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The Practice in a Pandemic

Judges and Lawyers:
Fortunate To Be Essential

Life and the Law During COVID-19:
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COVID-19 and Malpractice Claims -
Will There Be a Correlation?

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PRESIDENT'S PERSPECTIVE

Eleana Drakatos

President, Ohio State Bar Association



The Year of Curveballs

Reflections on My Term as OSBA President and Looking Ahead

By OSBA President Eleana Drakatos

As I wrap up my term as OSBA President, to call it “eventful” seems an extreme understatement. In fact, for a period in which baseball season has been suspended, we’ve sure seen our fair share of curveballs over the last year. I can tell you that from my vantage point (behind home plate to continue with the metaphor), I have been extremely proud that our team has been consistent and *persistent* in uncovering the opportunities in every challenge and finding the silver lining with each adversity.

Business Income Deduction – Telling Our Stories

It started just 16 days into my term when on my way back from a family vacation, I received a call from CEO Mary Augsburger breaking the bad news that in an 11th hour budget negotiation, the Ohio General Assembly had voted to preclude two professions – lawyers and lobbyists – from being able to take advantage of the state’s business income deduction (BID). This would have meant a significant tax increase for many Ohio attorneys who, like other professional service providers and small businesses, have been eligible for the deduction since 2013. Even setting the financial impact to the side, to be singled out in this way was an affront to our profession that we could not let stand.

Immediately we rallied. At an emergency meeting in August, the Board of Governors decided to retain counsel and crafted a tandem litigation and legislative strategy to reverse the decision. At the same time, we built a grassroots coalition of lawyers, firms and fellow bar associations to speak with one loud voice against this unfair policy and to contact individual legislators. Our strategy worked! Just a few short months after the amendment was adopted, we were pleased to see the Governor sign into law another amendment that reversed it.

This whole episode gave us an opportunity to talk about attorneys as small business owners and professionals who have a positive impact on our state and local economies. In addition, we serve on volunteer boards, contribute pro bono services and make our communities stronger. Very soon we’ll have updated numbers to back up these claims. In the weeks ahead we will be sharing a report prepared by economists at the University of Cincinnati quantifying the contribution Ohio lawyers make to our state. Though the report is still being finalized, here’s a spoiler alert – our contribution is significant. Armed with this data, we will more effectively tell our story to policymakers and just in the nick of time, as our state begins to confront

a budget shortfall in the wake of COVID-19 and additional tax changes could be on the horizon.

ABA Resolution 115 – Remembering Our Mission

While we are strong advocates and active participants in the effort to close the access to justice gap in Ohio, we continue to have strong reservations about proposed “reforms” that would allow non-lawyers to practice law or which would permit private equity companies to enter the legal space, allowing for non-lawyer ownership in law firms.

That is why when the ABA was set to consider a resolution this past February that would have opened the door to such possibilities, we rallied once again, built coalitions with like-minded bars in other states and successfully steered the resolution in a more productive direction. We believe bar associations should be focused on innovations that better connect those in need of legal services with the attorneys who remain the best trained and most suited to help them, regardless of their income. We have recently convened a task force headed by President-Elect Designee David Lefton to recommend ways the OSBA can do just that. This could include educating and promoting the use of limited scope representation,



as well as helping our members with innovative marketing and awareness campaigns to combat the persistent misperception by many consumers that they can't afford to hire a lawyer. We'll explore all of this with an eye on the current Rules of Professional Conduct, including the guidelines around advertising, to make sure they keep pace with any innovations we recommend, and we'll push for changes where necessary.

Of course, we'll also continue to advocate for robust legal aid and indigent defense funding and provide plenty of opportunities through the OSBA, the Ohio State Bar Foundation and the Ohio Access to Justice Foundation for you to give back through pro bono service. In this way we strive to fulfill our mission to both promote justice and advance the legal profession.

COVID-19 – Embracing Technology and Innovation

The onset of COVID-19 also made 2020 the year we were all forced to hone our online presentation and participation skills. Case in point, I was honored to participate in the Supreme Court of Ohio's first-ever virtual bar admissions ceremony and to address the newest members of the Ohio bar. You can watch my remarks by visiting bit.ly/2XT4JZI.

While we have missed seeing them and all of you in person, the significant investment the OSBA made in our online learning platform at OhioBar.org has allowed us to continue to bring you timely and relevant CLE programming and networking opportunities without asking you to leave the safety or comfort of your own home or office.

And because Ohio continues to restrict gatherings of more than 10 people, in a fitting final act before I turn over the reins to President-Elect

Linda Teodosio, I will preside over the OSBA's first-ever, *virtual* Annual Meeting of Members on July 24. Be on the lookout for more information via email on how to participate and on two important constitutional amendments we will take up related to OSBA governance innovations.

One amendment involves increasing engagement and representation on the Council of Delegates. The other would allow members in each district to re-elect their Board of Governors representatives if they so choose. Currently, governors are limited to one three-year term on the board – a restriction that is inconsistent with characteristics of the most high-performing boards. In many cases, governors roll off just as they have mastered the job. We believe that given the opportunity, members will opt to re-elect good and experienced advocates for the benefit of their districts, the Association and a more effective and cohesive governing board. You can read the proposed amendment and get more information by visiting www.OhioBar.org/annualmeeting. There you can register to participate as well as read up on all the legislative proposals the Council of Delegates will be taking up as part of their session, also on July 24. Remember, all members can participate and are encouraged to vote on the constitutional amendments I described as part of the General Assembly meeting, but only Council of Delegates members are permitted to vote on the legislative proposals before them. If you have an interest, you are more than welcome to listen in and participate in the debate of the Council of Delegates.

Racial Unrest – Continuing to Listen and Learn

Perhaps the most difficult challenge we are confronting is how the OSBA can productively contribute to the continued and painful national dialogue about policing and race in America. At the OSBA we are committed to and have

made important strides in promoting inclusion and diversity in the legal profession and our justice system. And as we said in our initial statement following the tragic death of George Floyd, we believe lawyers are uniquely equipped to listen and to help to bridge the divide. We don't pretend to have all the answers, but we know where to start: by recommitting ourselves to the Rule of Law and its equal application to all. We will also be listening closely to our black neighbors and colleagues for whom this ideal falls far short of its promise.

In coming weeks, we will be inviting you to participate in some educational programming around these issues. We appreciate all of you who have written in to share ways in which you feel the OSBA can best make a difference. Stay tuned and please get involved.

An Honor to Serve

Anyone who knows or who has worked with me knows that I am an extreme planner by nature. While I cannot say that my term as OSBA President went exactly according to plan, this year was the perfect opportunity to practice a valuable lesson I learned long ago about leadership: you have to play the game you are in, not the one you wish you were in.

As legal professionals and OSBA members, we have stared down a lot of curveballs this year, but thanks to my fellow officers and board members, CEO Mary Augsburg and her staff, and all of you, we hit some of them out of the park, got a couple of respectable base hits along the way and most importantly, we have an outstanding team warmed up and ready to meet the next challenge head on. As for me, I plan to stay in the game.

Thank you for the honor of serving as your President. I look forward to seeing you, virtually or otherwise, very soon.





Judges and Lawyers: Fortunate To Be Essential During a Pandemic

By Retired Justice Paul Pfeifer

Dining out the afternoon Governor DeWine closed the restaurants, one immediately knew government's reaction to COVID-19 would be incredibly consequential for everyone. There was an unmistakable look of sadness and terror among young waitstaff, who came to work on that March 15 Sunday with a job they loved and now would be going home to great personal and financial uncertainty.

Two weeks earlier at the urging of the Judicial Conference and the Supreme Court, after the first warnings by the Centers for Disease Control and the World Health Organization, judges immediately began developing plans for continuation of their court operations in the event of a possible major national lockdown. Those plans were based upon two unshakable assumptions: that courts must remain open, and that attorneys and court staff would be deemed essential workers if a national or state lockdown occurred.

As the political leaders and public health officials successfully and precipitously shut down the nation, there was never a hint of shutting courts down. In fact, in Ohio, every blanket public health order specifically mentioned separation of powers, carefully excluding the General Assembly and courts from



application of the orders. It is not possible to recount all the nimble and creative ways in which various courts have adjusted in an effort to respect the dangers of COVID-19 while remaining functional for essential court business.

Let's just say it turns out judges can quickly teach themselves new tricks. Some courts already were moving to greater utilization of technology for remote conferences and filings. With the help of \$6 million in quick-turnaround grants from the Supreme Court spread across Ohio, courts' abilities to conduct business remotely were greatly enhanced.

Challenging as the past months have been, the roughest water still lies ahead for both courts and lawyers. Clients and their families have suffered incalculable losses, not just financially but in their sense of self confidence and self worth. What had been the dependable staples in their

lives — work, school, church, recreation — all were torn away overnight by executive orders from a hitherto unknown public health official. The fortunate will gradually return to work, school and church, healing quietly with little public notice.

Millions of our neighbors, friends and fellow citizens will not be so fortunate. Their wreckage will soon become the business of lawyers and courts. For lawyers many of your clients will need pro bono assistance or greatly reduced fees. Expect a sympathetic ear from judges, but also remember judges are confronting the challenges of unpacking the rapidly accumulating backlog of deferred, less essential matters while managing to provide a reasonably COVID-19-protected environment for all who work or have business in their offices.

Judges and lawyers should take quiet pride in the many ways they have come together to meet urgent legal needs of a distressed nation under challenging work conditions. Looking ahead it will be essential for lawyers to have their clients' legal issues well understood and properly prepared when presenting client's business to judges, court staff and clerks. Expect exceptional tolerance and understanding from judges and court staff, but they will have great docket challenges - please do not waste their time by being unprepared or uninformed about a client's position when coming to court.

