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Letter to the editor

Dear editor:

[This letter was written in response to an article from the May/June 2016 issue of Ohio Lawyer titled "Permissible scope of an interrogatory."]

Penn Central was a pre-Civil Rules fact pattern which favored little or no discovery before trial. The Ohio Civil Rules favor as much discovery as economically possible. Penn Central and those who support it are not doing the current civil justice system any favors by using it. Even Judge McBride, when he got to the court of appeals, stated his 1971 decision was limited in its application.

How does a 1971 common pleas case from Southern Ohio have any precedential value all across Ohio? There is no reference to Penn Central in the Ohio Civil Rules comments. There are no exceptions in the Ohio Civil Rules for those who would prefer doing depositions rather than answering interrogatories or production requests. And, merely because there are alternative ways of gathering information, including oral and written depositions, does not mean that the Rules state that kind of litigation. There are plenty of Ohio litigants who cannot afford the high cost of depositions. Many cases do not warrant economically that kind of litigation.

Penn Central is not good nor favored law. Using it to avoid answers to interrogatories because they call for “a narrative response” misses the point of our Civil Rules. We need no amendments to Civil Rule 33. We need to recognize that Penn Central was a pre-Civil Rules fact pattern which favored little or no discovery before trial. The Ohio Civil Rules favor as much discovery as economically possible. Penn Central and those who support it are not doing the current civil justice system any favors by using it. Even Judge McBride, when he got to the court of appeals, stated his 1971 decision was limited in its application.

Michael P. Harvey, Esq., Rocky River
Lawyers have often led the charge toward greater justice and equality. While growing up in a slave culture, Alexander Hamilton later argued for abolition of slavery during the Constitutional Convention. Abraham Lincoln signed the Emancipation Proclamation. Thurgood Marshall successfully argued *Brown v. Board of Education* before the U.S. Supreme Court in 1954.

In 1968, then-OSBA President Norton Webster admonished members of this Association in his address at the end of his term that lawyers in Ohio needed to do better to assist African Americans to enter and succeed in our profession. He noted that of 500 people passing the bar exam that year, only five were African American. He also noted that African American lawyers found it almost impossible to lease quality office space in Ohio’s major cities due to racist attitudes.

On a larger stage during that same year, attorney (and presidential candidate) Robert Kennedy addressed a crowd in Indianapolis immediately following the assassination of Martin Luther King. I was in eighth grade, and I have a clear memory of seeing parts of the speech on the next night’s news. Trying to calm outraged people in that city and across the country, he made one of the great speeches of the twentieth century. On that horrible night, one which I remember well, he said:

> What we need in the United States is not division; what we need in the United States is not hatred; what we need in the United States is not violence and lawlessness, but is love, and wisdom, and compassion toward one another, and a feeling of justice toward those who still suffer within our country, whether they be white or whether they be black.

> So I ask you tonight to return home, to say a prayer for the family of Martin Luther King... but more importantly to say a prayer for our own country, which all of us love—a prayer for understanding and that compassion of which I spoke.

> We can do well in this country. We will have difficult times. We’ve had difficult times in the past, [...] and we will have difficult times in the future. It is not the end of violence; it is not the end of lawlessness; and it’s not the end of disorder.

> But the vast majority of white people and the vast majority of black people in this country want to live together, want to improve the quality of our life, and want justice for all human beings that abide in our land.

As we know, Robert Kennedy was assassinated, himself, two months later.

While there surely has been some modest improvement over the years, racial divides remain all too prevalent in our society. It is true that explicit discrimination has declined, but discrimination nonetheless remains palpable in its more subtle forms. All of us know that subtle means can have profound consequences. Witness that by many accounts, African Americans today are 30% more likely to be pulled over by law enforcement than are whites, and they receive sentences almost 10% longer upon conviction. Most stark, though, is the proposition that African Americans are up to 2.5 times more likely to die as the result of police action than are whites.

As I wrote in a letter to our members in July, such facts do not justify any citizen to engage in violence against any law enforcement officer. The vast, vast majority of law enforcement officers are dedicated to upholding all of the values of our society, and they risk their lives every day for our protection. In fact, our police forces...
too often are asked to do far more than we should be asking. They are required to deal with society’s very worst problems when no one else will.

Enforcement of the law is largely a reflection of our society. Until we obliterate from our landscape all forms of discrimination, there will be law enforcement officers who act improperly based on their explicit or implicit bias. The challenges experienced in St. Paul, Dallas and Baton Rouge are societal challenges. Blaming law enforcement absent an inward look at ourselves as a society is naive. We might as an ideal expect more from our law enforcement departments than we expect of ourselves, but that is an ideal not based in practical reality.

It is time to consider that the oath taken by anyone who enforces the law no more shields them from their biases than any one of us. The only thing that will prevent hate and division from drawing us into chaos is the conscious regard for the rule of law and a willingness to examine any thought that would thwart the sacred, solemn promise made to uphold the law.

As we continue to strive for greater justice in the form of racial equality (and equality for all groups in our society), our task is to address subtle biases in the form of implicit or subconscious racism. Such is a topic involving psychology and sociology. Many, including me, entertain biases of which we are barely aware. This is an obstacle that will not be overcome in one, or even two or three, generations. The problem requires constant conversation and education.

As lawyers educated concerning the rule of law, we have a unique opportunity (indeed, I believe a special obligation) to lead and teach about democracy. A democracy which fails to include every citizen on equal footing is short of a full democracy.

I have promised to focus on the issue of diversity and inclusion during my year as president. At the April OSBA Forum in Cincinnati, we held a Symposium on Race and Its Impact on the Practice of Law. At that Forum, I began discussions with a number of the minority bars across the state. In early August, I (and others associated with the OSBA) participated in another symposium on the same subject, held in Columbus. I continue to speak on this topic throughout the state. And I will continue to meet with the leadership of specialty bars throughout Ohio.

Clearly, we need to cause our law firms and our benches to become more diverse. As we serve on community boards, we need to strive for more diverse participation. But perhaps most importantly, we, the lawyers of Ohio, must lead our conversations in the direction of higher civility and greater knowledge. While we can’t solve all problems related to race and violence in our country, we can certainly educate, lead and make a difference. In large and small ways, other lawyers before us have done so, and we are obligated to continue that important tradition.

It was in 1968 that I decided to become a lawyer—largely moved by the political forces of that day. Since that time, I’ve not once lost the ardent desire to make a difference whenever and wherever I can. I will continue to do that in my own small arena as president of this bar. Wherever and whatever your arena, please join me in doing the same.

Ronald S. Kopp is the president of the Ohio State Bar Association and partner at Roetzel & Andress.
Inside OSBA

Save the date for your
2016 Fall OSBA District Meeting

Please plan to attend your 2016 Fall OSBA District Meeting. The lunch meeting will start at 11:30 a.m. with an afternoon 2.5-hour CLE seminar. Register for your District Meeting online at ohiobar.org/districtmeetings.

District 4 Annual Meeting
Monday, Sept. 12 at The Toledo Club, Toledo

District 3 Annual Meeting
Tuesday, Sept. 13, at Serrick Campus Center at Defiance College, Defiance

District 8 Annual Meeting
Tuesday, Sept. 20, at Lake White Club, Waverly

District 16 Annual Meeting
Thursday, Sept. 22, at Shawnee Country Club, Lima

District 5 Annual Meeting
Monday, Oct. 10, at Trillium Event Center, Bucyrus

District 6 Annual Meeting
Monday, Oct. 17, at Courtyard by Marriott, Springfield

District 13 Annual Meeting
Tuesday, Oct. 25, at Salem Golf Club, Salem

District 18 Annual Meeting
Wednesday, Oct. 26, at Avalon Inn, Warren

District 14 Annual Meeting
Monday, Nov. 14, at McKinley Grand Hotel, Canton

The 2016 campaign season has been interesting so far, but you haven’t heard everything until you’ve heard from prominent members of the bar, bench and press at this year’s Law & Media Conference.

The opening plenary session, moderated by attorney Dan Trevas, will explore how “dark money” and “legalized lying” have shaped this year’s campaign season. The conference, which will be held at the Ohio State Bar Association in Columbus on Friday, Oct. 14, will bring together journalists, lawyers, academics and students for a day of stimulating discussions about current media law topics.

Session topics include anti-SLAPP laws, FERPA, body cameras, the First Amendment right to anonymous speech, public records, student privacy vs. access to records, social media’s effect on copy editing, and the Open Meetings Act.

For details and registration information as it becomes available, visit ohiobar.org/lawandmedia.
Join us as we recognize excellence in the profession

Nominated by their peers, these attorneys prove that “paying it forward” is worthy of recognition and celebration. Please join the Ohio State Bar Foundation on Friday, Oct. 7, in Columbus as we gather to honor these men and women and share their inspirational stories from the front lines of the legal profession.

