Copyright or wrong?
SOPA, PIPA and “The End of the Internet”

Ohio landowners take on oil and gas giants
Pleading guilty: Does your client know the costs?
The surprising value of law reviews
MAKING THE MOST OF YOUR PRACTICE AT EVERY PHASE OF YOUR LEGAL CAREER

Presented by Ohio Bar Liability Insurance Company and OSBA Solo Small Firm & General Practice Section

Ohio State Bar Association Convention
Cincinnati, Ohio • Thursday, May 3, 2012
9:30 A.M. – Noon AND 2:15 P.M. – 5:30 P.M.

■ MORNING SESSION

*How to Maximize Your Current Practice (Including How to position your practice for sale)*
Featured Speaker – Dustin Cole, *Attorneys Master Class*

■ AFTERNOON SESSION

*Panel Discussion – What you need to know to buy or sell a law practice*

**Moderator:** Gretchen Koehler Mote, *Director of Loss Prevention/Claims Counsel, Ohio Bar Liability Insurance Co*

**Panel:**
Thomas J. Bonasera, *Dinsmore & Shohl, LLP, Columbus*
Richard D. Bringardner, *Wiles, Boyle, Burkholder & Bringardner Co., LPA, Columbus*
Dustin Cole, *Attorneys Master Class, Longwood, Fla.*
Theodore M. Mann, Jr., *Attorney at Law, Cleveland*

**Ethical Issues - Jonathan Coughlan** *Disciplinary Counsel, Supreme Court of Ohio*

**Substance Abuse - Scott R. Mote** *Executive Director, Ohio Lawyers’ Assistance Program*

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Ohio Lawyer

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Transitions

by Carol Seubert Marx

Change is inevitable—sometimes inspiring and often uncomfortable—but if you plan for change, you have the opportunity to influence its direction. If you adapt to change, you have the opportunity to guide the impact that any change may have.

To provide for inescapable change, every organization, including the OSBA, goes through a periodic strategic planning process to identify the direction of the organization and the resources needed to take it down that path. When I first came on the Board of Governors in 2007, the Board was implementing a strategic plan that resulted from a planning process undertaken the prior year under the leadership of President Jack Stith and President-Elect Rob Ware. President Carmen Roberto and I undertook an update of that process last year. Many of the goals of the initial strategic plan had been accomplished. Remarkably, the original plan needed very little tweaking to adjust to the changes that had transpired since 2006.

We became a stronger organization and a stronger bar association as a result of our strategic planning.

Key technological advances have occurred since 2007. Over this time period the OSBA Staff and Board of Governors have taken every opportunity to stay ahead of the curve: via our online OSBA Report®, through Casemaker®, on our website, in our CLE offerings, and on Facebook and Twitter. In many cases we could not foresee the changes that came to us, but we still embraced them, made them our own, and treated them as welcome guests.

Transformational change can occur at any time. Just last year we had a spirited debate at the General Assembly during the Convention in Columbus, as we discussed whether members should have the opportunity to vote statewide. Ironically with the typical time crunches that can occur at our conventions, by the time the vote was called, less than 100 members were on the floor to vote. This year our Governors in District 7 (Franklin County) and District 12 (Cuyahoga County) have taken the opportunity to have district-wide, primarily electronic, elections of their Council delegates. I look forward to future vigorous debates in our General Assembly on these and other such issues.

We are a stronger organization and a better bar association as a result of our flexibility and adaptability to technological advances and governance opportunities. This signifies the health and vitality of the OSBA.

Many of the OSBA’s projects over the years have taken the form of task forces and special committees, some of which began with the idea of influencing the direction of our association, others with the idea of seeking to evaluate and recommend changes to Ohio’s laws, and also to our judiciary. For example, the Committee and Section Advisory Council has been working for some time on its recommendations. These are likely to include a manual for new chairs to help them develop and maintain a structure and program for their committees and sections. As chair of our Task Force on the Organizational Structure of the OSBA, President-elect Pat Fischer is leading an evaluation of not only the OSBA’s structure but also its relationships with our many affiliates.
We will be a stronger organization and a better bar association as a result of these examinations of our structure, Ohio’s laws, and our judiciary, and we will be better prepared for future changes in the legal profession as a result.