Unknown unknowns lie ahead but when we later can reflect, let this be a time when lawyers and judges stepped up together to meet every challenge with the calm and measured performance expected of a great profession.

About the Author



Retired Justice Paul Pfeifer is the Executive Director of the Ohio Judicial Conference and has served in that role since January 2017 after his retirement from the Ohio Supreme Court. He was first elected to the

Supreme Court in 1992. Retired Justice Pfeifer has also served in both houses of the Ohio General Assembly, including one term in the House and four terms in the Senate. He received his law degree from The Ohio State University School of Law.



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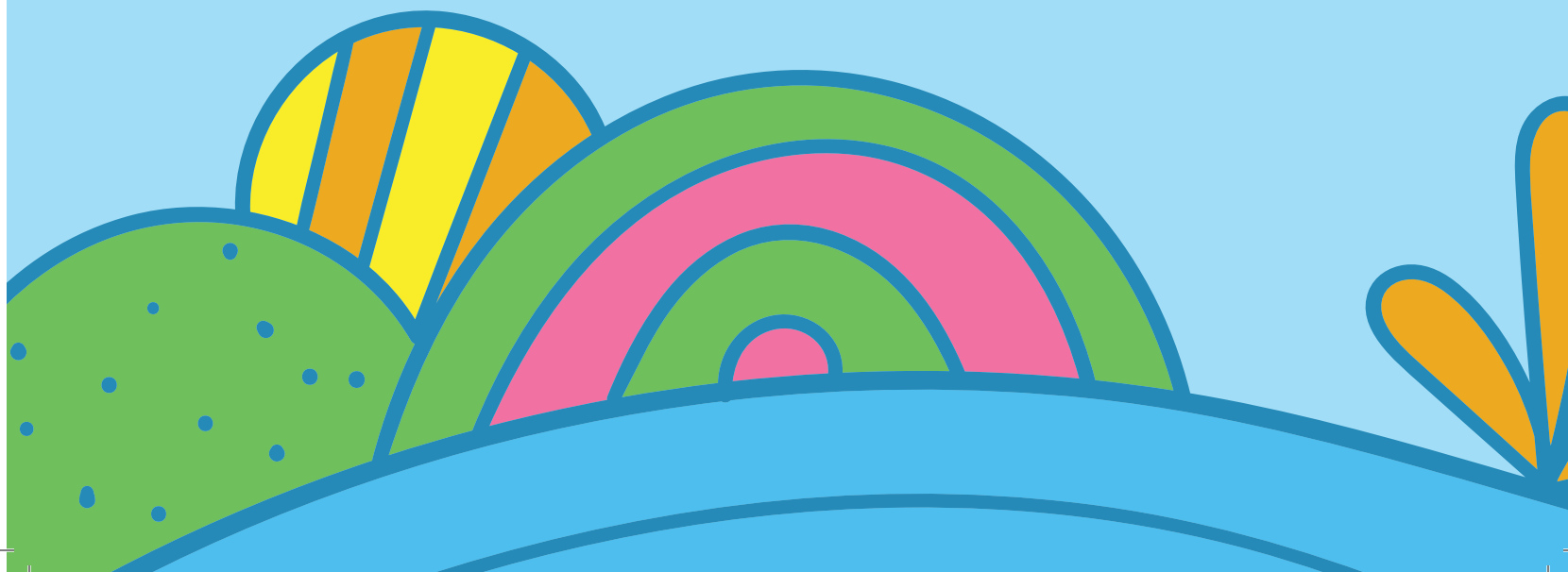
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LESSONS
LAWYERS
CAN LEARN
FROM
DR. SEUSS

BY JUDGE FRANK FORCHIONE
STARK COUNTY COURT OF COMMON PLEAS





Almost all of us in our lives have been touched by the wisdom, advice and humor of Dr. Seuss. His books have influenced millions of children. Even though you probably became enchanted by his verses for the first time during a bedtime story, his words continue to ring true and still make a lasting impact on those who read his work, especially in today's uncertain climate. A review of some of his most popular quotes should resonate with you, and even though his writing is geared towards those who believe in the tooth fairy, when you look closer there are deeper messages that can still impact your life today.

Treat People How You Want to Be Treated

"A person's a person no matter how small."

It doesn't matter if the person is a maintenance worker, a legal assistant or a fellow lawyer or judge, there is no excuse for not treating them with the highest respect. It does you or your client no good to chew out the judge's bailiff or magistrate because you're unhappy about something. Respect can be shown in simple ways. For example, if you're setting deposition dates, it's more professional to call opposing counsel rather than notify them of a unilaterally selected date. After all, the attorney and witnesses have their own schedules to consider. Failure to handle this affably usually triggers a tenuous relationship right from the start, which is totally unnecessary. Furthermore, rather than verbally abuse another lawyer who may lack a clear understanding of the civil rules, taking a few minutes to politely point out their misunderstanding would be more productive.

The same goes in your personal life. Lawyers are no better than any other person. Instead of taking out the frustrations of your day on the cashier at the supermarket, unleashing a smile can provide a huge benefit to both of you. Being a pitbull in the courtroom may be effective, but demonstrating that behavior with the general public only diminishes their perception of you and the legal profession.

Find the Right Balance in Your Life

"Step with great care and great tact, and remember that life's a great balancing act."

Juggling the different priorities in your life is one of the most difficult parts of the job. Now more than ever, it is crucial to find a healthy balance between the practice, which is your livelihood and career, and your family, as well as taking time out for yourself. When you achieve balance, you're calmer, happier and more motivated. As many of us find the lines between the office and home life blurred these days, it's important to draw clear lines of separation and make sure you're taking time for family bonding, exercise, or letting your mind drift away on a fun hobby. We are always one step from falling off the tightrope. It's better to relax and tread carefully so you can live a life with no regrets.

Be True to Yourself

"Today you are you. That is truer than true. There is no one alive who is you-er than you!"

One of my favorite movies is the holiday classic, "It's a Wonderful Life." When George Bailey gets frustrated with his "crusty old town", Mr. Potter

tempts him to work for him and to run his properties. He dangles out a huge salary, business trips to New York and Europe as bait. In the end George stays true to himself and sticks with the floundering building and loan and remains in Bedford Falls.

Are you true to yourself in your own life? Are you living beyond your means to impress others? Have you turned your back on your morals to be popular or gain a political advantage? Don't throw away your convictions when you're under attack or enduring a round of criticism. Don't stick your finger up to the wind to decide what's right. You don't have to live by another person's standards or rules. We all change over time but you don't have to change your values or what is important to you. Don't be something you're not.

Life Is Full of Hardships, But Be Persistent

"I meant what I said and I said what I meant. An elephant's faithful 100 percent."

When Horton the elephant agrees to sit on Mazie's bird's nest so she can rest, he doesn't realize what he's in for. Even though he is ridiculed and harassed, he still persists. As a lawyer you have to



have the confidence to stand tall and not back down when you believe what you are doing is right, even if you might feel the wrath of members of your firm, the public or even a judge. We see these types of obstacles every day during our practice. You may take a case that blows up in your face like a novelty cigar or get in over your head helping out a colleague. You can learn from Horton as he endures a number of hardships and threats. Horton teaches us that even though there are times you face roadblocks and barricades, you need to stay firm.

things. Do you need to work harder, or is it just simply a matter of bad luck? For example, you could lose several trials back to back, a few clients may terminate your services, or you mess up a project that affects your office. When these things happen you start to question yourself or become a bit unsure. This is a time to reflect and examine how you can do better. Do you need to focus more on sharpening your skills, preparing more thoroughly, reevaluating the manner in which your office operates, or getting feedback on what you can do to make your clients

you have enough good information to make this choice, whether you should discuss this issue with another attorney who had a similar experience, or if you're leaving this decision in the hands of fate or other people. You have to decide your own path. The tentacles of uncertainty have a very wide trajectory. Unfortunately, there are a number of different routes you can take each day. To help yourself, make sure you gain as much knowledge as you can, talk to a mentor, friend or associate, or find a person more well versed in the canons of ethics and, in the end, make sure you choose the right path.

Read, Read, Read!

"The more that you read, the more things you will know. The more that you learn, the more places you'll go."

Reading helps you grow mentally, emotionally and spiritually. Reading the Ohio Revised Code, Ohio Bar Reports, Ohio Lawyer, or other legal journals allows you to gain valuable insight in the practice. Jury verdict reporters give you a snapshot of similar cases which can assist you in evaluating your claims. Reviewing hours of depositions can make you more dangerous during depositions and the discovery process.

However, reading books leisurely increases your knowledge and makes you smarter. Reading allows you to escape the stresses that can torture your inner fibers. It allows you to feel emotions and connect with characters in a very compelling story. Reading books rather than wasting time on Facebook or Instagram updates or useless Twitter comments will provide you mental stimulation, increase your vocabulary and improve your focus and concentration.

"Slumps are a good time for you to reevaluate what you're trying to accomplish and consider whether there's a better way of doing things."

In addition, even though you are not an elephant, you should strive to be true to your word, especially when dealing with your opponent or the courts. It requires you to tell clients the truth, even when they don't want to hear it. Keep to your word – it defines you. After all, your reputation is the soul of your practice.

more satisfied? The way to get out of a slump is to remain confident, charge forward ahead and never give up.