2016 Annual Awards Dinner Honorees:

Sandra J. Anderson, Columbus
Ritter Award

Ronald L. Kahn, Cleveland
Ramey Award for Distinguished Community Service

Summit County Juvenile Court Crossroads Program, Akron
Outstanding Program Award

Drew Odum, Cleveland
Statewide Community Service Award for Attorneys 40 & Under

When:
Friday, Oct. 7, 2016 • 6:30 p.m.

Where:
Embassy Suites Columbus-Dublin
5100 Upper Metro Place,
Dublin, Ohio 43017

RSVP:
RSVP to Kristin Eckert at keckert@osbf.net or (614) 487-4474 by Sept. 23. Cost per person is $75 and seating is limited.

During the 2015 Awards Dinner, Robert McClendon met Fred J. Ball, recipient of the Ritter Award. Mr. McClendon was wrongfully convicted and released from prison with help from Outstanding Program Award honoree, the Ohio Innocence Project.

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Honor the exceptional, celebrate an occasion and recognize the significant people in your life with a charitable gift to OSBF. Tribute gifts are an easy way for you to support OSBF grant-making initiatives and to ensure special colleagues, friends and family receive the statewide recognition they deserve. To dedicate your gift, call (614) 487-4477 or visit www.osbf.net and click “Donate Now.”

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Gifts received from May 30, 2016 to July 15, 2016

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Kathleen A. Stoneman

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Ms. Susan L. Rhiel, Esq.

Fred J. Milligan
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IN MEMORY OF
Gifts received from May 30, 2016 to July 15, 2016

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John & Wendy Holschuh
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Member News

Cleveland

Jennifer Lawry Adams, Ulmer & Berne LLP, was named to the Leadership Cleveland Class of 2017.

Mary Jane Trapp, Thrasher Dinsmore & Dolan, earned the 2016 Inspire Award from the McGregor Foundation.

Stephanie Dutchess Trudeau, Ulmer & Berne LLP, was appointed to serve as a member of the Ohio State Bar Association’s Labor & Employment Specialty Board.

Cincinnati

John D. Holschuh, Jr., Santen & Hughes, was inducted into the International Academy of Trial Lawyers.

Jason A. Mosbaugh, Weltman, Weinberg & Reis Co., was appointed by the board of directors of the Cincinnati Paralegal Association to serve as a member of the organization’s Advisory Council.

Dayton

Erin Rhinehart, Faruki Ireland & Cox, has been named to Benchmark Litigation’s “Under 40 Hot List.”

In Memoriam

2016

Dwight A. Washington  66
Dayton  June 2, 2016

Dennis F. Keller  70
Toledo  June 12, 2016

Thomas C. Clark  80
Delaware  June 15, 2016

Joseph C. Boggins  87
Austin, Texas  June 17, 2016

C. Wesley Bristley Jr.  88
Fremont  July 6, 2016

Albert J. Ortenzio  89
Canfield  April 17, 2016

William A. Lavelle  91
Athens  May 15, 2016

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

FALL COMMITTEE & SECTION MEETING SCHEDULE

For more details and to register for a meeting, visit ohiobar.org/membermeetings.

Friday, September 16, 2016
Estate Planning, Trust & Probate Section

Saturday, September 17, 2016
Estate Planning, Trust & Probate Section
Banking, Commercial & Bankruptcy Law Committee

Thursday, September 22, 2016
Taxation Law Committee
Public Utilities Committee

Friday, September 23, 2016
Administrative Law Committee
Agricultural Law Committee
Juvenile Law Committee
Negligence Law Committee
Family Law Committee
Insurance Law Committee
Insurance Staff Counsel Committee
Natural Resources Law Committee
Senior Lawyers Section

Friday, September 23, 2016
Environmental Law Committee
Elder & Special Needs Law Committee
Traffic Law Committee
Workers’ Compensation Law Committee
Gaming and Liquor Law Committee

Thursday, September 29, 2016
Solo, Small Firms & General Practice Section

Friday, September 30, 2016
Construction Law Committee
Federal Courts & Practice Committee
Young Lawyers Section
Real Property Section

Saturday, October 1, 2016
Intellectual Property Section
Paralegal Committee

Tuesday, October 4, 2016
Health Care Law Committee

Saturday, October 29, 2016
Labor & Employment Section

All meeting dates and times are subject to change at the discretion of the committee chair.

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

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

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

3 opinions that shaped the current legal precedent for banning books

By Tori Metzger


Today banning a book means you won’t find it at your public library or in your child’s classroom. While some books are still challenged and banned today, it took many court cases to argue and adopt today’s principles—some books were previously banned from multiple countries, including the U.S.

The last book that was banned from the U.S. was Fanny Hill, banned in 1821 and again in 1963 for obscenity. How has the past affected the current precedent for banning books? Here is some case law history:

The Comstock Law (1873)
Passed by Congress in 1873, the Comstock Law was created to control and suppress the trade, circulation and possession of “obscene literature” and “immoral articles.” These included not only diverse books, but also pamphlets and other information about women’s birth control. U.S. Customs confiscated many of these books mailed into and outside of the country, keeping people around the globe from reading and distributing them until the Supreme Court eventually declared the law unconstitutional in 1983.1

United States v. One Book Called Ulysses (1933)2
James Joyce published his classic novel Ulysses in France more than 10 years before it was ever legal to publish or read in the U.S. The court case arose when the book was seized by U.S. Customs for importation of an “obscene” book. The judge, a book lover, ruled the book not obscene and legal in the U.S. The judge’s opinion also led to the legalization of other similar works of literature.

Miller v. California (1973)3
After consistently banning “obscene” books for two centuries, legislators decided it was time to officially define what constitutes “obscene” books and materials. In the 1973 case Miller v. California, the “Miller test” (also known as the Three Prong Obscenity Test) was created. A book is only considered obscene if it meets all three conditions of the Miller test:

1. “The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.

2. The work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law.

3. The work, taken as a whole, lacks serious literary, artistic, political or scientific value.”

This 1982 Supreme Court decision ruled that local school boards can’t remove books from school libraries simply because they’re offended by them or they disagree with the ideas within. Students sued the Island
TOP 10
MOST CHALLENGED
BOOKS IN 2015

10. Two Boys Kissing by David Levithan
9. Nasreen’s Secret School: A True Story from Afghanistan by Jeanette Winter
8. Habibi by Craig Thompson
7. Fun Home by Alison Bechdel
6. Holy Bible
5. The Curious Incident of the Dog in the Night-Time by Mark Haddon
4. Beyond Magenta: Transgender Teens Speak Out by Susan Kuklin
3. I Am Jazz by Jessica Herthel and Jazz Jennings
2. Fifty Shades of Grey by E.L. James
1. Looking for Alaska by John Green

Author Bio
Tori Metzger is a content strategist at the Ohio State Bar Association.

Endnotes
1 Comstock Law of (1873) - Materials, Court, Federal, and Women. JRank Articles. law.jrank.org/pages/5508/Comstock-Law-1873.html#ixzz4FJYksKbW.
2 cbldf.org/2013/04/obscenity-case-files-united-states-v-one-book-called-ulysses/.
3 www.law.cornell.edu/supremecourt/text/413/15.

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Trees school board for removing books from their library, and after the case was won, books including Slaughterhouse-Five, The Naked Ape, Best Short Stories of Negro Writers, Go Ask Alice and more were returned to school library shelves.

Today the only books that are banned from publication and distribution are those that include child pornography, although many schools and public libraries still challenge and ban books today. 😊

Write a review of Trials of the Century.
Read an advanced copy of Trials of the Century: a Decade-by-Decade Look at Ten of America’s Most Sensational Crimes written by attorney Mark J. Phillips and write a review for Books & Bytes. Email the editor at ncorbut@ohiobar.org to receive an advanced PDF copy.
Ohio’s tort reform legislation modified the rules governing joint and several liability among tortfeasors. It also set forth the protocol by which a tortfeasor may reduce its exposure by having the fact finder allocate responsibility between parties and non-parties. The application of these rules to a situation where a non-party is immune from the tort liability in issue has resulted in contradictory holdings. This article attempts to clarify this issue by discussing the methodology of apportionment as between parties and non-parties and exploring the potential impact on such rights when a defendant seeks the apportionment of tortious conduct from a non-party who would otherwise be immune. While courts are split on the issue, we believe that the more persuasive position is to permit apportionment to immune non-parties, even though those parties may never be liable.
R.C. 2307.22 governs the means of determining joint and several liability between persons who caused the same injury. Under this provision, a defendant who is determined to be more than 50% responsible for a plaintiff’s injury is jointly and severally liable in tort for all compensatory damages that represent economic loss. A defendant deemed to be less than 50% responsible for the plaintiff’s injury will only be liable for his or her proportionate share of the compensatory damages that represent economic loss. If a defendant is liable for an intentional tort, that defendant is jointly and severally liable in tort for all compensatory damages that represent economic loss, even if they are determined to be less than a 50% cause of the plaintiff’s injury. Finally, in a situation where one defendant is determined to be an intentional tortfeasor, any non-intentional tortfeasor defendant who is found to be a 50% or less cause of the plaintiff’s injuries is responsible only for their proportionate share of compensatory damages that represent economic loss. The calculation of an individual’s proportionate share is straightforward—the court multiplies the total economic damages by the percentage of tortious conduct allocated to the non-intentional tort defendant.

