 31**

**ACTL Ethics Video Replay**  
Columbus

**January 25**

**Saturday CLE: How to Better  
Manage Your Workload: Time, Task,  
and Email Management for Legal  
Professionals Video Replay**  
Columbus

**January 31**

**Ohio Cannabis Law Conference  
Video Replay**  
Columbus, Cleveland, Fairfield

**February 11**

**Discipline Problems Video Replay**  
Columbus, Cleveland

**February 19**

**Basics of Elder Law**  
Columbus, Cleveland, Fairfield,  
Perrysburg, Live Interactive Webinar

**February 21**

**Nuts & Bolts of Wills & Trusts**  
Columbus, Cleveland, Fairfield,  
Perrysburg, Akron, Live Interactive  
Webinar

**February 28**

**OVI Update Video Replay**  
Columbus, Cleveland, Fairfield



# Two Bites *at the* Same Apple

Supreme Court rules that  
defendants can be prosecuted  
by federal and state governments  
for the same crime

By D. Michael Crites,  
Jennie Ferguson  
& Micaela Taylor



On June 17, 2019 the U.S. Supreme Court declined to overturn the Dual Sovereign Doctrine, maintaining that individuals may be prosecuted under both federal and state law for the same criminal offense. The court's decision was a loss for petitioner Terance Martez Gamble, who had been prosecuted twice for illegal possession of a firearm, first in state court and then in federal court.

In 2008, Gamble pleaded guilty to felony robbery in the state of Alabama. Seven years later during a traffic stop for a broken tail light, an officer discovered a gun, marijuana and marijuana paraphernalia in Gamble's car. As a convicted felon, Gamble was not permitted to own a gun under Alabama state law, and the state prosecuted him for illegal possession of a firearm. In 2016, the federal government indicted Gamble for being a felon in possession of a firearm in violation of federal law for the same conduct arising out of the 2015 traffic stop.

Gamble filed a motion to dismiss in the U.S. District Court for the Southern District of Alabama, arguing that the federal government's decision to prosecute him after his state prosecution constituted a violation of his Fifth Amendment right against dual prosecutions for the "same offense." The district court found Gamble's subsequent federal conviction was constitutional under the Dual Sovereign Doctrine, which provides that separate sovereigns, including the U.S. federal government and state governments, may subject a defendant to prosecutions twice for the same conduct. Gamble appealed the district court's decision to the U.S. Court of Appeals for the 11th Circuit. The 11th Circuit affirmed the lower court's decision, reasoning that the Dual Sovereign Doctrine permitted the federal government to conduct a separate and subsequent prosecution. Gamble petitioned for certiorari, and

the Supreme Court granted on the question of the constitutionality of the Dual Sovereign Doctrine under the Fifth Amendment.

The Supreme Court's decision to take Gamble's case trailed on the back of a 2016 concurrence written by Justice Ruth Bader Ginsburg and joined by Justice Clarence Thomas in *Puerto Rico v. Sanchez Valle*, where both justices urged the court to reconsider the constitutionality of the Dual Sovereign Doctrine. When the court initially opted to take Gamble's case, the decision created considerable buzz surrounding what seemed like the potential willingness of the court to overturn the doctrine. Of course, the initial draw of the case was the possibility that defendants could be spared from dual prosecutions and subsequent convictions arising from federal and state prosecutors working together. A less expected interest in Gamble's case arose in the wake of the FBI's investigation into Russian meddling, where *Gamble v. United States* became the hopeful road paved with gold for officials under investigation. In one example, putting the Dual Sovereign Doctrine to rest would bar the state of New York from prosecuting Paul Manafort for tax fraud in addition to his federal conviction, giving more weight to a presidential pardon for Manafort's federal charges. But with the Supreme Court's decision to uphold the Dual Sovereign Doctrine, Manafort's get-out-of-jail-free card would have to come in another form.

In light of the Supreme Court's decision to take Gamble's case after nearly 60 years of silence on the constitutionality of the Dual Sovereign Doctrine, its resounding agreement to adhere to precedent is remarkable. In a sweeping 7-2 decision, the court declined to overturn the Dual Sovereign Doctrine, finding individuals convicted in either state or federal

court may be tried again in the other. In its reasoning, the Supreme Court remained loyal to 170 years of precedent and what it found to be the original understanding of the term "offence" under the Fifth Amendment. In writing for the majority, Justice Samuel Alito surprisingly embraced an originalist interpretation, which he has rejected in the past, stating that "an 'offence' is defined by law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws and two 'offences.'" Under this understanding of double jeopardy, Gamble's dual prosecutions arose out of separate "offences" under separate sovereigns rather than out of the "same offence."

"In any case," the court's majority stated in its syllabus, "eliminating the dual-sovereignty rule would do little to trim the reach of federal criminal law or prevent many successive state and federal prosecutions for the same criminal conduct, see *Blockburger v. United States*."

In light of his previous skepticism of the Dual Sovereign Doctrine, Justice Thomas' decision to write separately in a concurring opinion was unanticipated. In what was Justice Thomas' most forceful articulation of his opinion on *stare decisis*, he voiced his willingness to overhaul precedent, while qualifying his contradictory choice to side with the majority in declining to overturn the Dual Sovereign Doctrine. On the other hand, Justice Ginsburg remained faithful to her *Sanchez Valle* concurrence in criticizing the majority for its interpretation of the Fifth Amendment and its unwillingness to break away from precedent.

But what was perhaps most unexpected about this case was Justice Neil Gorsuch's willingness to defect from the other conservative justices to write separately in a vibrant dissent. Surprisingly, Justice Gorsuch



hinged his deprecation of the Dual Sovereignty Doctrine on originalism, arguing that the framers “sought not to multiply governmental power but to limit it.” But even the unlikely duo of Justice Ginsburg and Justice Gorsuch was not enough to sway the other justices in favor of abandoning the doctrine.