Avoid Heading Down the Wrong Path

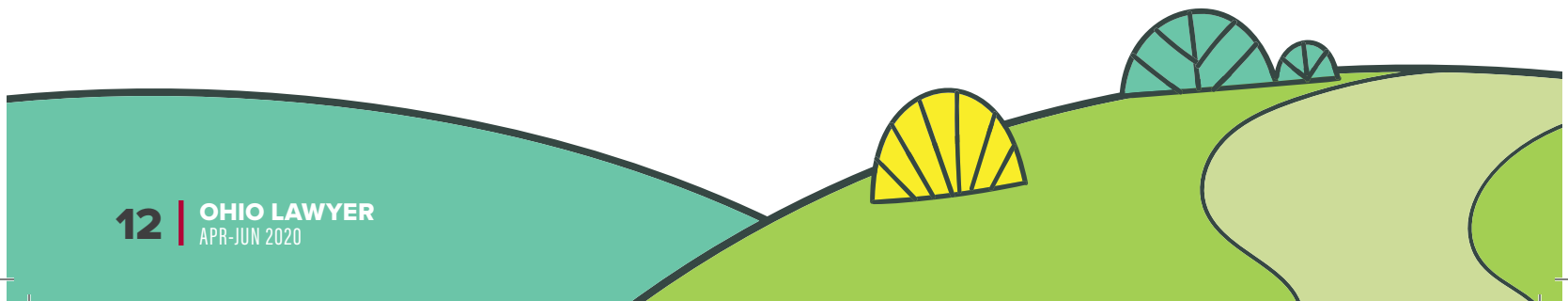
"You'll look up and down streets. Look'em over with care. About some you will say, 'I don't choose to be there.' With your head full of brains and your shoes full of feet, you're too smart to go down a not-so-good street."

You need to listen to the little person inside who screams when you are heading down the wrong path. It may be your career choice, case selection, relationships, or even the way you're dealing with opponents or staff members. It is critical that you stop and say to yourself, "Am I heading down the wrong path?" In making these decisions, it's crucial to consider whether

Slumps Will Happen

"You'll come down from the lurch with an unpleasant hump and chances are, then, that you'll be in a slump. And when you're in a slump, you're not much into fun. Un-slumping yourself is not easily done."

It may be fair to say that these days count as a slump. Slumps are a good time for you to reevaluate what you're trying to accomplish and consider whether there's a better way of doing





We Can Learn from Adversity

“Don’t cry because it’s over, smile because it happened.”

There’s no sense in crying over something that occurred and cannot be changed. It’s better if you look at misfortune in a more positive fashion. In the practice of law you can lose cases, clients may jump ship, and health scares pop up. Even family problems can drag you down. When things are not going your way, there’s no sense pouting or walking with your head down. Examine the mishap and consider why it occurred, could it have been prevented, and be grateful that something like this happened so you can make sure it doesn’t happen again. If things always went your way, what would life be like? However, when you rally back and smile after having your head handed to you, it tells people around you, “You can’t break me.” They tend to look at you differently, admiration now scripted on their brow.

Take the positive of what you’ve learned during this traumatic or difficult time. It will make you wiser, smarter, and probably a better attorney, friend, spouse and parent. You can always take positive thoughts from negative experiences. After all, it’s not important what you accomplish in life, it’s what you overcome.

Don’t Be Afraid to Try New Things

“If you never did, you should. These things are fun, and fun is good.”


We all tend to get set in our ways, develop a routine and become afraid to get out of our comfort zones. I found this out last summer when my two nephews, both recent college graduates,

talked me into skydiving. Trying new things can make you fresh and your life more fulfilling. Why do the same thing every day? A shift in the area in which you practice forces you to learn new legal concepts, form new relationships and spur personal growth. Think about it, life is an experience. Never be afraid to try new things and make some mistakes. It’s all a part of life and learning. Trying assorted ventures can help you find out that there may be a part of your heart that you’ve never tapped into. Even just a small change in your work environment can be breathtaking.

You Don’t Have to Wait

“Waiting for the fish to bite or waiting for when to fly a kite or waiting around for Friday night or waiting, perhaps, for their uncle Jake or a pot to boil, or a better break or a string of pearls or a pair of pants or a wig with curls, or another chance, everyone is just waiting.”

At times you may find yourself in a position where you’re stuck in a rut or at a crossroads feeling a bit lost, unmotivated and confused. Therefore, you’re just waiting. Waiting for something to happen. Waiting for things to change. Dr. Seuss points out that it’s up to you to take your own step forward. Use this time to reevaluate if you’re stuck. If you’re miserable in your job then you get organized and search for a new one. If you’re unsuccessful in becoming a partner in the firm, take the time to discover what they’re looking for to wear the crown. If you’ve always had a strong desire to dip your toes into public service, now may be the time to jump in head first. The only one looking out for you is yourself. If you keep waiting and waiting for an opportunity, life will simply pass you by.

In conclusion, Dr. Seuss doesn’t just inspire children, but he also teaches us to be better adults – and lawyers. The zany images, motley colored and uncommon characters will be stitched in our memories ‘til the end of time. If you incorporate the lessons outlined in his books into your own life - “Oh, the Places You’ll Go!” 

About the Author

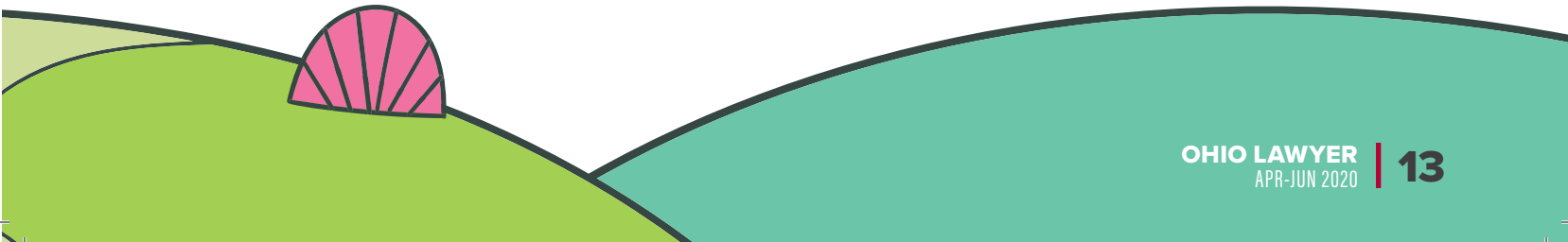


Judge Frank Forchione is completing his second term as a Stark County Common Pleas judge. He is the founder and chairman of the Stop Heroin From Killing

Committee, which has targeted the opioid epidemic. In 2018 he was selected “Outstanding Jurist” by the Ohio Association for Justice.

Endnotes

- ¹ “Horton Hears a Who!”
- ² “Oh, the Places You’ll Go”
- ³ “Happy Birthday to You!”
- ⁴ “Horton Hatches the Egg”
- ⁵ “Oh, the Places You’ll Go”
- ⁶ “Oh, the Place You’ll Go”
- ⁷ “I Can Read with My Eyes Shut”
- ⁸ “One Fish, Two Fish, Red Fish, Blue Fish”
- ⁹ “Oh, the Places You’ll Go”





Movie Review

*Law in the Movies:
The Invisible Man*

By Darren Shulman



“The Invisible Man” (R, 124 Minutes) is a reimagining of the classic monster movie of the same name, which itself was based on an H.G. Wells novel written in 1897. While fans of the original film will catch an Easter egg (hidden reference), I did not observe any nods to the 2000 film “Hollow Man” starring Kevin Bacon as a scientist who becomes ... wait for it ... an invisible man. With that said, Kevin Bacon is likely tied to this film through his ability to connect to every movie within six degrees of separation.

This incarnation of the invisible man is a controlling tech millionaire who kills himself and leaves his fortune to his ex-girlfriend Cecilia, with the proviso that she can’t commit any crimes and must be mentally stable to collect the money. Strange things start happening that lead her to believe that maybe he’s not dead, which causes others to question her sanity.

For someone watching with no advance knowledge, the movie has the makings of a pretty interesting psychological thriller. Is Cecilia losing her mind? Is there a ghost haunting her? What could possibly explain what is going on? Unfortunately, the movie is called “The Invisible Man,” so you already know the mysterious happenings are caused by ... an invisible man. Avoid the trailer if possible, as it reveals many (but not all) of the major plot points, stripping away some of the enjoyment that comes with surprise.

Trailer spoilers aside, “The Invisible Man” is an unexpectedly tense thriller with genuinely shocking moments that will have you wondering, *did that really just happen?* Standout lead actress Elizabeth Moss (“Mad Men,” “A Handmaid’s Tale”) has the unenviable job of interacting with an invisible character for most of the movie. Moss effectively portrays increasing fear and desperation as her situation continues

to worsen. Her performance is the main reason to see this movie, as she displays fragility while at the same time portraying underlying strength.

I also appreciated how the plot largely avoided two common scary movie pitfalls that drive me crazy: fake jump scares (in which a loud noise that makes you jump during a tense moment is revealed to be something lame like a cat knocking over a vase) and really dumb decisions (in which a character does something no one would ever do in order to put them in position for what the writer has in store next). Throughout her ordeal, Cecilia’s plans don’t always work, but they make sense in the context of what she is going through.