R.C. 2307.22 also provides that there is no joint and several liability for a non-economic loss. With respect to damages for pain, suffering and mental anguish, each defendant is responsible only for their proportionate share of such damages.

R.C. 2307.23 establishes the protocol by which the fact finder determines the percentage of liability attributable to each party and non-party claimed to be responsible for the plaintiff’s injuries. The statute mandates that when properly requested, the court in the non-jury action or the jury in a jury action “shall” return a general verdict form accompanied by answers to interrogatories to specify all of the following:

1. The percentage of tortious conduct that proximately caused the injury or loss to person or property or the wrongful death of the plaintiff to each party to the tort action for whom the plaintiff seeks recovery;

2. The percentage of tortious conduct that proximately caused the injury or loss to personal property or the wrongful death of the plaintiff to each person from whom the plaintiff does not seek recovery.

The Court “shall” return a verdict accompanied by answers to interrogatories to specify... the percentage of tortious conduct that proximately caused the injury or loss... of the plaintiff to each person from whom the plaintiff does not seek recovery.
The allocation protocol set forth in R.C. 2307.23(C) is designated an affirmative defense, though the statute provides that “any party to the tort action from whom the plaintiff seeks recovery in this action may raise an affirmative defense under this division at any time before the trial of the action.” Courts dispute whether a party can assert an allocation claim under R.C. 2307.23 when the party fails to raise the defense in its answer. Most courts give deference to the language in the statute providing that the allocation request can be raised “at any time before the trial of the action.” One federal court, however, holds that the reference in the statute allowing the raising of the allocation defense “at any time before trial” is procedural and, as a consequence, the requirements of the Federal Rules of Civil Procedure govern. Under this interpretation, the request for allocation under R.C. 2307.23 was deemed an affirmative defense subject to the pleading requirements in Fed. R. 8.

R.C. 2307.27 makes it clear that a plaintiff’s recovery against one tortfeasor does not discharge the liability of the other tortfeasor unless the entire judgment is satisfied. Subsection B of this provision provides that valid answers to jury interrogatories apportioning the percentage of liability of several defendants as set forth in R.C. 2307.23 shall be binding “as among those defendants in determining their right of contribution.”

This leads us now to consider whether a jury’s obligation to apportion a non-party’s “percentage of tortious conduct” under tort reform applies to a non-party defendant that would have immunity from the tort “liability” in issue. Ohio state courts are split on this issue. In Romig v. Baker Hi-Way Express, a 2-1 decision, the Fifth District Court of Appeals concluded that apportionment would not apply where the non-party was immune under Ohio’s workers’ compensation framework. This court initially noted that the apportionment protocol did not include an exception for employers immune from work-related claims. Nevertheless, the court went on to find that any consideration of an employer’s proportionate share of liability in the context of an R.C. 2307.23 apportionment analysis would be inconsistent with the statutory and constitutional immunities afforded complying employers under Ohio’s workers’ compensation system. In rejecting the defendant’s request to have the jury apportion fault to an employer who had workers’ compensation immunity, the majority panel reasoned: “[A]s there is no such thing as employer
negligence, a tortfeasor cannot raise the affirmative defense of the empty chair as to an employer for negligent acts.” The panel concluded: “[W]e find to include the employer’s negligence in the allocation of fault is completely inconsistent with the workers’ compensation system as structured by the constitution and legislature and as construed by the courts.”

In dissent, Judge Edwards distinguished apportionment of fault from the imposition of liability, reasoning:

R.C. 2703.23 contains no exceptions for an employer or any other potential non-party who enjoys immunity from liability. I would find that despite the fact that Baker is immune from liability for negligence pursuant to the Workers’ Compensation Act, the jury still could assign a portion of the tortious conduct to Baker pursuant to the empty chair doctrine. The ruling of the majority does not ensure that no defendant pays more than his or her fair share of the plaintiff’s damages; in fact, this decision forces Worthington to pay its own share plus Baker’s share by not allowing Washington to present any evidence of Baker’s tortious conduct that contributed to the plaintiff’s injuries.

Judge Edwards’ dissent has since been embraced in a number of decisions, resulting in an apparent jurisdictional split. In Fisher v. Beazer East, Inc., the Eighth District Court of Appeals, without even referencing the prior Romig holding, held that a defendant could seek to have a jury apportion fault to a non-party employer under R.C. 2307.23—even though the non-party employer would otherwise be immune from an underlying claim. The court reasoned that R.C. 2307.23 did not exclude any party who may be entitled to immunity. The court further noted that pursuant to the express language of R.C. 2307.11(G), the phrase “[p]ersons from whom the plaintiff does not seek recovery in this action,” includes “[p]ersons who are not a party to the tort action whether or not that party was or could have been made a party.” Recognizing that the statutory definition includes persons “whether or not that person could have been a party to the tort action,” the Fisher court concluded that the statute requires a jury to consider the fault attributable to each person who caused the injury, regardless of whether the plaintiff could seek recovery from that person.

The Eighth District’s analysis has been recognized and applied by a number of trial courts. In Farley v. Complete Gen. Constr. Co., the trial court addressed whether a litigating defendant could seek to have the jury apportion a percentage of tortious conduct to an immune, non-party employer. After noting the contrast between the Fifth District’s decision in Romig and the Eighth District’s decision in Fisher, the Farley court disregarded the Romig decision, finding that it undermined the purpose of R.C. 2307.23 to ensure that a defendant should only have to pay its proportionate share of liability. The court further noted that the Romig majority panel failed to properly consider the statutory definition of a “person from whom the plaintiff does not seek recovery” under R.C. 2307.01(G) and its impact on the scope of permissible apportionment relative to non-parties under R.C. 2307.23.

More recently, in Wise v. Mary Moppe Early Learning Ctr., the trial court considered whether a litigating defendant could seek to have the jury apportion the percentage of tortious conduct as against a non-party parent who would have parental immunity from the underlying claim in litigation. After citing approvingly to the Eighth District Court of Appeals decision in Fisher, the Wise court held:

As the Fisher court noted, the legislator could have specifically exempted employer negligence from the apportionment statute. They did not. The same is true for parental negligence. R.C. 2307.23 entitles defendant to present evidence in support of the apportionment of fault to other not named as defendants in this litigation.

The Wise court also cited approvingly to an earlier Franklin County trial court decision in Webb v. Fire-Safety Sys. Like the Fisher case, Webb involved a workers’ compensation fact pattern. The Webb plaintiff sought to recover for a workplace injury, but did not seek to recover from his coworkers or employer due to the existence of immunity for such parties. As the trial date drew near, the plaintiff filed a motion in limine seeking to preclude evidence of negligence on the part of his employer. The trial court denied the motion and allowed the issue of apportionment to go forward. The court rejected the argument that the employer’s conduct cannot be “tortious” because it was immune from finding that “the statutes specifically require the jury to apportion responsibility for the conduct that gives rise to the plaintiff’s claims to all parties to the conduct, whether or not plaintiff seeks a recovery from them.” The court also cited R.C. 2307.23(C) for the proposition that any party to a tort action may raise the “empty chair” defense at any time prior to trial.

The conclusions set forth by courts in Fisher and Wise and the dissenting opinion in Romig find support for reasons beyond those specifically discussed in those cases. In this regard, the immunity
right to have the jury allocate the percentage of liability to the non-party. The jury’s assessment of any percentage of responsibility to the non-party would not result in a finding “liability,” but could limit the damages imposed by an adverse verdict as to the litigating defendant.

Author bios

Clifford is a shareholder in the Cleveland office of Reminger Co., LPA, and serves as the co-chair of the firm’s insurance coverage/bad faith practice group. Cliff primarily focuses his practice on complex insurance coverage litigation, appellate practice, professional liability and general liability.

Matthew is an associate in the Cleveland office of Reminger Co., LPA. His practice areas include insurance coverage/bad faith, appellate advocacy, health care, professional liability and general liability litigation.