Even so, there is some debate as to whether the Supreme Court’s ruling would have had a significant impact had the other justices been swayed to rule in the reverse. For one, dual prosecutions are uncommon. The Department of Justice’s Petite Policy prevents federal prosecutors from pursuing subsequent prosecutions unless they have sought authorization from a policy waiver. Additionally, the justices all agreed that the Blockburger test for double jeopardy is easily penetrable, and it would not be difficult for federal or state legislators and prosecutors to maneuver the test in a way that would remove subsequent prosecutions from the bar of double jeopardy. Ultimately, there is no way to know what impact, if any, an alternative disposition would have had.



## About the Authors

D. Michael Crites and Jennie Ferguson are partners in the Columbus office of Dinsmore & Shohl LLP, where they focus on white-collar crime. Crites is a former United States Attorney for the Southern District of Ohio and Ferguson practices in federal and state courts before administrative and regulatory bodies. Micaela Taylor is a student at the Ohio State University Moritz College of Law. She was a 2019 Dinsmore summer associate.

## On the Blockburger Test

By Carly Edelstein, Assistant State Public Defender, Office of the Ohio Public Defender

The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” The Ohio Constitution similarly instructs that “[n]o person shall be twice put in jeopardy for the same offense.”

These clauses provide critical protections against “a second prosecution for the same offense after acquittal,” “a second prosecution for the same offense after conviction,” and “multiple punishments for the same offense.” *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

“Where successive prosecutions are at stake, the guarantee serves ‘a constitutional policy of finality for the defendant’s benefit.’” *Brown v. Ohio*, 432 U.S. 161, 165 (1977), quoting *United States v. Jorn*, 400 U.S. 470, 479 (1971) (Plurality opinion).

In *Blockburger v. United States*, 284 U.S. 299, 304 (1932), the U.S. Supreme Court articulated the seminal test for determining whether offenses qualify for this double jeopardy protection. The test requires reviewing courts to evaluate the elements of each statutory provision to determine whether each requires proof of an element which the other does not. If not, double jeopardy bars additional prosecution and punishment. The test forbids cumulative punishments and successive prosecutions for both a greater- and lesser-included offense.

The test is well-illustrated by the U.S. Supreme Court’s decision in *Brown v. Ohio*, 432 U.S. 161 (1977). Brown was arrested after stealing a car from an East Cleveland parking lot. He was first charged in municipal court with

joyriding, which is defined as the unlawful and purposeful taking, driving or operating of a vehicle without the owner’s consent. He pleaded guilty, was sentenced to jail time and a fine, and completed his sentence.

Soon thereafter, a Cuyahoga County grand jury indicted Brown on two counts, including theft of a car, which is defined as joyriding with the intent to permanently deprive the vehicle’s owner of possession. After comparing the statutory elements of each crime, the Supreme Court concluded that joyriding does not contain any elements that are not also contained in the auto theft statute and therefore the two offenses constitute the same offense under the Double Jeopardy Clause. Ultimately, the Court’s decision barred Brown’s second prosecution for auto theft.

Had Gamble (see accompanying article) been indicted in the same jurisdiction, by the same sovereign in both cases, the Double Jeopardy Clause likely would have barred his second prosecution. Under Alabama law, illegal possession of a firearm occurs when a person convicted of a crime of violence – in this case, robbery – owns a firearm or has one in his possession. And federal law prohibits a person convicted of a crime punishable by imprisonment for a term exceeding one year – again, in this case, robbery – from shipping or transporting in interstate or foreign commerce or possessing in or affecting commerce, any firearm or ammunition.

Gamble’s first charge of illegal possession of a firearm does not contain any elements not also contained in the federal statute. Therefore, the two charges would likely constitute the same offense under the Blockburger test.



## Bellefontaine

OSBA member **Kevin Braig** is the newest **Logan County Judge**, having been appointed and sworn in to the county's Court of Common Pleas.

## Cleveland

Valissa Turner Howard ended her second term as president of the **Norman S. Minor Bar Association** with 350 in attendance at the association's annual Trailblazer Luncheon.

Attorneys **Gregory G. Guice** and **Julian T. Emerson** were recently named to the 2019 list of "Who's Who in Black Cleveland," a publication that celebrates and recognizes the extraordinary and significant accomplishments of African Americans in the community.

Reminger Co. LPA attorney **Joseph S. Simms** has been appointed to serve on the Cleveland Metropolitan Bar Association **Judicial Selection Committee** for a three-year term.

## Columbus

The law firm of **Barnes & Thornburg** celebrates 10 years in **Columbus** in 2019.

## Dayton

Faruki PLL partner **Erin Rhinehart** has been selected as a Premier Health Care Lawyer (PHCL). Just one healthcare lawyer per city is selected and recommended by PHCL, and the inclusion is by invitation only. Rhinehart will represent Dayton as the leading healthcare lawyer for all of 2020.