Faking your own death (and becoming invisible) to torment an ex seems like an extreme measure and I pondered the legal implications of this plan. I researched what happens when someone is legally determined to be dead, but is later found to be alive (there are no cases of record about individuals who become invisible). My findings revealed some helpful tips for the next invisible man:

Wait before hatching your invisible man revenge plot: How is someone declared dead without a body to prove it? O.R.C. 2121.01 establishes the criteria for presumption of death, which arises if a person disappears and has been continuously absent from their last place of domicile without being heard from for five years. (O.R.C. 2121.01(A)(1)) Once the presumption is met, the Probate Court issues a decree and the death is effective as of the date of the decree. (R.C. 2121.04) As a result, the invisible man must likely wait five years to hatch his revenge. While this might seem like a long time to wait, prior to 1974, the period was seven years, which aligned with the common law rule (1974 S 349, eff. 9-30-74).

Evidence of peril can speed things

up: The five-year waiting period can be shorter if the person was “exposed to a specific peril of death” at the beginning of the absence. (O.R.C. 2121.01(A)(2)) Specific peril of death means “not the ordinary perils of travel or of navigation, but some unusual and extraordinary danger.” *Skele v. Mutual Ben. Life Ins. Co.*, 20 Ohio App.3d 213 (2nd Dist. Ct. App. 1984) (being alone in vast wilderness with dangerous weather conditions and wildlife constituted specific peril of death for missing backpacker). If the invisible man is impatient, he could leave behind some evidence that he was going camping with grizzly bears during a blizzard while wearing only shorts and a t-shirt.

Pretending to be dead doesn’t

necessarily end your marriage: If our invisible friend is seeking to torment a spouse, things might get complicated. In *Fultz v. Fultz*, Anna Fultz lived with husband Jacob Sturgis until “Sturgis left their home in Massillon, but the evidence [was] very indefinite and uncertain as to the cause of his hurried departure for parts unknown.” *Fultz v. Fultz*, 21 Ohio Dec. 159, 2 (Wayne County, 1910). Ms. Fultz was told by her father in law that Sturgis was “found dead at a haystack somewhere in Illinois” but she made no effort to verify this report (which seems odd, but maybe people were different in 1910). Instead, she married George Fultz. Unfortunately for all parties involved (except perhaps Jacob Sturgis), Sturgis was alive as Anna later learned. The court held that while there may have been a presumption of death based on his long absence, that presumption was undone by the conclusive proof that he was alive. The court concluded that once Ms. Fultz knew Sturgis was alive, she should have filed for divorce. Not having done so, there was no legal marriage with George Fultz because Sturgis and Anna were still married. If the invisible man is seeking to get out




Movie Review

of a marriage, an easier course of action would be to file for divorce.

Faking your death may be easy, but un-faking it is harder: Donald Eugene Miller disappeared in 1986, ditching his wife and two children. In 1994, his wife filed a request for presumption of death in the Hancock County Probate Court, which the court granted (Case No. 94-150), effective on August 31, 1986. In 2013, a very much alive Miller found himself inconvenienced when the Social Security Administration canceled his social security number, making it impossible for him to get an Ohio drivers license. He filed a complaint to vacate the order declaring him dead, noting “The Defendant, Donald Eugene Miller, Jr., the presumed decedent ... states that he is in fact not deceased.” Unfortunately

for Mr. Miller, his motion was denied because he failed to file his request within the statutory three-year period. O.R.C. 2121.08(A). As a result, in the eyes of the law, Mr. Miller remained dead. It is therefore incumbent on the invisible man to complete his invisible man schemes within three years of being declared dead to give him ample time to get his life back afterwards.

As an entertainment vehicle, I give “The Invisible Man” a 7 out of 10. Despite giving away too much in the trailer, Elizabeth Moss’ performance drives a tense movie that keeps things uncomfortable (in a good way). For Ohio lawyers, it also provides an opportunity to look smart by being able to explain Ohio’s presumption of death statute to friends and family. 

About the Author



Darren Shulman has served as the Delaware City attorney since 2011. Shulman previously served as an associate legal

counsel for the Ohio Department of Administrative Services and prior to that was a Montgomery County Assistant Prosecuting Attorney. He also co-hosts a weekly movie review podcast, “Through the Lens with Darren and Tracey.”



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>

*As we all navigate these challenging times, we would like to give **a big thank you to...***

Our loyal policyholders for unbelievable positivity and support;

Our dedicated staff for continuing to deliver incredible, prompt service to our policyholders during a pandemic;

Our owner, the OSBA, for its leadership and necessary support of our profession;

Our technology partners for enabling smooth, uninterrupted operations;

Our building staff for creating a safe environment in which to work;

Our first responders and medical professionals for their tireless effort to keep us all safe;

Our families and friends for their loving support and patience as we navigate our new normal; and

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WE'RE GOING VIRTUAL!

Register now for the 2020 OSBA Annual Meeting on July 24th!

Featuring: The State of the Bar report, a Supreme Court update, consideration of amendments to the OSBA Constitution, consideration of proposals submitted by OSBA committees and sections, and recognition of our annual award recipients.

For more details and to register, visit ohioabar.org/annualmeeting or call the OSBA Member Services Center at (800) 232-7124.



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Agenda Preview

2020 Awards Presentations

Recipients of the 2020 Bar Medal Award, Eugene R. Weir Award, Nettie Cronise Lutes Award and the Ohio Access to Justice Foundation's Presidential Award will be honored throughout this year's virtual annual meeting. Join us as we recognize the contributions of these outstanding Ohio attorneys and add them to the distinguished ranks of past award winners.

The Ohio Bar Medal – Kurtis Tunnell, posthumously



The 2020 Ohio Bar Medal – the OSBA's highest honor — will be presented to Kurtis Tunnell, a prominent Columbus attorney and devoted legal advocate, who passed away in August 2019. He worked as a managing partner at the law firm of Bricker and Eckler, where his practice centered on public policy and politics and

where he was a leader in the effort to increase inclusion and diversity in our profession. Widely recognized and valued for his public policy expertise, Tunnell previously served as legal counsel to former Governor George Voinovich and as advisor to attorneys general, members of the Ohio General Assembly, congressional leaders and President George W. Bush. Tunnell will be awarded the Bar Medal posthumously, for his legacy of leadership and service.

Eugene R. Weir Award – Edwin “Terry” Patterson III



An attorney for more than 40 years, Terry Patterson has served as general counsel of the Cincinnati Bar Association since 1982, and as counsel to the Certified Grievance Committee and Ethics Committee. He has been an invaluable resource to countless Ohio attorneys, providing ethics advice and guidance. His

tireless dedication to his field, zeal for serving the needs of the legal community and his continued commitment to professional responsibility, earn him this year's Weir Award.



Nettie Cronise Lutes Award – Tania Nemer



Tania Nemer serves as the community outreach prosecutor for the Summit County Prosecutor's office and has worked in private practice, the nonprofit sector and as a magistrate for the Akron Municipal Court. Nemer is a zealous advocate who dedicates her time to educating young children about the law and serving immigrant families, including volunteering her time at detention facilities along the southern U.S. border. For her quiet diligence and a career that is a testament to service, Nemer is the recipient of the Nettie Cronise Lutes Award.

Ohio Access to Justice Foundation Presidential Award – Gerald (Gerry) H. Greene



Gerry Greene is a volunteer attorney at the Legal Aid Society of Greater Cincinnati. He went to law school after a 33-year career with Proctor and Gamble in engineering management and his second career as a lawyer has been dedicated solely to pro bono service. He has served 17 years as an in-house, volunteer attorney at legal aid. Greene is awarded the 2020 Presidential Award for his model of unselfish service to those most in need.

OSBA Constitutional Amendments

At the General Assembly meeting on July 24, members will consider two amendments to the OSBA Constitution that will further update the association's governance structure to align with modern best practices and to provide more leadership opportunities for Ohio lawyers through the OSBA Council of Delegates. All members in good standing may vote on these amendments.

Extension of Board of Governors Representative Terms

Recognizing that experience and collegiality develop over time, the first amendment under consideration would allow for those elected to the OSBA's Board of Governors to serve up to two consecutive, three-year terms, provided they are re-elected by the members of their districts. Currently, board members may serve only one, three-year term and in many cases, governors roll off just as they have mastered the job. Studies show that high-performing governing boards have longer terms of office. While staggered terms continue to allow new and diverse members to annually join the board, the possibility for longer terms affords each member the time needed to learn the ropes and gain valuable experience for the benefit of the organization as a whole.

Increased Council of Delegates Representation

The second amendment is an effort to provide more leadership opportunities in the OSBA for attorneys around the state and would increase the number of representatives to the OSBA Council of Delegates. The proposed amendment would ensure that in future years, each of the 18 OSBA districts would have at least two delegates elected to the council, regardless of the number of regular attorney members practicing in that district.

OSBA Committee and Section Legislative Proposals

At the annual meeting, OSBA committees and sections will once again have the opportunity to shape the future of OSBA's public policy agenda as the OSBA Council of Delegates takes up the consideration of legislative proposals. Though only members of the Council of Delegates may vote on the proposals, all members may join in the conversation. This year's batch includes:

- The **Criminal Justice Committee** and the **Young Lawyer Section Council** teamed up to submit a proposal that would create a nonpartisan agency to assist the legislature in considering the impact of new or changed criminal law.
- The **Estate Planning, Trust and Probate Law Section** continues its work on updating Ohio's probate code, including a proposal for the adoption of postnuptial agreements.
- The **Real Property Law Section Council** continues its work on revising and updating Ohio's Title Standards.
- The **Family Law Committee** seeks to revise Ohio law to ensure that children may not be removed from a suitable parent.
- The **Juvenile Law Committee** tackles lack of funding and availability of qualified counsel to take juvenile cases
- The **Military and Veterans' Affairs Committee's proposal** concerns data collection of attorney veterans.
- The **Negligence Law Committee** seeks to amend the Revised Code to require "other next of kin" to present damage claims.
- The **Agricultural Law Committee** proposes the adoption of a crop lease termination statute.