Endnotes

1 Id. at ¶ 38.
LIMITED SCOPE REPRESENTATION:

A NEW WAY OF THINKING ABOUT ACCESSIBLE LEGAL SERVICES

By Eileen Pruett and Bert Tiger Whitehead
Consider this scenario: a client comes to you, the attorney, and is seeking assistance in a legal case. The case has not started yet, a lawsuit will need to be filed, discovery sent and responded to, and hearings must be attended. Typically, an attorney would quote a fee for assisting the client in every facet of the case and for attending every hearing throughout. The cost: a fairly high initial retainer fee alone is enough to cause their heads to drop and mutter quietly, “Wow, I can’t afford that…” This is usually the end of the consultation, the end of the opportunity for the lawyer to get a new case, and the end of the possibility for the client to get much needed assistance in a legal case.

The result? For many lower- and moderate-income Americans, the initial retainer fee alone is enough to cause their heads to drop and mutter quietly, “Wow, I can’t afford that…” This is usually the end of the consultation, the end of the opportunity for the lawyer to get a new case, and the end of the possibility for the client to get much needed assistance in a legal case.

Now, consider this second outcome. The client says, “Wow, I can’t afford that…” after the full-representation quote. The attorney then responds, “Well, what I could do to help you is just handle some of the different steps of the case, at various flat rates, and then you can pay for just the services you most need and can afford. For example, we can get the paperwork prepared and filed, in just your name alone (pro se), and I could charge you a low flat fee of $____. Then I can assist you in getting the person served for another fee. Then once served, we can wait and see if the person answers the complaint; if not, I can help you at another flat rate to file a motion to enter default judgment, and get a hearing that you can attend on your own. If they do answer the complaint, I can assist you for a flat fee in preparing and sending discovery requests, and if you receive any discovery requests, I can quote you another fee for helping you respond to those. You just pay for each step as we come to it, which should make it much more affordable. You can attend the pre-trial hearing on your own; later in the case, if you really need full representation, then perhaps I can help you then on a flat rate or hourly rate plus retainer to get us through the rest of the case.”

The result? For many lower- and moderate-income Americans, this conversation offers the client the only path to affordable legal services. Many clients who could not afford the high initial retainer for full-representation can certainly afford the lower flat-rate cost of having a lawyer prepare, file, and help serve the initial complaint documents, while buying the client

Unbundling legal services is still taboo for many attorneys. Although it may not be the best option for large firms, it can help solo practitioners gain clients while improving access to justice.
time to get more money to pay for the next step in the process, and so on.

Some attorneys are already engaging in this type of representation, yet many others are interested but still learning about it, and some are even hesitant about it.

Unbundled legal services or limited scope representation

The attorney in the second outcome is discussing a legal-services model called “unbundled legal services” or “limited scope representation.” This model is “an alternative to the traditional full-service model where an attorney can limit the attorney-client relationship to a specific task such as document assistance for procedural advice, or for such things as custody or pension issues in family law.”

Is it ethical?

Limited scope representation is ethical, allowed by Ohio Rules of Professional Conduct since 2007. Under Prof. Conduct R. 1.2(c) “[a] lawyer may limit the scope of a new or existing representation if the limitation is reasonable under the circumstances and communicated to the client, preferably in writing.” Current discussion of limited scope representation is a direct result of the Supreme Court Report and Recommendations of the Task Force on the Access to Justice. In its final report, the task force recognized that most lawyers in Ohio are unwilling to take on representation of a client for a limited task. They are unsure whether the Rules ofProfessional Conduct permit such limited representation.

To address these concerns, the task force recommended development of continuing education programs for judges and attorneys. In addition, the task force recommended requesting guidance about what constitutes “reasonable under the circumstances” under R. 1.2(c). In fact, the Ohio State Bar Association Committee on Professionalism is working now to determine what clarification about the R. 1.2 is needed and what other rules and forms might be needed to encourage the use of limited scope representation.

Is it new?

No, the idea that attorneys might provide representation to clients for one or more components of a civil or family dispute is not new. In 2003, the American Bar Association initiated education for attorneys about effective options to provide affordable services for the parts of a dispute a pro se party does not feel comfortable handling alone.

Doesn’t it increase malpractice risk?

No, as long as you do it right. A leader in advocating for limited scope representation since the ABA’s 2003 initiative, M. Sue Talia re-stated key factors about limited scope representation in 2015:

- What limited scope representation is not: it is not limited liability, it isn’t a second-class practice, it isn’t unethical, it isn’t just for poor people and it isn’t good for every case, every issue or every client.

- What limited scope is: a high-quality practice with all of the duties required for any full-service client. There is an attorney-client relationship and the same standard of care applies to a particular task as it is for the standard of care for full service. Limited scope representation is ethical, safe and a profit center.

Thus, Ohio attorneys should be comfortable integrating unbundled legal services into their practices (and some already are) if they keep in mind the following guidelines:

- Limitations on scope must be informed and in writing;

- Limitations must be reasonable under the circumstances.

Is it being used in Ohio already, and if so, how do Ohio judges, court staff, and attorneys feel about it?

Yes, work to implement limited scope representation to Ohio citizens is moving forward in multiple areas. Legal aid organizations offer limited scope representation through legal clinics and information sessions; volunteer attorneys also help legal aid clients, or clients referred by the court with individual components of a case. For example, Legal Services of Western Ohio offers pro se clinics in several counties. The Family Court hosts the clinic twice each month. Court staff makes appointments with the legal services attorney who explains the basics to clients, makes child support software available to them, helps them with their forms, etc. In addition, a Community Christian Legal Services Clinic operates monthly in both Bowling Green and Napoleon. However, if clients come in with an issue that is too much to handle in the short time at the clinic, they are referred to an attorney who has agreed to represent the individual, on an “unbundled” basis, if appropriate, for a lesser fee than he or she might normally charge.

Judge Denise McColley of the Henry County Family Court says that she “would welcome having pro se parties appear having received advice or assistance from an attorney for critical parts of a case.”

In Muskingum County, Judge Jeffry Hooper notes that "there are one or more unrepresented parties in more than 50% of the cases in my court." Members of the Muskingum County Bar Association volunteer one evening a month to assist pro se litigants who meet indigence guidelines. They guide clients to appropriate forms and answer
threshold questions about service and other issues. These volunteer efforts do not meet the needs of all of the legal aid eligible litigants in his court. In addition to the needs of the poor, Judge Hooper believes that there are parties who appear pro se in his court who could pay for attorneys to do some work on the cases. If attorneys in his bar were comfortable offering unbundled legal services—“it could be a ‘win/win’…” for attorneys to get paid for the work they do and for clients to receive much needed legal assistance. Judge Hooper sees limited scope representation as a natural progression to offer legal services to individuals who do not qualify for legal aid, but need assistance in critical part(s) of the case. Like Judge McColley, he anticipates that attorneys implementing limited scope representation will be providing a much needed service for a group of clients who cannot proceed alone on some part(s) of their case.

The idea of win/win outcomes with limited scope representation is catching on among young attorneys as well. Jocelyn Armstrong, assistant executive director of the Columbus Bar Association, reports that “Some attorneys taking cases into their practices with Columbus Bar’s Professional Development Center recognize that clients may want to be selective about the services they receive from an attorney. They also know that potential clients are more ‘savvy’ than in the past—they may have done their own research.”

The Sixth District Court of Appeals in Toledo uses another model for limited scope representation where pro bono attorneys represent pro se parties (who meet indigence guidelines) in mediation. The court mediator, Carrie Connelly, is pleased with the program and is thinking of ways to offer the service to litigants with incomes above legal aid guidelines, but still cannot afford full representation at the mediation stage of the case.

What limited scope representation is not: it is not limited liability, it isn’t a second-class practice, it isn’t unethical, it isn’t just for poor people and it isn’t good for every case, every issue or every client.

The recurring theme among many judges, court staff and attorneys is that they are looking for ways to offer assistance to litigants with cases and issues that are appropriate for limited scope representation. As Bill Weisenberg, OSBA Senior Policy Advisor and member of the task force, noted, “Limited scope representation offers opportunities for attorneys to provide competent legal services and at the same time provides opportunities to expand their practices.”

What kinds of legal services and legal tasks are best suited for this model?

M. Sue Talia and others have identified family law, consumer law, landlord/tenant and government benefits/housing as particularly suitable for limited scope representation. However, even in full-scale civil litigation and other legal matter types, an attorney may be able to offer the following types of limited scope, à la carte service offerings:

- Advising on court procedures and courtroom behavior
- Coaching on strategy or role playing
- Collaborative lawyering
- Conducting legal research
- Reviewing documents
- Drafting documents, contracts and agreements
- Drafting pleadings, briefs, declarations or orders
- Ghostwriting
- Making limited appearances
- Negotiating
- Coaching for or participating in online, telephone or in person dispute resolution
would hire an attorney if only they could afford one, then the limited services model is an excellent model to enter and be successful serving that market, both profitably and affordably.