## In Memoriam

### 2019

**Michael Harold Holz**; 76, Dayton, February 15, 2019

**George E. Gessner**; 74, Cortland, February 23, 2019

**Roger Coolidge Stridsberg**; 92, Columbus, April 20, 2019

**Joseph W. Maxin**; 92, Youngstown, April 29, 2019

**Richard A. Chenoweth**; 93, Naples, FL, May 6, 2019

**Allan H. Gifford**; 87, Wimberley, TX, May 6, 2019

**C. Duane Anderson**; 88, Ashland, June 19, 2019

**Douglas W. Franchot Jr.**; 97, Silver Spring, MD, June 20, 2019

**Ray A. Cox**; 85, Centerville, June 23, 2019

**Robert G. Stachler**; 89, Newtown, July 11, 2019

**James H. Coogan**; 81, Cincinnati, July 17, 2019

**Marvin J. Feldman**; 89, Shaker Heights, July 17, 2019

**Stewart R. Jaffy**; 89, Columbus, July 22, 2019

**Frank Howard**; 69, Marysville, July 25, 2019

**Frederic Lewes Ross**; 93, Middletown, July 25, 2019

**Mark V. Klosterman**; 89, Celina, August 4, 2019

**Lawrence S. Huffman**; 89, Lima, August 6, 2019

**Kurtis A. Tunnell**; 58, Hilliard, August 31, 2019

**Kirk F. Loxterman**; 69, Painesville, September 3, 2019

**Kristin Waid Whitesell**; 44 Hilliard, September 4, 2019

**James S. Irwin**; 85, Fairfield, September 14, 2019

**Dirken T. Voelker**; 86, Columbus, September 22, 2019

OSBA Legal Leaders is limited to awards and civic duties. The news listed is edited from press releases submitted to the OSBA. To submit an announcement for consideration in Legal Leaders, please email [Editor@OhioBar.org](mailto:Editor@OhioBar.org).



## Two Views on “Dark Waters”

In “Dark Waters,” Experience the Emotional Toll of an Attorney Fighting for Truth

By Chris Tavenor



As a public interest attorney at the Ohio Environmental Council (OEC), I've worked on water quality issues including PFOA and other perfluoroalkyl substances (PFAS). I'd heard Rob Bilott's story before — he was a speaker at the OEC's inaugural Ohio Public Interest Environmental Law Conference in 2018. We invited him to speak not only due to his Ohio connection, but because his lawsuits are incredibly important to the future of global human health. The science is certain on the dangers of PFOA, as revealed by Bilott's work — and we're just starting to recognize the risks of a thousand similar chemicals.

I expected Hollywood to approach PFOA with its usual hammer in “Dark Waters,” rather than with a scalpel. I was certain they would skirt over the details of the law, the legal system and the human health risks, instead crafting a fast-paced narrative intended to thrill and wow audiences with unrealistic farmomgering.

Instead, “Dark Waters” presents a harrowing, character-driven tale illustrating the stress and emotional toll of fighting against corporate-powers-that-be. Mark Ruffalo shines as Rob Bilott, the attorney . . . and Rob Bilott the scared son, and father, husband, and human seeking answers to murky questions. Anne Hathaway, playing Sarah Bilott, masterfully portrays a woman simultaneously supportive of the eccentricities of her ambitious husband while fighting against the sacrifices made in her own life.

Moviegoers may expect a tale of corporate espionage and chemical terror, but in reality, “Dark Waters” is all about Rob Bilott's real life. And it works. Rather than compress and combine legal narratives into a single case, “Dark Waters” shows the true scope of Bilott's fight against DuPont, starting in 1999 and ending the film in 2015. Sixteen years of legal battles - and those are only the fights shown in the film! Bilott's fight continues, even today.

From depositions to discovery, from procedural motions to oral arguments, “Dark Waters” explores the grueling path through the courts taken to unveil DuPont's treachery against the people of Parkersburg, West Virginia. At the same time, 16 years of fighting takes a toll both on Bilott and the people actually threatened by PFOA. “Dark Waters” is a film of details, including the unsung, emotional tragedies of the people Bilott fights to protect.

Through expert (albeit cliché) on-screen storytelling, we see the dangers presented by PFOA and other similar substances. In an archetypical dingy bar scene, a chemist draws on a notepad, showing Bilott the true nature of C8. Similarly, using real footage and photos from the original lawsuit protecting a farmer from DuPont, the film illustrates the risk to animals ingesting contaminated water. It also shows the political and cultural risks of pursuing restitution through the courts — and how long it can take to resolve complicated cases.

However, the movie truly shines through the portrayal of Bilott's personal experience fighting against the bad actors. Often personified by older, traditionalist attorneys (some employed by Taft itself, the firm for which Bilott still works), numerous antagonists push against Bilott's efforts to reveal the dangers of PFOA. And even as Sarah Bilott rallies behind her husband, she too expresses discomfort at his work. She sacrificed her career for him, and he might throw that away on a doomed crusade against a multi-billion dollar company? He puts stress upon himself, too, for he often doubts whether he's doing the right thing. It's brilliantly raw, visual storytelling. It's clean and concise, even when skipping year-to-year.

I give “Dark Waters” 3.5/4 stars. Rob Bilott dove into darkness, taking on a corporation with near-unlimited resources and holding them accountable to truth. It nearly killed him, but by the end of the movie, viewers will recognize why he never stopped fighting — and continues fighting to this day. Perhaps it'll inspire others to join the fight, too.

### About the Author

Chris Tavenor is the Ohio Environmental Council Law Center's staff attorney, supporting the legal and policy teams in their efforts to ensure clean air, clean water and clean energy for Ohio. In 2018, he co-authored a Petition for Rulemaking to the US EPA regarding PFOA and other PFAS, requesting regulations under the Safe Drinking Water Act and Clean Water Act. Tavenor is a graduate of the Ohio State University Moritz College of Law.

To learn more about Dark Waters and see an interview with attorney Rob Bilott, visit [OhioBar.org/DarkWaters](http://OhioBar.org/DarkWaters)

## “Dark Waters” Falls Flat

By Rob Brundrett



“To Kill a Mockingbird,” “12 Angry Men,” “A Few Good Men” and “My Cousin Vinny” can all rest easy. Their places in the pantheon of legal movies are safe for now. “Dark Waters” falls well short of earning a place among the great American legal dramas.