To register and download the complete text of these constitutional amendments and legislative proposals visit OhioBar.org/AnnualMeeting.



Life and the Law During COVID-19 One Solo Practitioner's Experience

By Michael Schroth

An early Spring snowstorm enveloped me last month as I stood outside my clients' car in my office parking lot. My clients, a husband and wife, rolled down their windows and I passed them manila envelopes containing their estate planning documents. I stepped six feet back from the car while they removed the documents, which they had previously seen in digital form. My wife stood next to me. With no one else at work, she agreed to meet me at my office. Our three boys sat buckled into my wife's SUV about 50 feet away.

We witnessed my clients execute their wills, and then we signed our names to the documents on a little wooden tv tray that we set up in the parking lot. A minute later, the meeting ended, my clients waved goodbye, and my wife jumped back into her SUV with

the boys and headed home. We had successfully completed my first "drive-thru" will signing. Such is the life of a lawyer trying to practice law during a pandemic.

The New (Ab)Normal

Most days, work feels like going into the office on a Saturday morning. I am usually alone, the phone isn't ringing off the hook, and there are few (if any) meetings. In one sense, work is more relaxed. The courts are largely shuttered and filing deadlines have been frozen or pushed back. I often come into work in jeans and tennis shoes. I'm even growing a beard. While I still work a full week, I'm no longer coming into the office on the weekends (a good thing), and some days I come in later or leave earlier depending on the needs of my family at home. If the weather

is nice, I'll take a short, afternoon walk in the park across the street from my office. One silver lining from this experience is seeing my work/life balance improve. It is an adjustment I hope to solidify when this is all over.

On the other hand, my levels of stress and frustration have increased as fewer new clients come in, and fewer case files are opened. While I hope to weather the storm in the short term, I worry about my long-term prospects as unemployment continues to soar and the broader economy languishes.

Without a legal assistant currently working beside me, I find myself handling more and more administrative tasks. And without immediate access to an IT specialist, I am learning to



use software programs that I probably should have learned to use years ago.

I've adapted my practice to adhere to social distancing standards. In addition to drive-thru wills, Zoom meetings have become ubiquitous and new clients are being serviced without ever meeting me face-to-face. While most of this is nothing new, it has become the new and rather lonely normal.

Staying Engaged

With the pace of practice slowing down, I am also putting my proverbial house in order. I am reorganizing my filing system, (finally) going paperless, and updating my website.

With live webinars and online seminars, I know one attorney who completed an entire year's worth of CLE credits in one week. Many lawyers are also knocking out their written discovery requests long before they need to be served on another party. Others are spending time researching case law for future briefs, or just to expand their knowledge on a given topic.

Maintaining client contact is critical right now. We need to inform our clients what is happening in their cases, even if things are at a standstill. Our clients are as anxious as we are, and our communications with them must continue.

On a personal level, we need to maintain our mental health. Due to the pandemic, we are isolated more than any other period of our lives. But, that does not mean we are alone. We need to find creative ways to stay in contact with colleagues, coworkers, and professional groups. We should talk about the work we are doing. We shouldn't be afraid to share our struggles and frustrations. Remember that we are all experiencing some level of frustration and anxiety.

To combat this, we need good self care. We have lost many of the things that bring us joy, comfort and satisfaction: going to restaurants, attending parties, working out at the gym, visiting loved ones and watching sports, for example. These activities build us up, bring us together and relieve our stress. We need to develop alternatives so that the mental, emotional, physical and spiritual parts of our life stay in balance. Otherwise, anxiety, depression, anger and compulsive, unproductive behavior may fill the void.

Look at this period of isolation as a time to try new things or revisit old hobbies. I know people who are expanding their culinary talents, exercising at home with a virtual coach, reading favorite novels, putting together a family history and spending time in quiet meditation. For some, social media has been a way to connect with friends and family. For others, social distancing from social media has become important.


For those who are struggling, reach out to others and, if necessary, seek professional help. Many counselors and therapists offer remote consultations. Utilize the services provided by OLAP, the Ohio Lawyer's Assistance Program for mental health concerns.

Staying Afloat

Being able to pay the bills and merely keep the lights on has become a primary objective for many lawyers. Many applied for forgivable loans offered through the federal government's Payroll Protection Program (PPP) or the Economic Injury Disaster Loan (EIDL). Unfortunately, the chaotic rollout of these programs increased our frustration as funding dried up quickly and certain businesses received sizable amounts of money while hundreds of thousands of small businesses, including law firms, were shut out altogether.

We just don't know what, if any, other economic relief the government intends to provide for small businesses. But if it does offer something else, be advised to act immediately when applying for additional assistance. Cast a wide net when looking for lenders to work with. Some of the nation's largest banks proved to have the most difficult time processing loan applications under the PPP. Meanwhile, companies like PayPal and Lendio were turning over thousands of applications in rapid fashion.

Cash is king during this crisis. But it can be hard to maintain cash flow when clients have limited funds to pay their legal bills. Consider offering payment plans to clients, or even deferring some payments if clients can guarantee future payment. If you do not have a line of credit with your bank, think about whether you need one now or whether an existing line of credit needs to be extended. You may also consider whether you need to defer your own payment obligations. Many landlords and health insurance providers have offered deferment options.

We must be flexible and willing to adapt to our current environment. The day will come when this pandemic will pass. Although we will have to piece our lives back together and the future will not be the same as the past, a feeling of normalcy will return. 

About the Author



Michael T. Schroth is a solo practitioner based in Avon, Ohio. He focuses his legal practice in the areas of employment

law, and estate planning and probate law.

COVID-19 and Malpractice Claims – Will There Be a Correlation?

By Steve Couch

President and CEO, OBLIC





Coronavirus, aka COVID-19, and the resulting economic aftermath, have created so many challenges that it is difficult to comprehend all of the far-reaching impacts on our profession, much less the world in which we live and practice. Fortunately, stay-at-home orders are gradually being lifted and businesses are slowly being permitted to open, although when life returns to “normal” is a question few, even the experts, can realistically answer.

Just as our society has experienced upheaval at levels not seen in decades, lawyers and law firms have had to wrestle with unprecedented change, learn new ways to practice, with many adapting “on-the-fly” to a work-from-home environment, even with law firms being deemed “essential businesses” in Ohio. This new way of practice means learning how to utilize tools and software perhaps already available within the firm, or implementing technology completely new to lawyers and their staff. Video conferencing through Zoom, Microsoft Teams, Go To Meeting, Skype, Cisco Webex or a myriad of other platforms has become a much more common way of interacting with clients and staff, though telephone calls and emails certainly form the backbone of the communication channel. Accessing client files has become a new process with digital files accessed remotely or taken to home offices. Cyber breaches, always a significant risk, pose an increased risk with a slew of new attacks on the unwary.

Many law firms have seen significant disruption to their day-to-day business model, with some firms wrestling with large drops in revenue as stay-at-home orders have practically meant less legal business being conducted by individuals and businesses. With many courts closed for usual business, some litigation-centric areas of practice have experienced postponements of

trials and hearings meaning, for many lawyers, less billable work. Likewise, transactional practices have been hard hit as economic downturns often put a halt to negotiations or the completion of transactions. Some attorneys have reported that clients drastically impacted by the economic impact have postponed payment of bills for legal services, adding to the economic pressure on law firms.

On the flip side, some firms have seen an increase in business, such as in probate, estate and trust, with an added sense of urgency by some to have wills prepared in this day of extreme uncertainty, or with some clients just finally getting around to legal work they have needed to complete for some time. Insurance coverage attorneys are now back in vogue, with an array of new coverage issues to test given the breadth of business interruption losses and businesses looking to recoup those losses in some way.

All of these changes, many unwelcome, some positive, contribute to a wide array of risks for law firms to recognize, manage, and for the most severe, to avoid. To put things in historical perspective, professional liability insurance carriers and lawyers experienced in defending law firms report that significant economic downturns have quite often been followed by a spike in malpractice claims. This spike was felt in both the frequency of claims and the severity accompanying them. Two common threads that run through this experience are claims caused by attorneys dabbling in unfamiliar areas of practice and claims brought by businesses or individuals looking to shift an economic loss to their professional advisor(s). Given the additional disruption of the closures of courts, attorneys working from home, and vast differences between the current economic downturn and

past events, it is reasonable to expect a higher chance of malpractice claims following this COVID-19 pandemic.

Steps to Mitigate Claims

There is some good news, as knowledge can provide an incredible means to control future outcomes. Armed with an understanding of potential risk, lawyers and their firms can take proactive steps today to manage, mitigate or outright avoid potential malpractice claims. The following are some practical suggestions you and your law firm can take to minimize or avoid risk.

First, manage the day-to-day risk of practicing in a changed environment. While working from home, utilize secure, encrypted VPN access to your law firm network. Control and manage this access to ensure only authorized individuals can log into your law firm network. If bringing files home, maintain confidentiality of the client file from curious eyes around the house. Even when working from home, find a way to supervise the staff and attorneys in your firm and to follow established firm policies and procedures. Be deliberate in communicating regularly with all current clients, especially in this turbulent time. Whether through video conferences, email, or “old school” telephone calls, find the communication method preferred by each client and stay in touch. Clients will feel much more engaged and less likely to blame you for their circumstances. Although the Ohio Legislature recently passed House Bill 197 to toll certain statutes of limitation and discovery deadlines, attention to deadlines and timelines remains vitally important, especially when working in a disrupted manner. The final bit of day-to-day practical advice is to avoid suing clients for unpaid legal fees, as such will almost guarantee a retaliatory malpractice claim.