Regarding lowering one's profits, the opposite is actually true: limited scope services offer more clients, more cases and higher profits. In the two halves of the conversation above, the limited scope option only entered the conversation after it was clear that the client could not afford the high retainer of the full-service model. Although firms like Access Legal Care usually start with the limited-scope conversation, rather than end with it, there is no reason other firms cannot do the opposite. By doing so, the attorney has a choice: either lose this client, this case and all profits from it by allowing this client to walk away, or offer the client a limited scope arrangement that helps the client give the lawyer some profitable work, and creates a long-lasting attorney-client relationship. This model created the opportunity for profits where none existed. Furthermore, because most limited scope services are flat-fee, the attorney gets paid 100% up-front, and the fee can usually be non-refundable, which means no lost profits from unpaid balances.

Does this take work away from other members of the bar? Well, yes—that is the point! Owning a law firm is a competitive business like any other business. We succeed by getting more clients. Every time we get a client, that means another law firm did not get that same client; thus, we took a client away. However, we are not a non-law-firm taking business away from lawyers; we are a law firm getting more of the pie by offering more affordable alternatives to a larger market.

What’s in it for the attorney? Limited scope legal services offer attorneys the ability to say “yes” more often to more consumers across the state by offering limited scope services to them at affordable flat-rate prices. You can also say yes to more lower- and moderate-income clients who do not need, or cannot afford, your full representation. Finally, you can build more life-long client relationships with more people because you can custom tailor your limited scope legal service to meet the smallest and largest needs of potential clients—from a document review, to preparing, filing, and serving documents, to full representation as needed. All of this leads to more clients, more cases and more profits.

Does it lower profits and/or take work away from other bar members? Certainly, if an attorney has a reputation of providing high-touch, high-cost, full-representation, full-service legal services to middle- and upper-income clients for complex or costly cases, and can command high retainers and high hourly fees for doing so, then the limited scope model may not be a good fit. For that lawyer’s clients, at least, perhaps the “unbundled legal services” model may create a sense that this attorney’s legal services are being commoditized, which may create a perception of lower value. These few attorneys should probably keep doing what makes you successful. However, for the vast majority of attorneys who are struggling to get more clients, who desire to tap into the multi-billion dollar “latent legal market” of lower- and middle-income consumers who

- Organizing discovery materials
- Preparing exhibits
- Providing legal guidance or options
- Assisting with service
- Appearing at a hearing
- Negotiating on a client’s behalf

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Attorneys benefit with more clients, more life-long relationships, cases and profits. Many Ohio judges, court staff and other attorneys have already embraced limited-scope legal services, and the Ohio Rules of Professional Conduct have already deemed it an ethical legal services delivery model, as long as attorneys take key steps and meet standards. This model offers winning outcomes for all interested parties—attorneys, clients, court staff and judges.

**Author bios**

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**Endnotes**


2 The Supreme Court of Ohio Board of Professional Conduct clarified its view on appropriate placement of “flat fees into trust or business accounts in its Opinion 2016-1, issued Feb. 12, 2016. The opinion cites the requirement in Prof. Conduct R. 1.5 (d) (3) that a lawyer shall not enter into an arrangement for “a fee denominated as ‘earned upon receipt,’ ‘nonrefundable,’ or in any similar terms, unless the client is simultaneously advised in writing that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund...” www.supremecourt.ohio.gov/Boards/BOC/Opinions/2016/Op_16-001.pdf (last visited June 29, 2016). It only makes sense that that written advice is in the initial written agreement for services.

3 The Supreme Court of Ohio Report & Recommendations of the Task Force on the Access to Justice, March 2015. The task force was charged with identifying gaps in and obstacles to accessing the civil justice system in Ohio. www.supremecourt.ohio.gov/Boards/accessJustice/default.asp (last visited July 5, 2016).

4 Id. at p.30

5 Id.


9 Id.

BY Lindsey Carr Siegler & Michael E. Smith

Disqualification, disgorgement and discipline as the price of disloyalty
How do attorneys remain loyal to their clients when conflicts of interest arise? What are their ethical and professional obligations to their practices, their clients and themselves? A review of recent cases will help determine which route to take in these scenarios.

We all have heard of “customer loyalty”—a customer, happy with a service or product, remains loyal to the company providing that service or product. In the legal profession, however, we must remain mindful that “customer loyalty” often means the exact opposite, as the attorney must remain loyal to the customer because of the attorney’s ethical obligations. Attorneys must keep clients’ confidences, provide zealous representation and, of course, avoid conflicts of interest that threaten the attorney’s ability to diligently represent each client without compromising their interests.

With the traditional notion of “customer loyalty” fading in today’s hyper-competitive legal market, the attorney’s duty of loyalty is constantly challenged. As the Roman philosopher Seneca wrote: “Loyalty that is bought with money may be overcome by money.” How difficult it remains, then, for attorneys to appropriately address a conflict of interest situation where it presents a separate threat to their economic well-being. Two recent cases from other jurisdictions have spotlighted this persistent issue.

In Atlantic Specialty Insurance Company v. Premera Blue Cross, a judge disqualified the firm Lane Powell from representing Premera in a coverage dispute because the firm also represented one of ASIC’s corporate affiliates, Homeland Insurance, in an unrelated case.1 When the firm learned of the conflict, it attempted to solve the issue by terminating the representation of Homeland, dropping the client like a “hot potato.” Despite the firm’s purported lack of knowledge regarding the affiliation, the court held there was enough of an intertwined relationship between two subsidiaries that representation was problematic: “Although Premera has provided numerous declarations establishing the fact that none of the attorneys at Lane Powell were previously aware of the relationship . . . the fact remains that an attorney-client relationship existed vis-a-vis the affiliates’ unified operations.” The court disqualified Lane Powell, holding the firm should have known of the affiliation. The court also chastised Lane Powell for trying to terminate a relationship with one client in favor of the other: “[A]n attorney may not dissipate a conflict of interest by converting a present client into a former client by withdrawing from representation of a disfavored client.”

In Sheppard Mullin v. J-M Manufacturing, a California court held a law firm was not entitled to fees where it was disqualified as a result of a conflict. J-M hired Sheppard Mullin to defend it in false claims litigation.2 Although the law firm’s conflict check disclosed the issue, Sheppard Mullin failed to advise J-M that it had handled labor work for an opposing party. J-M did not learn about the conflict until the municipality sought to disqualify the law firm, after the firm had billed J-M almost $4 million in fees. The court concluded J-M was not required to pay the fees, explaining, “[t]he representation of both parties without informed written consent is contrary to California law and contravenes the public policy embodied in” the California Rules of Professional Conduct.

As evident from these recent cases, law firms must constantly manage conflicts to mitigate the risks that inevitably arise when two clients find themselves in a dispute. When a firm identifies a conflict, it must attempt to remedy the conflict or withdraw from representation. Otherwise, the firm faces the prospect of some sort of sanction. Curiously, in Ohio, whether a court will automatically disqualify counsel in light of a current conflict may depend on whether a motion to disqualify is filed in state or federal court.

For example, in Cliffs Sales Co. v. Am. S.S. Co., the judge denied a motion to disqualify defense counsel, even after noting the existence of an actual conflict.3 Cliffs argued the firm was disqualified from acting as counsel for ASC in light of its simultaneous representation of Cliffs’ parent company in a case before the Sixth Circuit. Prior to accepting the representation of ASC, the attorney conducted a conflict check that revealed the firm represented Cliffs’ parent in a case by a former employee. The attorney met with the attorney responsible for the
employment matter who advised that the case was over. But the employment matter was in fact still pending, though it was dismissed shortly thereafter. Thus, although they were unrelated, the firm’s representation of CCI in the employment case and the firm’s representation of ASC overlapped for two months.

The district court determined that, rather than applying a per se rule of disqualification for violations of Rule 1.7, “the better approach is to examine the factual situation to determine if disqualification is necessary.” The court held that “[a] court must determine if [the lawyer] can represent adverse clients concurrently with equal vigor, without conflict of loyalties and without using confidential information to the detriment of either client.” Based on that analysis, disqualification was not necessary.

In contrast, in Carnegie Cos., Inc. v. Summit Properties, Inc., the court sanctioned a law firm for bad faith conduct in refusing to withdraw as counsel for a client that was suing another client of the firm, holding that “the language of [Rule 1.7] prohibiting concurrent adverse representation is mandatory.” Carnegie and Summit sued one another over issues arising out of a land deal. Carnegie filed a motion to disqualify opposing counsel and requested attorney fees. The trial court granted the motion to disqualify and ordered Summit and its counsel to pay nearly $80,000 in fees.

In affirming disqualification, the appellate court held that the firm acted in bad faith by trying to ignore or conceal a conflict with Carnegie and pressing for a conflict waiver rather than withdrawing. The court declined to follow the rule in Cliffs, stating, “the idea that concurrent representation is permissible as long as it can be done with ‘equal vigor’ comes from case law decided under the former DR 5-105. That DR was materially different from the currently applicable Rule 1.7 of the Ohio Rules of Professional Conduct. To violate DR 5-105, the concurrent representation had to be likely to have an adverse effect on the lawyer’s independent professional judgment. DR 5-105(B). Rule 1.7(a) does not require any adverse effect on the lawyer’s judgment. Under the Rules of Professional Conduct, any directly adverse concurrent representation is sufficient to violate the rule regardless of how vigorously the lawyer may be able to represent both clients.”