“Dark Waters” is the fictionalized account of attorney Rob Bilott’s legal battle against DuPont. The story takes place over 20 years, depicting impacts of the case on his law firm (managing partner played by Tim Robbins), family (wife played by Anne Hathaway), and health. The movie, based loosely on a New York Times Magazine article, works overtime to try to convince the audience that DuPont was negligent in its business practices and put the lives of its workers and communities along the Ohio River at risk. Bilott, played by a dour Mark Ruffalo, claims the company’s use of the compound, C8, which is part of the Perfluorooctanoic acid (PFAS) family of chemicals, is poisoning humans and animals in the Parkersburg, West Virginia community.

For those who might not be familiar, PFAS chemicals have been ubiquitous in modern life since at least the 1940s. Many items we rely on every day include these substances – including rainproof gear, carpet protectant, medical devices, aircraft, low-emissions vehicles and electronics. “Dark Waters” seeks to play on the public’s lack of knowledge about these substances to build fear and paranoia. However, many of the movie’s claims have been outright refuted.

“Dark Waters” wants to be a David versus Goliath story – but getting to the conclusion requires epic tolerance.

On one hand, the two-hour movie often drags as Bilott explains – at length – the case facts and legal minutia to whichever character happens to be stuck with him. In other moments, the production seeks desperately to spice things up with deception, danger and violence. The film uses everything from potential car bombs, to arson, to shady characters in trench coats in an attempt to keep viewers hanging around. Of course, anyone who has followed the real case knows that these dramatized events are simply that – creations to make the movie more sensational than your typical corporate civil litigation case.

The film purports that C8 contaminated a small farm and killed a cattle herd. While the farmer honestly believed this to be true, the facts showed otherwise. A 1999 investigative report, co-authored by leading scientists, veterinarians and the U.S. EPA, concluded that the cows died as a result of malnutrition, endophyte toxicity, pinkeye and copper deficiency – not C8 exposure. Specifically, the report concluded that the cattle had been fed fungus-containing food, which led to the endophyte toxicity.

The movie leads viewers to believe that PFAS and PFAS alone cause illness, cancer and birth defects. Like just about every other thing on the planet, either synthetic or naturally occurring, presence alone does not equate to toxicity. The movie fails to thoroughly disclose the results of the C8 Science Panel – the largest community health study ever conducted on these issues. This panel determined that there is no relationship between PFAS and birth

defects, yet this was a central theme of the movie.

It would be fascinating to hear what the people of Parkersburg think of this portrayal of their community and their lives. The movie casts the company as the worst type of villain and the local people as rubes. A group of West Virginia lawmakers recently decried images of people in the film as “literally toothless hillbillies.”

In its attempt to thrill audiences and drive an agenda, it puts forward a narrative that even the most hardcore fans of legal genres will question. If you came into the movie thinking that corporate America cares about nothing but profits this movie will certainly leave you feeling justified. But if you dig into the facts and history, sort the fact from the Hollywood fiction, you might just find yourself wondering what really happened along the Ohio river.

Lawmakers and regulators – both in Ohio and Washington – need to rely on sound science, and not Hollywood, as they consider how best to advance health and safety when it comes to environmental policy.

### About the Author

Rob Brundrett is the Director of Public Policy Services for The Ohio Manufacturers’ Association (OMA). In this role, Rob coordinates the OMA’s day-to-day lobbying efforts at the statehouse and before the executive branch. He works extensively with manufacturing leaders on a variety of issues impacting manufacturing including workers’ compensation, environment, healthcare, workforce and taxes.



The Logan County courthouse renovation took 588 gallons of paint, 15 miles of electrical conduit and 910 sheets of drywall to complete.

# Ohio Courthouse Series

## Get to Know Logan County

This fall, the OSBA visited the Logan County Courthouse for the next installment of the *Ohio Courthouse Series*, featuring video and interviews with courthouse staff. This series helps you get to know your county courthouses, from where to park to how to navigate the building.

The Logan County courthouse was originally designed by a Cleveland architect Alexander Koehler and built in 1870 in Bellefontaine's main square, where it stood until a storm swept through the town in 2012. The day of the storm, courthouse employees sheltered in the basement until they thought it was safe to leave — only to have the storm unearth that the courthouse needed extensive structural repair, and it was a stroke of luck that the building had not collapsed on them. After more than six years of renovation, the courthouse reopened on Nov. 19, 2018, featuring the original bell tower clock.

Read on for more facts visiting attorneys should know about the Logan County courthouse:

**Fact:**  
*The Logan County Courthouse was placed on the National Register of Historic Places in 1973.*

### Get to know the people:

#### Judges:

- Judge Dan W. Bratka, Common Pleas Family Division
- Judge Kim Kellogg-Martin, Common Pleas Family Division
- Judge Kevin P. Braig, Common Pleas General Division

*Clerk of Courts:* Barb McDonald

*Recorder:* Patricia Myers

### Clerk and Recorder Hours:

Monday-Friday 8:30am-4:30pm

The court only accepts original or fax filings, no e-filing.

### Don't stress about parking or accessibility:

2-hour parking surrounds the courthouse with a public lot on the northeast corner of E. Chillicothe Ave. and N. Madriver. Renovations included updating the building to make it ADA accessible.

**Check your email** with WIFI available for the public and attorneys

**Chat with your clients** in meeting space available in Logan County Courthouse conference rooms or nearby spaces: Bella Vino Events & Wine Room, Union Station of Logan County and the Hilliker YMCA.