Second, balance the temptation to take on representation to keep revenue coming through the door against the risk of taking on matters outside your area of expertise. The legal professional liability insurance industry refers to this risk as “dabbling.” The danger, although likely obvious, is not knowing what you don’t know. Many areas of practice require certain knowledge and experience to fully understand the subtleties needed to meet the standard of care. Rule 1.1 of the Ohio Rules of Professional Conduct requires that, “A lawyer shall provide competent representation to a client.” Further, competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.


Comment [1] lists relevant factors for determining whether a lawyer has the requisite knowledge and skill in a particular matter:

- the relative complexity and specialized nature of the matter
- the lawyer’s general experience
- the lawyer’s training and experience in the field in question
- the preparation and study the lawyer is able to give the matter
- whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

But if you dare to dabble, note that Comment [2] of the Rule explains that a lawyer can provide adequate representation through necessary study or through association with a lawyer of established competence in this new area of law you wish to undertake.

Finally, it is quite difficult to manage the risk of malpractice claims by clients looking to blame their attorney for a business loss or an outcome the client did not expect. The process

of mitigating this risk begins with careful client selection, continues through constant and thorough communication, and requires managing client expectations throughout the representation. One of the most effective ways of managing client expectations is to give timely and honest evaluations of what can be achieved over the course of the representation. The client needs this feedback early and often, as hearing it just before an important decision is needed can leave the client unprepared to make a tough decision and apt to blame counsel for an unexpected result. The last line of defense is documenting your communications with the client, especially significant issues discussed and decisions made. This is a challenging skill to learn and apply in every representation, but if practiced religiously, with all clients and all matters, it will pay off in a myriad of ways and will deter inevitable second-guessing by clients. Should a malpractice claim be asserted, this sort of documentation will be a vital component to a successful defense.

If attorneys and law firms follow these suggested steps to manage their risks to malpractice claims, there is a reasonable chance COVID-19 and its economic impact will not add insult to injury by inviting malpractice claims at a time when we are trying to get back to “normal.” 

About the Author



Steve Couch is President and CEO of the Ohio Bar Liability Insurance Company (OBLIC), a legal professional liability insurance company founded by the Ohio State

Bar Association. He also manages the OSBA Insurance Agency, an agency providing a myriad of insurance solutions to Ohio attorneys.





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*Barron Peck Bennie & Schlemmer is proud to
congratulate our friend and partner,*

DAVID H. LEFTON,

*on his recent election and
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Elect of the Ohio State Bar
Association. We know how
much David is looking
forward to accepting the
responsibilities of his new
role and we are excited to
experience the leadership
he brings to OSBA.*



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How Employers Can Maintain Workplace Privacy Compliance During the COVID-19 Pandemic

By David J. Oberly



As the novel coronavirus (COVID-19) pandemic has deepened over the last two months, employers across all industries have experienced significant difficulties in navigating the complexities of collecting and using employee health information as part of their COVID-19 response efforts, while at the same time also ensuring they do not run afoul of workplace privacy law.

Due to the substantial health threat posed by COVID-19, employers have been required to monitor personal, private aspects of employees' lives in unprecedented ways. But despite these unprecedented circumstances, employees are still entitled to their individual privacy rights. Consequently, employers must strike the proper balance between managing the safety of the workplace and ensuring employee privacy in order to avoid finding themselves on the receiving end of an EEOC complaint or civil lawsuit.

Key Recent Guidance Provides Clarity and Flexibility on Workplace Privacy Issues

Fortunately, several pieces of key guidance have been issued by the Centers for Disease Control and Prevention (CDC), the Equal Employment Opportunity Commission (EEOC) and the Occupational Safety and Health Administration (OSHA), which together provide critical direction on many of the thorny workplace privacy issues that have arisen in connection with COVID-19.

Importantly, this guidance also provides employers with a fairly significant degree of flexibility to aggressively respond to the health emergency and minimize the threat posed by COVID-19 to the greatest extent possible. This is primarily due to the EEOC's determination that COVID-19 satisfies the definition of a "direct threat" under the Americans

With Disabilities Act (ADA). As a result, employers have been given considerably more leeway to monitor the health of employees to mitigate the risk of community spread of the virus in ways that would normally violate the ADA's restrictions on disability-related inquiries and medical examinations.

Employee Body Temperature Measurements

One major issue facing employers concerns their ability to take employees' temperatures to screen for COVID-19.

While body temperature measurements are normally considered "medical examinations" prohibited by the ADA, the EEOC has clarified that because COVID-19 constitutes a direct threat, employers are permitted to measure all employees' body temperature. Importantly, however, employers cannot single out specific employees to have their temperature taken unless the employer has a reasonable belief based on objective evidence that the worker



may have COVID-19. Further, CDC guidance recommends that employers measure the temperature of workers who were or may have been exposed to the virus as a “pre-screening” measure before they are allowed to return to the workplace. Employers may also bar employees from remaining at work if they refuse to allow their temperature to be taken.

Scope of Permissible Employee COVID-19 Inquiries

Another major issue impacting all employers is the scope of permissible questions that employers may ask their employees relating to COVID-19.

Generally speaking, employers are permitted to ask all employees who enter the workplace questions relating to COVID-19 exposure and other health-related issues, including the following: (1) if they have COVID-19; (2) if have been tested for COVID-19; (3) if they are experiencing symptoms commonly associated with COVID-19; or (4) if they have come in contact with anyone who has been diagnosed with COVID-19 or who has experienced symptoms of the virus. Furthermore, employers may ask employees who report feeling sick at work or who call in sick if they are experiencing symptoms of COVID-19. Employers may also bar employees from remaining at work if they refuse to answer inquiries pertaining to COVID-19.

However, if an employer seeks to direct an inquiry to a specific employee, under the ADA the employer must have a reasonable belief based on objective evidence that the employee might have COVID-19. Also, if employees are working remotely, these questions are off limits completely.

Employee COVID-19 Medical Testing

The ability to administer COVID-19 testing to detect the presence of the

“The ability to administer COVID-19 testing to detect the presence of the virus is another hot-button issue that has commonly arisen at the intersection of workplace safety and employee privacy.”

virus is another hot-button issue that has commonly arisen at the intersection of workplace safety and employee privacy.

On this issue, the EEOC has clarified that employers are permitted to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus, and as a condition of allowing employees to return to the workplace.

Requiring Employees to Leave Work/Remain at Home and Provide a Doctor’s Note Upon Return

Another key tool in managing the risk of COVID-19 exposure and community spread is to ensure that sick employees remain away from the office until they return to full health.

In this respect, the EEOC and the CDC both permit employers to require employees to leave the office and remain at home if they have COVID-19 or are otherwise experiencing symptoms associated with the virus. The EEOC has further provided that once those sick employees are set to return to work, requiring a doctor’s note stating the employee is fit for duty before returning to work is permitted under the ADA.

Disclosures of Cases of COVID-19

One of the issues that has most vexed employers in connection with COVID-19 relates to the scope of permissible disclosures of confirmed or suspected cases of COVID-19. Employers are permitted — and encouraged — to inform other employees of their coworker’s confirmed or suspected case of COVID-19 and

their possible resulting exposure to the virus, so long as the disclosure would not reveal the identity of the sick employee. Importantly, however, employers must ensure the confidentiality of the sick employee’s identity as required by the ADA in making this disclosure to coworkers. Employers must refrain from doing two things: First, specifically disclosing the identity of the sick employee; and second, disclosing *other information* that would allow coworkers to identify the sick individual.

These rules differ slightly, however, in the context of staffing agencies and contractors. Pursuant to the EEOC, when a staffing agency or contractor that places an employee in an employer’s workplace learns that the employee has COVID-19, that agency or contractor is permitted to disclose the identity of the sick employee, as the employer may need to determine if the employee had contact with anyone in the workplace.

Finally, the EEOC has clarified that employers may also disclose the names of employees to public health agencies when they are made aware of an employee who has COVID-19 due to the threat of substantial harm to other individuals who may be exposed to the virus by coming into contact with the sick employee.

Recordkeeping Requirements

Lastly, employers must also ensure that they adhere to proper recordkeeping practices to avoid exposure to workplace privacy liability. If an employer collects any personal health information relating to COVID-19 from an employee, the employer must treat that



information as a confidential medical record and maintain the information in a confidential medical file separate from the employee's main personnel file. In addition, the employer must also limit access to the employee's medical file to only those individuals with a business need to know.