The court noted that Rule 1.7 does not limit conflict disqualification to situations in which the attorney’s judgment is likely to be compromised. Rather, the mandatory nature of Rule 1.7’s language compels disqualification. The court recognized “the ‘delicate balance [that] must be struck between the prerogative of a party to proceed with counsel of its choice and the need to uphold ethical conduct in courts of law.’” The court concluded that “in concurrent representation situations, the importance of maintaining the ‘public confidence in the propriety of the conduct of those associated with the administration of justice’ outweighs a party’s interest in choosing its own lawyer.”

The appellate court later affirmed the trial court’s finding of bad faith and the award of attorney fees. Consistent with its earlier ruling, the court held that “a firm which is aware of its representation of directly adverse clients in separate matters, yet seeks a waiver of the conflict directly from one client despite the firm’s knowledge that the client is represented by counsel from another firm, is acting in bad faith. By bypassing opposing counsel, the firm acts with a dishonest purpose, moral obliquity, conscious wrongdoing, and in breach of a duty premised on an ulterior motive to obtain a benefit or advantage it could not otherwise obtain.” The court noted that “multiple attorneys at the firm acted to ignore or conceal the underlying conflict, and to press Carnegie to waive the conflict rather than simply withdrawing . . . .”

Two years after Carnegie Cos. litigation began, in Little Italy Dev. LLC v. Chicago Title Ins. Co., a federal judge again rejected the proposition that disqualification is mandatory.” Chicago Title moved to disqualify counsel for Little Italy in a dispute regarding a title insurance policy. Chicago Title claimed that the firm, which began representing Little Italy in 2008, also represented Chicago Title on a variety of matters.

According to the court, the first step is to identify the clients since Rule 1.7 “applies only to conflicts of interest involving current clients.” Chicago Title argued disqualification was required because the firm’s representation of Little Italy in the coverage dispute was directly adverse to Chicago Title’s interest in the dispute, as both Chicago Title and LID were “current clients” of the firm when the conflict of interest arose. Chicago Title also argued that disqualification was required because the firm did not obtain a written waiver. Little Italy claimed the parties’ interests were not “directly adverse,” and even if a conflict of interest occurred, disqualification was not required.

The court held the interests of Little Italy and Chicago Title were “directly adverse” during the time the firm represented both parties.
However, although the Court agreed the language contained in Rule 1.7 is mandatory in nature, it held the language applied to determining whether a violation of the concurrent client rule occurred—*not for any particular mandatory consequence once a violation is established. Nevertheless, the court did disqualify the firm:

In the typical conflict of interest case, the attorney has no stake in the conflict, other than perhaps obtaining additional business from a “lucrative” client. In this case, however, [the firm] appears to have renegotiated a favorable fee agreement with LID so that the fees LID incurred in the Underlying Litigation could be paid by Chicago Title, who was another firm client at the time the fee agreement was signed.

. . .[the firm] clearly violated its duty of undivided loyalty by taking adverse action against its client, Chicago Title, in favor of another client, LID. Given the unique nature of this case in that it ultimately involves determining which client will pay [the firm’s] fees for the Underlying Litigation, together with the fact that [the firm] took actions against Chicago Title during its representation which will be used against Chicago Title in this case, the Court finds that the interests in maintaining the public confidence and assuring the propriety of attorney conduct, outweigh LID’s interest in choosing its own attorney.

Many courts throughout the country similarly hold “disqualification is not mandatory even after a finding that a law firm has violated a conflict of interest rule.”
Many courts throughout the country similarly hold “disqualification is not mandatory even after a finding that a law firm has violated a conflict of interest rule.”

Finally, attorneys cannot avoid disqualification by dropping the original client and continuing the adverse representation. Federal District Judge Ann Aldrich long ago held that “a firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client.” The “hot potato” doctrine has been adopted by courts throughout the country. This rule is in place because otherwise “the challenged attorney could always convert a present into a ‘former client’ by choosing when to cease to represent the disfavored client.”

Of course, these cases only address the ramifications of a conflict of interest in litigation. A corollary issue is the ethical discipline an attorney may face in not properly addressing a conflict. The Ohio Supreme Court recently addressed this issue in Disciplinary Counsel v. Phillips, in which two attorneys were found to have improperly represented clients with competing interests in the context of some intertwined companies. In imposing a stayed six months suspension, the Court noted that it historically has sanctioned attorneys with public reprimands and stayed suspensions “for conflict-of-interest violations.” Accordingly, failing to properly address a conflict carries both economic and professional implications.

These cautionary tales should give attorneys pause to focus on stringent due diligence in addressing conflicts issues. Whether disqualification and disgorgement of fees earned are mandatory consequences, the economic and professional risks and headaches that can negatively impact an attorney’s practice cannot be overstated.

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Endnotes

1 Case No. 2:15-cv-01927, (W.D. Wash. April 22, 2016).
2 198 Cal.Rptr.3d 253 (Cal. App.4th 2016).
6 183 Ohio App.3d 770, 2009 Ohio 4655 (9th Dist. 2009).
7 Id. at 790.
8 See Rule 1.7 (“an attorney shall not represent a client if the representation involves a concurrent conflict of interest” unless a written waiver is obtained).
9 Id. at 790 (citation omitted).
10 Id.
12 Id. at P-22.
13 Id. at P33.
15 Id.
18 See e.g., Flying J Inc. v. TA Operating Corp., 2008 U.S. Dist. LEXIS 18459, *13 (D. Utah 2008), citing ABA/BNA Lawyers’ Manual on Professional Conduct S1:117-18 (Dec. 19, 2001) (“once the lawyers find themselves representing clients with adverse interests, they generally may not drop one client in order to represent the other, preferred client”); El Camino Res., 623 F. Supp. 2d at 877 (“a law firm will not be allowed to drop a client in order to resolve a direct conflict of interest, thereby turning a present client into a former client”).
19 Pioneer at *6.
20 2016-Ohio-3027.
21 Id. at ¶31.
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Practice Tips

Sticky service situations:
Obtaining service in unusual circumstances

By Christopher Caspary and Darci L. Deltorto

The Hague (1965 Foreign Service Treaty)
To serve an individual in a foreign country (Civ. R. 4.5), out-of-state service must be generally authorized by Civ. R. 4.3, 4.4 or both. Civ. R. 4.3(A) specifically identifies 10 scenarios where service is permissible. Civ. R. 4.3(B) subsequently authorizes service by certified, express or commercial carrier (“clerk service”) or through personal service. Civ. R. 4.4. (Service by Publication) differentiates between whether residence is unknown (4.4(A)) or known (4.4(B)).

If Civ. R. 4.3 or 4.4 allows for service and service is to be perfected in a foreign country that is a “signatory” to the Hague, Civ. R. 4.5(A) provides that the Hague controls. Sixty-nine countries, in one form or fashion, are signatories to the Hague. Therefore, the Hague controls in various significant legal environments, including the United Kingdom, the United States, Brazil, India and China.

Pursuant to Civ. R. 4.5(A), attorneys are directed to follow Articles 8 and 10 of the Hague, provided that the country has not formally objected. Article 8 permits contracting countries to effect service vis-à-vis “diplomatic or consular agents.” Article 10 prevents contracting countries from interfering with (1) judicial papers sent in postal channels; (2) “judicial officers, officials, or other competent persons” from the origin country effecting service through “judicial officers, officials, or other competent persons”; or (3) interested persons effecting service through “judicial officers, officials, or other competent persons” of the state of origin.

In instances where the country of service is not a signatory to the Hague, Civ. R. 4.5(B) provides that foreign service can be perfected through clerk service, a procedure authorized by the foreign jurisdiction if that procedure is “calculated to give actual notice,” a letter rogatory, personal service, upon a corporate or other legal entity officer or agent, via clerk directed delivery that includes a return receipt, or as otherwise authorized by the court.

Defining “residence”
“Residence” has not been clearly defined.1 This definition is important as it determines which Civil Rules subdivision applies. Residence for the purpose of the service rules appears to indicate a place of dwelling, falls short of requiring a domiciliary, but cannot be a mere business address.2

Service by publication
Civil Rule 4.4 allows a plaintiff to perfect service on a defendant “where such service is authorized by law.” Civil Rule 4.4(A), read in conjunction...
Central Authority to reach a defendant who lives in South Africa, to serving the secretary of state, to reaching a tourist who drove through the heartland of Ohio. Practitioners should start with the basics, assuming the defendant has a known residence. If this is unsuccessful, or if a residence is unknown, plaintiffs have options designed to actually or constructively notify defendants of pending lawsuits and afford them an opportunity to be heard.