### Don't get lost in the building:

#### Ground level:

- Court of Common Pleas—Family Court Division
- Juvenile Probation
- Fiscal/ HR

#### First Floor:

- Court of Common Pleas—Family Court Division
- Domestic Relations, Juvenile, Probate

#### Second floor:

- Court of Common Pleas—General Division
- Clerk of Courts

*Courthouse Annex*—100 S. Madriver St.: Logan County Recorder

### When you're hungry but don't want to go far, check out:

- Brewfontaine
- Kiyomi Sushi
- 2 G's Barbecue
- Six Hundred Downtown

**Fact:** *Brewfontaine is a 1950's diner transformed into a popular bar & restaurant with craft beer and tasty sandwiches.*

### If you need a coffee-boost:

- Sweet Aromas
- Native Coffee
- Tim Hortons

### Where to catch some z's:

- Super 8 by Wyndham Bellefontaine
- Comfort Inn Bellefontaine



### Paved the way

*The courthouse is adjacent to Court Avenue, the first concrete street in the United States, paved in 1893.*



To learn more about Logan County and its courts, visit [OhioBar.org/LoganCountyCourthouse](http://OhioBar.org/LoganCountyCourthouse)





# The Conference Center at 1700



The Ohio State Bar Association's newly renovated corporate conference center provides modern meeting and event space. Our facilities are ideal for special events, conferences, board meetings, orientations, receptions, corporate trainings, mediations, depositions, arbitrations, workspace solutions and more.

Call to find out about our competitive rental rates.



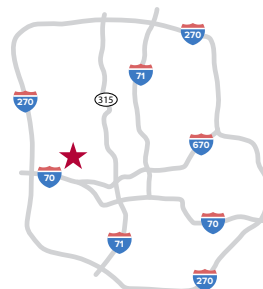
## FEATURING

- Complimentary, State-of-the-Art A/V Technology
- Complimentary, Hi-Speed Wi-Fi
- Free, Ample Onsite Parking
- Complimentary Coffee, Tea, Sodas and Filtered Water
- Approved Caterers Permitted
- Ask About Our Onsite Professional Video Studio Rental
- OSBA Members Receive 20% Discount



## CENTRAL LOCATION

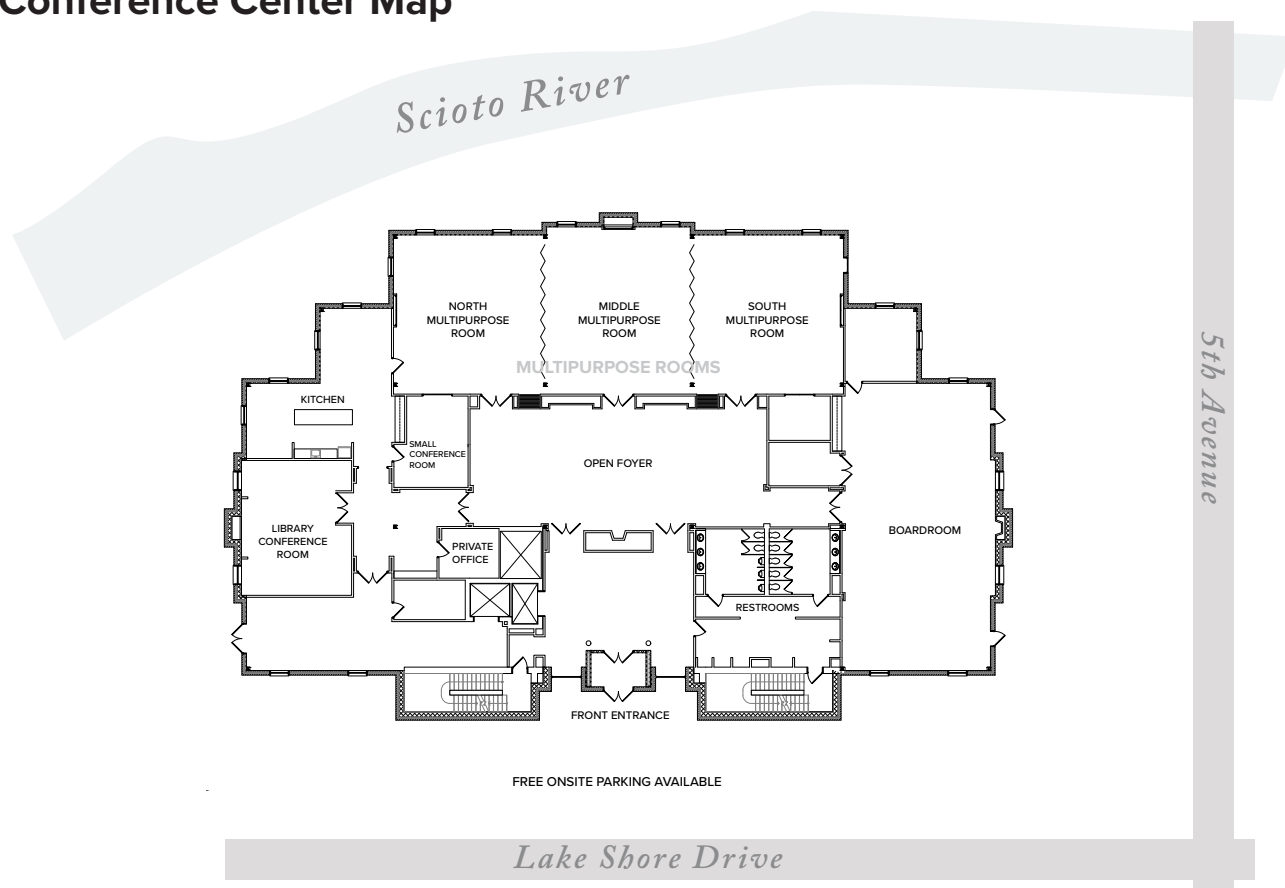
**Ohio State Bar Association**  
1700 Lake Shore Drive, Columbus, OH 43204  
(800) 232-7124 | (614) 487-8585 | ohioabar.org