Compliance Strategies

To mitigate the risk of potential legal exposure stemming from workplace privacy mishaps, employers can consider implementing the following strategies and best practices:

- **Proportionality/Data Minimization:** As a starting point, employers should adhere to the principles of proportionality and data minimization when collecting, using and disclosing COVID-19 employee personal health information. Specifically, when seeking information from employees, only that information which is fundamental to safeguarding the health and wellbeing of workers should be collected. Similarly, any disclosures of COVID-19 employee health information should be nonspecific as possible and devoid of any information that could potentially identify a sick employee.
- **Dedicated COVID-19 Privacy Protocol:** Employers should consider developing a dedicated COVID-19 privacy protocol that provides detailed information and guidance on how the employer will collect, retain, secure, and delete employee health information that is to be used as part of the employer's COVID-19 response efforts. At the same time, employers should ensure their HR policies and procedures pertaining to employee health information are consistent with public health recommendations and existing workplace privacy laws and guidance.
- **Privacy Notices:** Employers should ensure they have the appropriate privacy notices in place that directly address matters relating to COVID-19, including the collection of employee COVID-19 health information. Employers should consider providing a supplemental notice for COVID-19-specific matters if those issues are not adequately discussed in the employer's general privacy policy. In addition, employers should also consider creating a more specific COVID-19 employee privacy notice that can be given to workers who are diagnosed with COVID-19 to inform them what to expect in terms of use and disclosure of their information in connection with the employer's communication of the individual's COVID-19 diagnosis to coworkers.
- **Data Security Measures:** Employers should also ensure they have effective data security safeguards in place to protect employee health information from being improperly accessed or acquired. This is especially important at this particular juncture, as cyber criminals have stepped up the frequency of their cyberattack campaigns to take advantage of the unique security vulnerabilities that have arisen as a result of COVID-19 — and with respect to employees working remotely for the foreseeable future in particular, which has significantly weakened companies' overall security posture.

- **Stay Current and Compliant With Evolving Guidance:** Finally, employers should also stay current with the ever-evolving guidance relating to COVID-19 workplace privacy issues and take immediate action to comply with any new requirements that may be promulgated moving forward.

Conclusion

Ultimately, privacy issues will remain one of the toughest challenges that employers will continue to face for the duration of the COVID-19 public health emergency. While the recently issued COVID-19 workplace privacy guidance has provided vital direction for employers as they attempt to balance privacy rules and workplace safety concerns while taking action in response to the growing health threat posed by COVID-19, it is likely that the current guidance will change over time as the COVID-19 pandemic evolves. As such, employers should always consult experienced legal counsel before taking any action that may implicate workplace privacy issues to ensure that those actions comply with the current state of workplace privacy law in the employer's particular jurisdiction. 

About the Author



David J. Oberly is an attorney in the Cincinnati office of Blank Rome LLP and is a member of the firm's cybersecurity & data privacy and

privacy class action defense groups. His practice encompasses both counseling and advising sophisticated clients on a wide range of cybersecurity, data privacy and biometric privacy matters, as well as representing clients in the defense of privacy and biometric privacy class action litigation. Follow Oberly on Twitter at @DavidJOberly.



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Lobbying Looks a Little Different These Days

Scott Lundregan
OSBA Chief Legislative
Counsel



An interesting myth exists that the term “lobbyist” was conceived by President Ulysses S. Grant. As the story goes, President Grant was a frequent visitor to the lobby of the Willard Hotel in Washington, DC, where he was known to enjoy a brandy and a cigar. According to this fable, advocates visited the lobby of the Willard Hotel because they thought they could influence the President while he was in a good mood. To that end, he referred to these people as lobbyists and overtime a new profession was coined.

The story is apropos. Lobbyists, after all, seek to influence decision makers any way we can, and we often do

strategically ask for things when we know a legislator is likely to be in a certain mood or in a certain place. But this year, as with many other professions, the work of lobbyists has necessarily had to adapt to change. Without the benefit of face-to-face interactions with lawmakers around Columbus, lobbyists have had to resort to creative phone or written advocacy.

At the same time, our advocacy work has never been more important to the legal profession. The OSBA has been focused on uniformity for the calculation of tolling periods, flexibility for the execution of documents, deeming law firms essential businesses and as always, priority legislation developed by our committees and sections.

In one week, the Ohio legislature passed an omnibus health emergency bill with an amount of substantive policy changes that are similar to that

of the budget (a process which usually takes seven months). The OSBA mainly advocated for the legislature to enact some sort of statewide standard for the purpose of adjusting statutorily created deadlines for civil and criminal law. Many states had their Supreme Court do this but, because these deadlines are created in statute and, according to Article 1 §18 of the Ohio Constitution, only the General Assembly can suspend laws, we had to go to the legislature. In addition to the usual channels in the General Assembly, we also worked in close consultation with the Ohio Supreme Court. In the end, HB197 included a tolling provision. Since then, we’ve been working on providing clarity for our members and are happy to report that HB251 and SB10 now include an amendment that does just that.

Also in the early days of the pandemic, we got in touch with our Governor to ensure that legal services would be deemed essential. As a result, many



of our members have been sharing the creative ways that they've been able to continue their businesses while adhering to social distancing guidelines.

Since those early days, much has changed and we have returned to continue our work at the statehouse. But, we also came back to a Capitol Square that quickly became a center of protests, with the statehouse and the Ohio Supreme Court sustaining some damage. We continue to show up and do our important work and I encourage you, if you haven't already, to read the email from OSBA President Eleana Drakatos, President-Elect Linda Teodosio and CEO Mary Augsburger on how we can continue to do our little bit of good in the world, and contact the OSBA with your thoughts on the legal profession's role in these difficult but necessary conversations.

Inside the statehouse, we are continuing to focus on pushing OSBA committee and section priority legislation forward. Our chairs have continued their advocacy work with convincing testimony before Senate committees. SB276 – the first rewrite of Ohio's LLC code since 1994 – is moving along after Corporation Law Committee Chair Mike Moeddel testified in front of the Senate Judiciary Committee this June. Likewise, OSBA Senior Lawyers Section Chair Mike Jones made a strong case for a statute of repose for attorneys in Ohio, which would put an absolute end to a lawyer's exposure to a legal malpractice claim. As a result of our efforts, a statute of repose for legal malpractice was added as an amendment to HB251.

And congratulations are in order for the OSBA Access to Justice Committee, whose proposal for a permanent Driver's License Reinstatement Amnesty Program – HB285 – received the strong support of the OSBA Young

Lawyers Section and is on Governor DeWine's desk as of this writing.

More priority legislation is on the way, as the Council of Delegates is set to consider OSBA committee and section proposals at the virtual OSBA Annual Meeting on July 24. We'll keep you posted in this column, and our Weekly Legislative Report, found in your OhioBar.org dashboard every Thursday.

As Ohio proceeds with plans to reopen, you'll continue to find us working hard to advocate for the profession. We may not be hanging out in lobbies or sharing a brandy with lawmakers, but our mission remains the same: to promote justice and advance the legal profession.






The Ohio State Bar Foundation Welcomes its 2020 Fellows Class

OSBF Fellows are a diverse group of lawyers. They represent the entire state of Ohio and justice system. From rural towns to big cities, large law firms to sole proprietors, judges to prosecutors, the OSBF Fellows Program brings them together under one common mission – bettering the justice system.

The Foundation is thrilled to announce the members of its 2020 Fellows Class. These attorneys continuously go above and beyond serving their communities. They put the needs of others first, giving their time and talent to help other Ohioans understand and navigate our legal system.

As a part of the OSBF, the 2020 Fellows will have the opportunity to volunteer with our grantees, present to students on important law-related topics, directly contribute to the Foundation’s grantmaking efforts, and much more. 



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Gifts have been made between February 1 – April 30, 2020.



Join the movement!



INNOVATE.

In response to the COVID-19 pandemic, **Ohio Supreme Court Chief Justice Maureen O'Connor** has authorized **\$6 million in remote technology grants** to 277 courts in 87 Ohio counties.

The grants are meant to ensure that Ohioans retain access to justice by allowing courts to do more of their work remotely.

“I have authorized these funds to ensure access to the courts, while also minimizing the risk of COVID-19 transmission to the public, litigants, the bar and court staff,” Chief Justice O'Connor told “Court News Ohio.” “Judges have told me that the new equipment they are receiving has changed the way they can do business – not just during this crisis, but going forward when we return to normal.”



LEAD.

Angela Phelps-White is the new executive director of the **Ohio Civil Rights Commission**.

Phelps-White, a former labor relations administrator and common pleas court judge, succeeded the retired G. Michael Payton on March 16.

The commission investigates charges of discrimination and harassment in employment, places of public accommodation, housing, credit and disability in higher education based on race, color, religion, sex, national origin, disability, age, ancestry, military status or familial status.

Phelps-White, of Franklin County, is a graduate of the University of Dayton Law School and has worked at the State Employment Relations Board, the Ohio Attorney General's Office and as both a magistrate and judge at the Franklin County Common Pleas Court. She will oversee all agency business in the commission's five regional offices as well as its satellite and central administrative offices.