Disclaimer: The contents of this article are not intended to serve as legal advice. Appropriate legal counseling or other professional consultation should be obtained prior to undertaking any course of action related to the topics explored by this article.

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Endnotes

1 See, e.g., Prouse, Dash, & Crouch, L.L.P. v. Dimarco, 116 Ohio St. 3d 167, 2007-Ohio-5753, 876 N.E.2d 1226, ¶ 9. (declining to define “resident” and noting that the General Assembly has also declined to generally define the term).
5 See Brooks v. Rollins, 9 Ohio St.3d 8, 11, 457 N.E.2d 1158 (1984); see also, Civ. R. 4.1 et seq.
6 Compare Conn. Gen. Stat. 33-929 (if a foreign corporation’s certificate of authority is revoked in Connecticut, the secretary of state becomes the registered agent for service of process) with N.Y. Bus. Corp. Law 305(a) (in New York, domestic and authorized foreign corporations may designate a registered agent or the secretary of state “upon whom process against such corporation may be served”).
In the late 1970s, Pepsi began conducting the Pepsi challenge, which was a blind taste test between Coke and Pepsi held throughout the country at shopping malls, college campuses and other public places. Naturally, Pepsi reported that people preferred Pepsi to Coke. The Coca-Cola Company then conducted its own taste test, and, you guessed it, announced that people preferred Coke to Pepsi. How could this be? The difference between the two tests was that Coke's taste test was not a blind taste test. The participants saw the Coke label and the Pepsi label when they tasted the colas. When they believed they liked Coke better, and they knew they were drinking Coke, they liked Coke better. And they truly liked it better.

A wide range of cognitive studies suggests the brain gets what it expects. When we think something will be good, our brain perceives it as good; when we think something will be bad, our brain perceives it as bad. If people believe they like Coke better, their brain tells them it tastes better, and it does taste better to them.

What does this have to do with introductions? Everything.

The beginning of the document, whether called an introduction or a preliminary statement, is the judge's first taste of the document. It's your opportunity to prime the judge for what is to come. Just like the taste testers who expect to like Coke better, a judge who reads a strong introduction is primed to favor your position and to think that your brief will be good. A well-written introduction prepares the judge for what follows and puts the judge in the right frame of mind.

Essential elements of an introduction
An introduction should include three essential elements: a theme, some context, and a couple of reasons why you should win. You may include other things, but these three are essential.

Finding a theme
Finding a theme requires you to spend time thinking. First, identify your most favorable fact. What fact is most likely to cause the judge to rule for you? For example, if you are representing a store in a lawsuit from a customer who fell on a slippery floor, your best fact might be that the store had a prominent sign warning of the slippery floor. Once you identify the best fact, you want to build your theme around it. Without thinking about the law, why would it be fair for you to win based on that fact? Why does your client deserve to win? In our example, the theme might be that we can reasonably expect people to be careful when they see “slippery when wet” signs. Consider your theme as an overall moral principle, such as “don’t steal,” “respect other people’s property,” or “keep your promises.” In our example, the overall moral value would be “be careful.”

Your theme can create the hook that begins your introduction. Starting strong is important because you are inviting the reader on a journey with you, and you want that journey to look interesting. Too many introductions begin with the procedural background (“This motion opposes summary judgment…”) or with factual background (“Plaintiff filed this suit after slipping on a wet floor….”). Even more detrimental beginnings feature the opponent’s case (“Plaintiff was severely injured when she slipped on wet floor….”) or merely respond to the opposing party’s counts or assignments of error (“Plaintiff’s Count One fails because….”). If you start with the
theme and highlight the best fact, the judge immediately knows the best part of your case. In our example, we might begin with “On rainy and snowy days, retail stores often have wet floors at their entrances. Although the water and snow is visible, stores typically warn their customers by displaying prominent floor signs warning of the slippery floor, which is exactly what client did here. These signs warn customers that they need to be careful.”

**Include a brief explanation**

After you have identified the theme featuring your best fact, you will want to provide a little context. In broad terms, what is the case about? Try answering these questions:

- Who are the parties?
- What is the dispute?
- How did the dispute occur?
- What is each party claiming?
- What is the status of the dispute now?

You may not include the answer to every question in your introduction, but these questions will get you started. If you have other strong facts, you may want to highlight them here.

The context should give an overview of the case, not a detailed explanation of the facts. At this point, you are merely preparing the judge to understand the factual details of the case. If you provide too much detail, the judge will become lost. Think of the overview as creating a file folder in which details can be deposited later.

When providing context, you may be tempted to include numerous dates. Don’t do it! Dates will clutter the introduction and bore the judge. Dates are too much detail for an introduction. If a date is vital to the case, you can include it; if not, omit it. Rather than including dates, a better practice is to identify how much time elapsed (“two weeks after the accident”; “three days before”; “later”).

Also, avoid providing too much procedural background as context for the case. Unless the main issue of the case is a procedural issue, including procedural background wastes the valuable real estate of the introduction. Provide only what you need to give the judge an overview of the case. You can always give more detail in a subsection of the facts.

If the context of the case is particularly interesting or persuasive, you may want to start the introduction with the context rather than the theme. Using your best judgment, start the introduction with whatever you think will grab the judge’s attention.

**Why should you win?**

Once you have a theme and an overview of the case, tell the judge two or three reasons why you should win. Do not give every reason from every section; only give the two or three best reasons. As a mathematician once said, “There are only four numbers: one, two, three, and many.” If you include more than three reasons, the judge is likely to forget them.

You will want to explain each reason briefly. After each reason, add the word “because” and finish the sentence. What comes after “because” is probably your reason. In our example, rather than simply stating, “Client met its duty to warn,” we would want to add the reason why: “Client met any duty to warn by displaying a prominent floor sign warning of the slippery floor.” These explanations of the reasons are another opportunity to highlight your best facts.

Your list of reasons should match the order in which they appear in your argument section. The first reason should be in the first section, the second reason should be in the second section, etc. After reading these reasons in a certain order in the introduction, the judge will expect to encounter the reasons in the same order in the argument. Another good idea is to use numbers when listing your reasons (“First, Client Store met any duty... Second, the hazard was open and obvious... Third, no one witnessed the fall...”). Numbers help lead a reader through a list.

While you may cite a case or statute in these reasons, you don’t need to do so. In fact, multiple citations will clutter the introduction and detract from your purpose of preparing the judge to read the rest of the brief. Citations and details about the law have their place in the argument, so be cautious about including them in the introduction.

In addition to the three things above—theme, context and reasons—you may want to contrast the competing views of the case. In other words, show how your view of the case differs from your opponent’s view. “This case is not about...This case is about...” You can’t always include this type of contrast, but when you can, it can provide a nice closing paragraph for the introduction.

Conclude with what the judge should do. Grant your motion? Overrule a lower court? Your final sentence should be a short one telling the judge what you want the court to do.

**How long should your introduction be?**

The length will vary with every document. Some people like to keep the introduction to one page, while others follow a rule of about 10% of the document. Although you don’t want the introduction to be long, eliminating clutter such as dates, citations and procedure is more important than length. Most judges would rather read a three-page introduction giving a nice overview of the case than a one-page introduction with lots of...
Beyond the Courtroom

The Ohio lawyers who saved Abraham Lincoln’s life

By James P. Muehlberger

On April 27, 1861, President Abraham Lincoln said: “Nothing is too good for men who stood off a rebel army.” Who were these men and what had they done? Some had fought with James Lane against pro-slavery soldiers in “Bleeding Kansas” before the Civil War. After the fall of Fort Sumter, Lincoln asked them to bivouac in the White House and serve as his bodyguards—and they likely saved Lincoln’s life. As a result of the discovery of documents identifying these men, five of whom were Ohio lawyers, their story can now be told.1

At the outbreak of the Civil War, Confederate leaders realized the South was outnumbered. Their best chance for success depended on a quick strike. Many believed their best chance for victory would be to eliminate the person with the determination to “put the foot down firmly” if necessary—Abraham Lincoln: “There was forty times the reason for shooting [Lincoln] in 1860 than there was in ’65….2

Washington was located in Confederate country. Most of its residents and employees were pro-slavery and the city was surrounded by the slave states of Virginia and Maryland. Washington had no fortifications, only a few loyal soldiers, and was infested with Confederate spies. There was not yet a U.S. Secret Service. Most of the U.S. Army was out West fighting Indians. Lincoln needed men who could fight. Fortunately, scores of fighters had just arrived to enroll in the army. Jim Lane was their leader. Lincoln summoned Lane to discuss the crisis. Lincoln told Lane: “I don’t know who I can depend on.” Lane replied, “I’ll organize a body of men who will fire when called upon.”3