ROOM	SQUARE FOOTAGE	MAX CAPACITY	CLASSROOM	HOLLOW SQUARE	CONFERENCE TABLE	THEATER STYLE	BANQUET TABLES	INCLUDED TECHNICAL CAPABILITIES
Multipurpose	3,069	200	150	-	-	200	200	📶 📺 🖥️ 🎤 🗨️ 📊
North Multipurpose	924	60	42	20	20	42	60	📶 📺 🖥️ 🎤 🗨️
Middle Multipurpose	1,221	70	60	20	20	60	70	📶 📺 🖥️ 🎤 🗨️
South Multipurpose	924	60	27	20	20	27	60	📶 📺 🖥️ 🎤 🗨️ 📊
Boardroom	1,600	50	50	40	40	40	50	📶 📺 🖥️ 🎤 🗨️
Library Conference	475	16	12	16	16	16	16	📶 🖥️ 🗨️
Small Conference	170	8	-	-	8	-	-	📶 🖥️ 🗨️
Private Office	120	3	-	-	-	-	-	📶 🗨️

- 📶 High-Speed Wi-fi
- 📺 Projector
- 🖥️ Screen(s)
- 🗨️ Teleconference
- 🎤 Microphone(s)
- 📊 Podium, Stage

## Conference Center Map



### RENTAL HOURS

Monday - Friday: 9am - 5pm  
Weekend/After Hours Available  
Upon Request



### CONTACT

Visit [ohioabar.org/rentourspace](http://ohioabar.org/rentourspace) to learn more or to request a quote.



## Ohio State Bar Foundation's Fellows Program

OSBF's honorary, elite Fellows program is accepting nominations through **January 15!**

### What's an OSBF Fellow?

A Fellow is a member of the Foundation - an attorney who gives his or her time, talent, and treasure to advance the law and build a better justice system through community service efforts and monetary donations to the Foundation.

### Why Should You Be Interested?

The OSBF Fellows Program is a rewarding experience for attorneys looking to extend their reach and give back. It brings people together from across the state who represent different firms and walks of life to connect, volunteer, and bring the OSBF's mission to life.

*"Being an OSBF fellow provides you an opportunity to learn about and participate in some of the amazing charitable work happening across the state. During our Fellows Class meeting at Migration and Refugee Services of Cleveland Catholic Charities, I was thrilled to learn about how OSBF funding is helping to provide immigration-related legal services for Ohioans in need. As a volunteer, it was a powerful and moving experience to*



*help a refugee on their path to United States citizenship. I'm proud that OSBF is assisting in this life-changing work, and I am inspired to do more in my local community to help migrants and refugees."*  
- Joseph Wenger, OSBF Fellow

*"I was honored to have been nominated to be a Fellow of the Ohio State Bar Foundation. To me, being a Fellow means giving back to the community while striving to make the world a more just place through education, service, and advocacy. Others who strive to make the world a better place through their work would be well served by becoming an OSBF Fellow."*

- Larry Hayman, OSBF Fellow

### Ready to Get Involved?

Fellows can be nominated or can self-nominate. All nominations are due January 15th and will be reviewed by the OSBF's Membership Committee. Final approval is required by the Board of Trustees.

If you'd like to nominate someone to be a Fellow, fill out a nomination form at [OSBF.org/NominateAFellow](http://OSBF.org/NominateAFellow). If you'd like to self-nominate to be a Fellow, fill out the self-nomination form at [OSBF.org/SelfNominate](http://OSBF.org/SelfNominate).

## CONNECT WITH OSBF

**Twitter:** @\_OSBF\_

**Facebook:** [facebook.com/OhioStateBarFoundation](https://facebook.com/OhioStateBarFoundation)

**LinkedIn:** [linkedin.com/company/ohio-state-bar-foundation](https://linkedin.com/company/ohio-state-bar-foundation)

**Instagram:** [instagram.com/OhioStateBarFoundation](https://instagram.com/OhioStateBarFoundation)

## Top 3 Reasons to Be an OSBF Fellow

Still not convinced you're ready to nominate or self-nominate for the Fellows Program? Here are three more reasons you should consider getting involved:



### 1. Volunteer Opportunities

After volunteering all day at a re-entry clinic in Cincinnati, one Fellow left feeling exhausted, but also moved - more so than he has felt during a typical workday. As an OSBF Fellow, you'll be able to volunteer with OSBF grantees across the state. Take a day away from the office and be reminded of why you wanted to help advance the law.



### 2. A Network of New Connections

OSBF Fellows reside across the entire state and use their law degrees to find careers in an array of areas. Join this elite group of attorneys to form a new network of connections when you become a Fellow.



### 3. Impact Ohio

One hundred percent of Fellows' pledge support is given to Ohio nonprofits through the OSBF's grantmaking efforts. These are organizations who push for a better justice system and educate communities on the law. By being a Fellow, you're consistently giving back and fighting for a better, more just Ohio for us all.

## ► HONOR. REMEMBER. CELEBRATE.

Honor the exceptional, celebrate an occasion, or recognize the significant people in your life with a charitable gift to the OSBF.

Tribute gifts are an easy way for you to support OSBF grantmaking initiatives and ensure special colleagues, friends, and family members receive the statewide recognition they deserve.

To dedicate your gift, call Cynthia Kincaid 614-487-4477 or visit [OSBF.org/Donate](https://www.osbf.org/Donate).



### WE HONOR

#### IN HONOR OF

Thomas Bonasera  
Judge Frederick D. Pepple

#### DONOR

Martin E. Mohler  
Robert C. Wiesenmayer

### WE REMEMBER

#### IN MEMORY OF

Eli T. Naffah  
Carole Dougherty  
Hon. Eugene S. Nevius  
Athornia Steele  
Kenneth W. Amos  
Janice Romanoski

#### DONOR

Donald C. Canestraro  
Ronald W. Dougherty  
Emilie E. Forman  
Michael C. Jones  
Scott and Gretchen Mote  
Al E. Schrader



# Join the movement!



## INNOVATE.

The OSBA's **Corporation Law Committee** had been working for over two years on creating the **Revised Ohio LLC Act**. This act effects a complete restatement of the 1994 Ohio LLC Act in order to provide clarity and guidance to the businesses and legal entities who work with this section of Ohio Revised Code on a regular basis. Other sections of the OSBA have also been involved in the drafting process, including the Estate Planning, Trust and Probate Law Section, and the Corporate Counsel Section.