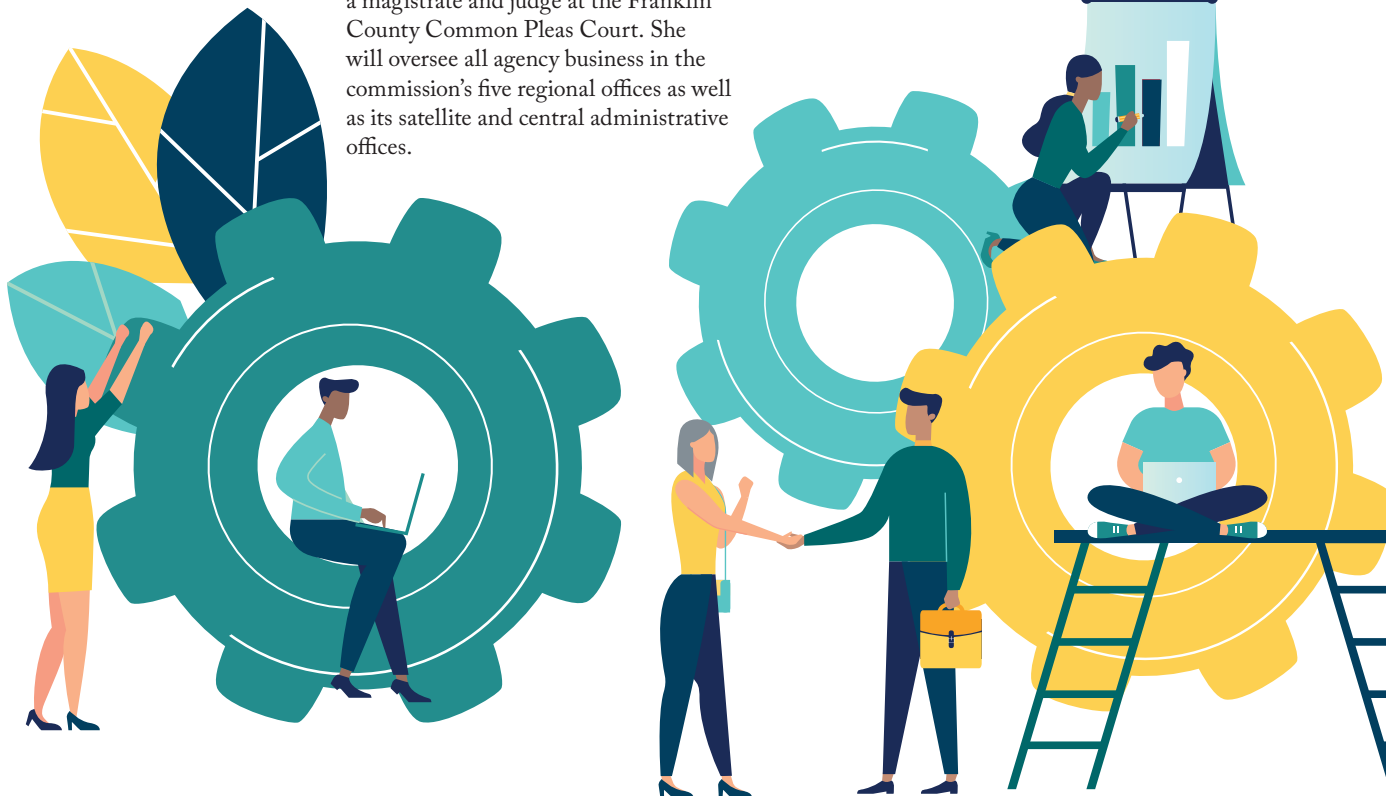
EDUCATE.

The Ohio State Bar Association (OSBA) developed the **COVID-19 Resource Directory** in an effort to respond quickly to the coronavirus pandemic and to keep members – and the public – informed.

The directory includes links to resources for every branch of government, from executive orders to new legislation to guidance from the Ohio Supreme Court. Continuously updated with information as it becomes available, OSBA members can take advantage of practice tips, public health resources, labor and employment resources and much more.

OSBA members can also take advantage of **free, coronavirus-related CLE courses**, for both live interactive and self-study credit.

Visit OhioBar.org/COVID19Resources to learn more.





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



ADVOCATE.

OSBA Committee and Section priority legislation is moving forward at the statehouse. **Corporation Law Committee Chair Mike Moeddel** testified in front of the Senate Judiciary Committee on **SB276** – the first rewrite of Ohio's LLC code since 1994. OSBA **Senior Lawyers Section Chair Mike Jones** made a strong case for a statute of repose for attorneys in Ohio, which would put an absolute end to a lawyer's exposure to a legal malpractice claim, and is now an amendment to **HB251**. And the **OSBA Access to Justice Committee**, with an assist from the **Young Lawyers Section**, was successful in getting a proposal for a permanent **Driver's License Reinstatement Amnesty Program – HB285** – to Governor DeWine's desk for his signature.



COLLABORATE.

The OSBA was pleased to participate in the **Ohio Jury Trial Advisory Group**, a statewide group providing input to the Supreme Court of Ohio from the perspective of defense attorneys, prosecutors and civil counsel, as well as bailiffs, court reporters, deputies, witnesses and clerks of court.

Many thanks to Belinda Barnes, our representative on the advisory group, as well as fellow members who worked closely with her, including Jan Allen Baughman, Frank Gallucci, Katherine Hollingsworth, John Holschuh and Matthew Mullen. To read a copy of the report and recommendations delivered to the Chief Justice, visit **OhioBar.org/JuryTrialReport**.



VOLUNTEER.

The **Ohio Center for Law-Related Education (OCLRE)** responded to the COVID-19 pandemic by moving its student competitions and showcases online. To make this happen, OCLRE relied on technology and volunteers. These volunteers served as judges for live argument rounds in the Moot Court Showcase, reviewed student submissions in an appellate brief writing competition and reviewed and critiqued videos in mock trial showcases for middle and high school students.

This fall, OCLRE is preparing virtual legal education resources that teachers can use with their students attorney volunteers are needed to work with OCLRE staff to create explanatory videos on topics ranging from rules of evidence to landmark Supreme Court cases. **To get involved visit [OCLRE.org/Volunteer](https://www.oclre.org/Volunteer).**





Janica Pierce Tucker

Partner-in-Charge,
Taft Columbus

YEARS IN PRACTICE:
18

CITY/COUNTY:
Columbus

How did you take an interest in the law?

It's funny, there's a picture of me in my office from the first grade, and I have this hideous ponytail, and it asks, "What do you want to be when you grow up?" It says lawyer. I couldn't sit here and tell you why I wrote that in the first grade, but will tell you that I knew by the time I went to the University of Tennessee for undergrad that I wanted to be a lawyer. I thought I was going to work in a science-related industry

related to the law, but then I took organic chemistry and realized my brain doesn't work that way. I changed my major to political science and business administration. I've always wanted to practice the law, and I always wanted to do something that involved working with individuals.

What was your law school experience like?

I attended the Ohio State University Moritz College of Law. I enjoyed law school from the standpoint that it introduced me to a different way of thinking and lifelong friends.

One of the things that was always difficult for me is how it's set up. You have one exam and that is your grade. But you press through it, and once you get through your first semester and you get your grades back, you think, "Okay, I didn't flunk out, I'm still here." You get into a routine and realize what the exam might look like and what they want you to know.

When I was there, law school didn't do a lot of "real-life-experience" classes that help you with your transition to a law firm environment. From dealing with summer associates, I know this is something they focus on now, but it is one thing I wish I had more of.


How has the OSBA played a role in your career?

I have been involved with the Labor and Employment Law Section Council, which has allowed me to meet people in my area of law across the state of Ohio. I also served on the planning committee one year for the Midwest

Labor Conference, and that's one of the biggest CLE programs that the OSBA puts on. Through that involvement and that network, I have been invited to other speaking opportunities through the OSBA. It has really helped my network and it has helped me see other things I could get involved with, that I wouldn't have otherwise known about.

What is some advice you would give to a new lawyer? What is the best piece of advice you have been given?

One thing I always say to our younger attorneys is don't pigeonhole yourself. There are a very small number of attorneys who get out of law school and know what they want to do. For the rest of us, you need to be open-minded to opportunities and put your best foot forward no matter what. I just encourage them to keep going, it will all work out - if you're not challenged, why are you doing it? But also, be open-minded to opportunities because you never know where it will take you.

One piece of advice that I always hold true to my heart is one given to me by my grandmother. She always says, "Every day you wake up, be the best you." That has guided me through my entire life. It applies to every situation, every circumstance, every part of my life and that's what I do. 



Watch video and learn more about Janica at OhioBar.org/JanicaPierceTucker



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

In Memoriam

2019

Marilee Stephenson Russell; 69, Portsmouth, June 11, 2019
Janice E. Romanoski; 73, Cuyahoga Falls, Sept. 11, 2019
Robert James (B.J.) Murphy; 40, East Sparta, Sept. 17, 2019
Earl Robert Miller; 93, Salem, Sept. 21, 2019
Stanley J. Aronson; 77, Akron, Sept. 22, 2019
Marlin J. Harper; 70, Barnesville, Oct. 3, 2019
John Leslie Wolfe; 92, Akron, Oct. 12, 2019
Donald Allen Richer; 70, Garfield Heights, Oct. 23, 2019
Michael J. Weisz; 62, Columbus, Nov. 6, 2019
Mary Jill Hagan; 57, Bellevue, KY, Nov. 11, 2019
Powell McHenry; 93, Cincinnati, Nov. 12, 2019
Michael D. Linn; 58, Middleburg Heights, Nov. 15, 2019
Joseph Richard Skelton; 69, Coshocton, Nov. 16, 2019
Thomas R. Wolf; 61, Strongsville, Nov. 24, 2019
Robert W. Phillips; 96, Columbus, Dec. 2, 2019

Peter L. Moran; 94, Toledo, Dec. 12, 2019
Jerome H. Hossler; 94, Canton, Dec. 26, 2019
James W. Dorr; 89, Cincinnati, Dec. 30, 2019

2020

Judge Nathaniel R. Jones; 93, Cincinnati, Jan. 26, 2020
Barth E. Royer; 72, Bexley, Jan. 27, 2020
John Charles Frentz; 94, Akron, Feb. 13, 2020
Joseph D. Kondela; 49, Youngstown, Feb. 20, 2020
John D. Erhardt; 94, Maineville, Feb. 28, 2020
Judge Henry J. Bruewer; 97, Hamilton, March 2, 2020
John Anderson Carnahan; 89, Columbus, March 5, 2020
Meyer J. Kohn; 97, Beachwood, March 12, 2020
John E. Gotherman; 86, Dublin, March 13, 2020
Brenda K. Bowers; 55, Columbus, March 15, 2020
Fred W. Dahler; 56, Canton, March 20, 2020

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