As the sun set on April 18, 1861, Lane and 50 heavily-armed men, including five Ohioans, marched to the White House and set up camp. Lincoln’s secretary noted: “The White House is turned into barracks.” For the next 10 days, the men operated as the country’s first “Secret Service.” Newspapers called them the “Frontier Guard.”4

Washingtonians fled the city, terrified of being caught in a battle. Only the 800 foot width of the Potomac River separated Washington from the Confederate States of America. In the Virginia hills overlooking the city, Confederate campfires blinked like evil red eyes. The Confederates intended to attack Washington that night, but the Frontier Guard caused them to hesitate, as the Confederates attempted to learn their opponent’s troop strength. The Guard began a misinformation campaign, inflating their numbers. At night, they marched noisily back and forth across the wooden bridge spanning the Potomac, making the rebels believe they were being reinforced.
By April 20, Washington was a ghost town. Confederates had torn up the railroad tracks leading north. But Union spies reported that the Confederates believed the Guard were now “400 or 500 strong.” In reality, their number had grown to only 116, including Edward McCook, a 26-year-old horseman and Ohio lawyer. On April 22, the city was deserted. Union regiments had sailed into Annapolis Harbor, but their commanders refused to allow them to sail up the Potomac River because they feared enemy guns might shell them. Union General Winfield Scott asked Lane who among his men was the best rider; Lane said McCook. Scott ordered McCook to ride through enemy lines to Annapolis carrying written orders that the Union commanders there were to hurry their men to Washington. McCook knew he would be executed as a spy if captured.5

On April 23, a haggard-looking Lincoln scanned the Potomac River looking for ships bringing troops and exclaimed, “Why don’t they come!” Unknown to Lincoln, McCook had made it to Annapolis and delivered General Scott’s orders to the Union commanders. On April 24, the Confederate general in Alexandria, Virginia, wrote General Robert E. Lee that he believed there were “ten to twelve thousand” loyal troops in Washington. The propaganda efforts of the Guard had succeeded. On April 25, a train carrying New York soldiers pulled into Washington. The emergency had passed. The Guard had succeeded in giving Lincoln the time he needed to rush Union troops to Washington. Lincoln rewarded the men in the Guard with military and political appointments.6

Lincoln offered McCook a commission in the 1st U.S. Army Cavalry. McCook fought at the Battle of Shiloh, and Brigadier General McCook later accepted the surrender of Montgomery, Alabama, the “Birthplace of the Confederacy.” After the war, President Andrew Johnson appointed McCook Governor of the Territory of Colorado.7

Ed McCook’s uncle, Daniel McCook Sr., called “Judge” due to his election as a probate judge in Ohio, was the leader of the Ohioans in the Guard. McCook had raised his family in Carrollton, Ohio, where he had 12 children, including eight sons who fought for the Union. Judge McCook fought beside his son Charlie in the First Battle at Bull Run. A Confederate shot Charlie, who thereafter died in his father’s arms. McCook swore the entire McCook clan—fathers, uncles, brothers and cousins—would fight the Confederates in Charlie’s honor. They were thereafter called “The Fighting McCooks.” On July 23, 1863, McCook charged Confederates along the Ohio River and was shot dead.8

Thomas Ewing, Jr. was also among these 116 men. He practiced law in Cincinnati. After serving in the Frontier Guard, Ewing was appointed a Colonel of the 11th Kansas Calvary. In March 1865 Ewing was promoted to Major General for his gallantry at the Battle of Pilot Knob, Missouri, where his 800 troops fought off repeated attacks from 15,000 Confederates. After the war, Ewing moved to Ohio and served in the U.S. House of Representatives.9

Today, Lincoln is a monument, but for these Ohioans, Abe was a man. Lincoln never forgot these Ohio lawyers. We should remember them, too.

**Author bio**

James P. Muehlberger is a partner at Shook, Hardy & Bacon, L.L.P. in Kansas City, Missouri, where he focuses his practice on defending businesses in class actions and complex litigation. His recently published book, The 116: The True Story of Abraham Lincoln’s Lost Guard, has been nominated for the Lincoln Prize. He may be reached at jmuehlberger@shb.com.

**Endnotes**

2 Id., 1-2.
3 Id., 2-3, 18-19.
4 Id., 126, 133.
5 Id., 85, 141.
6 Id., 146.
7 Id., 182-188, 196.
8 Id., 141, 152, 178-82.
9 Id., 296-98. Robert McBratney and Cooper Watson were the other Ohio lawyers in the Frontier Guard.

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**Introduction, continued from page 31.**

Details. Use your best judgment, but keep it short and simple.

Ultimately, at the end of your introduction, you want the judge to think, “I want to rule for you.” If you have accomplished that, you have written a winning beginning. ☞

**Author bio**

Julia “Julie” Helmreich is the legal writing coach at the Ohio Attorney General’s Office. In her role, she regularly coaches and counsels lawyers and staff on effective brief writing and formal and informal written communication. Before joining the AG’s Office, she was the legal writing coach at Porter Wright. Julie is a 1988 graduate of The Ohio State University College of Law.

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Counsel Comments

Is it ethical to join an online lawyer referral service?

Guest column by Heidi Wagner Dorn

It is not uncommon for lawyers to seek new ways to drum up business and get new clients. At least once a week, I receive an email from an online legal company asking me to create a profile and start getting new clients referred to me. (I suppose this might interest me more if I didn’t work for the government.) Many of these websites ask me to sign up to be part of, essentially, an online lawyer referral service. The website asks me to create a profile, listing my area(s) of practice (that match the services the website is offering to clients), experience and other relevant information for prospective clients. After that, the website does all of the work. It finds the clients and matches the lawyers with the clients. The website takes care of all of the dirty work of collecting payments from clients, defining the scope of work, and even handling disgruntled clients. All the lawyer has to do is pay the website a “marketing fee” after the website pays the lawyer the client fee.

This sounds almost too good to be true, right? Well, it is. Unfortunately, many of these online companies ignore the Rules of Professional Conduct and other rules governing the practice of law in Ohio, or put misleading disclaimers on their websites stating that they are approved in certain states, like Ohio. When in reality, neither the Supreme Court of Ohio, the Board of Professional Conduct, nor any bar association in Ohio actually has approved the online service; they just haven’t rejected it... yet.

The staff lawyers of the Board of Professional Conduct advise lawyers
and judges daily on ethics and the ethical pitfalls they may encounter in their practices. In the past year or two, the board has received numerous calls from lawyers seeking advice regarding whether it is permissible to join the type of online lawyer referral service I described above.

As a result, the Board issued Advisory Opinion 2016-3, which provides guidance for lawyers to evaluate and ethically participate in an online lawyer referral service. The Board advises that before participating, a lawyer must ensure that a referral service meets all of the elements of such a service under the Supreme Court of Ohio rules, and complies with the Rules of Professional Conduct.

A critical issue that often arises with referral services is the fee arrangement between the lawyer and the referral service. A fee arrangement that is a percentage of or based on the amount of an individual client’s matter is not permissible, unless that referral service is registered with the Supreme Court of Ohio. Additionally, it is unethical for a lawyer to participate in an online lawyer referral service that requires the lawyer to pay a “marketing fee” or other payment to the service for each legal service completed, especially one that is determined based on the fee charged by the lawyer.

The opinion explores several other ethical considerations for lawyers when evaluating whether to participate in an online lawyer referral service. Before participating, a lawyer should ensure that the referral service does not interfere with the lawyer’s independent professional judgment. For instance, the lawyer’s participation in the referral service cannot arbitrarily limit the provision of legal services that might otherwise be necessary or appropriate based on the circumstances of the individual client. The lawyer also must be aware that he or she is responsible for the conduct of the nonlawyers working for the service, as well as the content of the advertising and marketing provided by the service on the lawyer’s behalf.

Due to myriad issues that can arise when a lawyer joins an online lawyer referral service, the Board recommends that lawyers carefully evaluate and understand the service for which they are signing up. Simply because the online lawyer referral service’s website claims that it is “approved” in Ohio does not mean that the Supreme Court of Ohio, the Board of Professional Conduct or the Ohio State Bar Association has actually approved it or opined that it satisfies all ethical considerations.

The decision to join or not join a lawyer referral service ultimately is a choice that each lawyer must make individually. Hopefully this article and the recent opinion will provide some guidance and resources for you the next time you receive an email asking you to join an online lawyer referral service. Additionally, if you are in doubt or need further guidance, you always may call the Board of Professional Conduct to discuss your issue with one of its staff lawyers.

Author bio

Heidi Wagner Dorn serves as counsel for the Board of Professional Conduct, where she provides ethics advice to lawyers and judges, drafts advisory opinions, and presents on ethics issues throughout Ohio. She is admitted to practice in Ohio, Michigan, the U.S. District Court for the Southern District of Ohio, and the Supreme Court of the United States.
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