The Revised Ohio LLC Act is based on the Revised Prototype Limited Liability Company Act published by the American Bar Association's Committee of LLCs, Partnerships and Unincorporated Entities and is modified to fit the needs of Ohio LLCs. The act provides greater consistency and clarity and includes modern advancements that sophisticated investors require to do business.

The bill contains the input of the Ohio Secretary of State's office and creators believe that the end result is one of the most modern limited liability company acts in the country.

Look for its formal introduction in the Ohio General Assembly soon.



## LEAD.

Nominations for the OSBA **Women in the Profession Section's Nettie Cronise Lutes Award** are being accepted through Feb. 2, 2020.

The Nettie Cronise Lutes Award, named after the first woman licensed to practice law in Ohio, has been awarded annually since 1996 in recognition of a woman lawyer who has improved the legal profession through her own high level of professionalism and who has opened doors for other women in the field.

To be eligible for this award, a nominee must be a female member of the OSBA who has advanced the legal profession and created opportunities for other women and girls.

The OSBA is also accepting nominations for the **Weir Award** through Dec. 31, 2019. The award recognizes the demonstration of exceptional professional responsibility among Ohio Lawyers.

The award recipients will be honored at the **OSBA Annual Meeting, May 7-8**



## EDUCATE.

On Dec. 6, the OSBA hosted its **Eighth Annual LGBTQ and Allies Diversity and Inclusion Conference**. This year's theme, "Fifty Years After Stonewall: Where We Were, Where We Are, and Where We're Going" commemorated the Stonewall riots of 1969 and the progress made in the last 50 years.

Speakers from the Harvey Milk Foundation, Ohio University, Kaleidoscope Youth Center, Stonewall Columbus, Human Rights Campaign, Equality Ohio, and ACLU of Ohio presented on the history of Stonewall, including LGBTQ legal and political history and what to expect for the future of the LGBTQ legal and political fields.



# Here's how the OSBA and our members help improve and advance the legal profession.



## ADVOCATE.

The OSBA has been working to support **House Bill 1**, which was passed by the Ohio House of Representatives in May 2019 and introduced to the Senate in June 2019. HB 1 encourages rehabilitation by ardently promoting intervention in lieu of conviction in as many cases as possible and by making it easier for individuals to have their records sealed.

With this bill, the state pushes for courts to address the underlying cause of crimes in order to rehabilitate offenders. In order to ensure statewide application, the bill requires that a court state their reasons for denying a request for intervention in lieu of conviction in an official entry.

The OSBA promotes the bill by testifying in support of it and working behind the scenes to encourage passage. OSBA members can also support HB 1 by reaching out to their local Senators and to the office of the Senate President and expressing their approval of the bill's movement toward criminal justice reform. Visit the Ohio Legislature's website to learn more about HB 1 and how you can encourage its passage in the Senate.



## COLLABORATE.

The Ohio State Bar Association has teamed up with five metropolitan bar associations, including Akron, Cincinnati, Cleveland, Dayton and Toledo, to create the **Ohio Notary Services, LLC (ONS)**, which provides statewide notary education and testing services for current and future Ohio notaries public.

As a result of recent modernization, the process for becoming a notary public in Ohio has changed, and the online notarization of documents is now permitted. To address these changes, ONS takes on the task of preparing individuals for the new designation of online notary public as the Secretary of State's sole authorized provider for training and testing to become an online notary.

ONS's training and testing is conveniently available both online and in person, making it widely accessible. While there is certainly a new focus on online notary training, ONS is also committed to providing training and testing for those who wish to obtain or renew their status as traditional "wet-stamp" notary's public, either online or in person.

The OSBA is excited about its collaboration with fellow bar associations and the Ohio Secretary of State's office to provide quality education and testing of Ohio notaries public through ONS.



## VOLUNTEER.

The Ohio State Bar Association has teamed up with the **Ohio Access to Justice Foundation** and local legal aids to promote pro bono service with the **Ohio Justice Bus**, a mobile legal aid office and technology hotspot that allows attorneys to travel and provide services at no cost to clients.

In order to facilitate volunteer participation, the OSBA invited the Justice Bus to each of its fall OSBA district meetings and created a legal clinic/pro bono opportunity for interested attorneys. Prior to the clinic, the OSBA offered a CLE on Ohio criminal record-sealing and certificates of qualification for employment, preparing attorneys for the work that they would do on the Justice Bus.

The CLE offered prior to the Justice Bus clinic gave attorneys the specific knowledge they needed to work on expungements and record sealing, even if this was outside their typical area of specialty or experience. As OSBA's Director of Inclusion and Outreach, Jocelyn Armstrong stated, "It is important for attorneys to get out of their typical boxes, which is what the Justice Bus allows them to do."

Future clinics are planned for spring district meetings. Look for the upcoming schedule at [OhioBar.org/DistrictMeetings](http://OhioBar.org/DistrictMeetings).





## STEFAN THOMAS

Director, Thomas Ingram  
Law Group

### YEARS IN PRACTICE:

7

### CITY/COUNTY:

Columbus

#### How did you take an interest in the law and specifically IP law?

It was presented to me in undergrad by an English professor at OSU who told me to meet with her after I turned in a paper, which was concerning, I thought she'd say this wasn't for me. But, she said, "You know you have a voice in your papers and the way you write and it's something I know my lawyer friends look for, you should really look into the law."

Intellectual property actually came because of the entertainment space. I work with a lot of artists and arts groups and obviously intellectual property is king, the gold of the creative space. I kind of happened into it, not because I had some kind of fanciful mind. The artists and the arts groups need to protect their property and their property is creation, and so it forced me to learn more about copyrights and trademarking.

#### What's your favorite thing about your day-to-day practice?

Being able to work with the clients the way that I'm able to work with them, in a non-traditional sense, a lot of teamwork, a lot of creative back and forth. Even though I'm an external party, I get to see a lot of internal thought and it's more of a camaraderie. It's not just, "Hey we need you to work this contract," it's "I have these issues" or "I have these thoughts, what do you think?" That's my favorite day-to-day, the ability to help build and prepare.

#### What is one of the biggest challenges you've faced as an attorney?

Being underestimated. Being young, being black, being male, coming from a more urban environment. Whether it's colleagues, whether it's opposition — there are times when I approach the table and there's a level of not knowing if I can do the job. It happens even in getting new clients, people see me versus seeing the majority and the assumption is the majority has the expertise. That's a hurdle that I've been fighting since I entered law school. It's been difficult but also very inspiring when I have the

opportunity to show the value that I, or someone who looks like me, can offer to a client, a government, to whomever.

#### What are some of your goals in your profession? Or in life?

One of the aspirations I have in being an owner of a practice is providing exposure to someone who may not traditionally get that exposure. It grew on me as I started to practice in my own setting that I really just enjoy being that trusted advisor to my clients. Growing in that role would be great.

Personally, my goal is to experience culture. I want to continue to gain experience in the most expansive way possible through travel, languages, meeting people who don't look like me. Life is short and I don't want to spend it behind my laptop or behind my desk.

#### For this interview, we are in the Lincoln Theater. Can you speak to why?

We're in the Lincoln Theater because of my artistic side. I've written songs for myself, for others, been a part of major productions, a face for the Columbus Makes Art campaign, and been at the Grammys recently. The Lincoln Theater is one of the first theaters that I headlined as a musician, I've taught in the incubation program and I've provided intellectual property leadership to different artists and groups that come through that 12-month program. I've spearheaded the legal side of that since its inception. 



Watch video and learn more about Stefan at [OhioBar.org/StefanThomas](http://OhioBar.org/StefanThomas)



Do you know an attorney who's doing great things? Nominate them for a Member Spotlight! Send an email to [Editor@OhioBar.org](mailto:Editor@OhioBar.org)



## STATEWIDE LEGAL ETHICS

By Charles J. Kettlewell

Charles J. Kettlewell



Ethics and Professional Responsibility Law  
– Columbus, OH

### Charles J. Kettlewell

Hundreds of grievances defended; hundreds of advisory opinions written; bar admissions; risk management; legal malpractice representation and expert witness. AV-Preeminent Rated. American Bar Foundation Fellow.

Peer voted 2012, 2016, & 2019 Lawyer of the Year in Ethics & Professional Responsibility.

[www.legalethics.pro](http://www.legalethics.pro)  
[Charles@legalethics.pro](mailto:Charles@legalethics.pro)  
(614) 436-2750



## Ethics and Professional Responsibility

Statewide Representation for grievance investigations, discipline proceedings, and character and fitness. Available for ethics consultation and expert witness participation. **Richard C. Alkire**, former Chair and Member of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Chair of its Probable Cause Panel and Member of its Advisory Opinion Subcommittee (1997-2005). NBTA Board Certified in Civil Trial Law. Past President of CATA, CMLAA and ABOTA-Ohio Chapter. E-mail: [rick@alkirelawyer.com](mailto:rick@alkirelawyer.com).

**Dean Nieding**, NBTA Board Certified in Civil Trial Law. Former Trustee of the Cleveland Academy of Trial Attorneys. E-mail: [dean@alkirelawyer.com](mailto:dean@alkirelawyer.com).

Alkire & Nieding LLC, 6060 Rockside Woods Blvd., Suite 200, Independence, OH 44131-2375.

P: (216) 573-0801; F: (216) 573-0806.  
Website: [www.alkirelawyer.com](http://www.alkirelawyer.com).



## Advertise in The Marketplace

Find expert services, office spaces for sale, referral ads, and other listings. This is an easy and affordable way to reach the OSBA Members on a quarterly basis.

Contact **Amanda Morrow** for more information at (614) 487-4453 or email at [AMorrow@ohiobar.org](mailto:AMorrow@ohiobar.org).



## OSBA Career Center

Whether you are seeking new career opportunities or hiring new associates for a law firm, the Ohio State Bar Association has the resources you need for all your employment goals. Legal professionals looking for new opportunities can post resumes, search jobs, access numerous career resources and manage their job search all in one place. OSBA members seeking qualified professionals receive special rates on job postings, and all employers have access to numerous tools designed to help you find the right candidate for your job opening.

To post your job immediately online, visit <https://careercenter.ohiobar.org>

# Get published at the OSBA

The Ohio State Bar Association offers high-quality law-related information to a wide audience via a variety of formats.



## What's missing? Your contribution.



### OhioBar.Org

The OSBA website is home to a robust practice library and quality public content that receives thousands of unique views per month.



### Ohio Lawyer Magazine

The award-winning Ohio Lawyer magazine is not just a perk of being an OSBA member. It offers vetted insights on timely, cutting-edge topics affecting the legal profession today.

A contribution to Ohio Lawyer puts you among the thought leaders of the profession.



### Law You Can Use

Get the exposure you need by providing the OSBA's most visited content. "Law You Can Use" offers the public and statewide media information on common legal topics and connects you with potential clients.

These are just some of the opportunities waiting for you at the OSBA.

*Now get writing!*

Submit your contribution to [editor@ohiobar.org](mailto:editor@ohiobar.org)