One of the aspects of our governance that inspired me to run for president-elect in 2009 was the knowledge that I would have the opportunity to participate in the transition process to new leadership of the OSBA. With the appointment last summer of the OSBA Transition and Search Committee for the replacement of Executive Director Denny Ramey, that process was put in motion.

As I write this article in March, we have chosen a search firm, which, by the time you read this, will have met with our staff, board, past leadership and members to help us frame our needs and our search. Despite the bittersweet nature of this endeavor, given the years of terrific experiences and experience that Denny has given to the OSBA, I find that my inspiration for running for this office is still front and center. What we are doing now will open a new chapter in the development of the OSBA, and I am excited about the possibilities.

Whether any change we confront is inevitable, inescapable, uncomfortable, unforeseen, inspirational or transformational, one of the most challenging functions of your OSBA leadership is to manage such change effectively and efficiently. Your OSBA staff and volunteer bar leadership take this mission seriously. We know that you deserve our very best efforts. There is always more being done behind the scenes to help make this one of the best bar associations in the country.

It has been an honor and privilege to serve you as president, president-elect and governor of the OSBA, and I will continue to put forth every effort through the end of my term on June 30, 2012, and through my remaining tenure as past president. Thank you for allowing me this remarkable opportunity.

Carol Seubert Marx is president of the Ohio State Bar Association.
The new OSBA Report

Think outside the book.

For more than 80 years, Ohio State Bar Association members have trusted the OSBA Report (affectionately known as the green book) to arrive in their mailboxes each week. This time-honored tradition continues today, but now the OSBA Report can be delivered to email inboxes, cell phones and other mobile devices.

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In Brief

Sitting U.S. Supreme Court stands apart from predecessors

The current incarnation of the Supreme Court differs in many ways from its predecessors, according to a recent study by University of Tennessee College of Law professor Benjamin H. Barton. The study compiled a database of the experience of every Justice from the Court’s inception to its most recent appointment and found that the current Court is an “outlier” in several key areas from the previous 105 Courts.

For the first time, there are three women Justices on the Court. No state between the East Coast and California can claim a Justice as a native, and four of the five New York City boroughs are represented on the court. Also for the first time, there is no Protestant on the Court.

The study delved further into the types of practical experience each Justice has and found that these areas are where the current Court differs most from its predecessors.

- Prior Justices averaged 17 years in private practice before appointment. The current Court averages six years, with two members having no private practice experience.
- No current Justice has served in a state court, and only one has served as a trial court judge. Almost all of the Justices’ experience was gained at the appellate level, with Kagan being the only exception.
- Of any prior Court, the current version has spent the most time in elite legal academia—a collective 95 years.

Barton sees this as meaning the Court has the least practical experience of any other, but that has spent the most time studying and considering constitutional law and theory than any other Court.

—www.washingtonpost.com
March 4, 2012

Nearly 40 percent of Americans have been to court

Nearly four out of every 10 Americans have spent time inside a courtroom as either a plaintiff or defendant in a court case, according to a new survey by FindLaw.com.

Thirty-seven percent of people say they have been to court. Men are much more likely than women to have spent time in court—44 percent versus 31 percent—and men are more likely than women to have been in court across all types of courts and cases.

—www.findlaw.com
March 14, 2012

More Ohioans legally carrying concealed handguns

According to the Ohio Attorney General’s Office, the number of Ohioans who have licenses to carry concealed handguns has more than doubled in the last three years. In 2011, another 49,825 people were granted licenses. When added to the peak year of 2009, in which 56,691 licenses were granted, and 2010, in which 47,337 people obtained licenses, the 2009-2011 figure was 153,853 new licenses, pushing the total for the state up to nearly 275,000 concealed carry license holders.

To obtain a license, an Ohioan must attend required training classes. Instructors cite concerns for personal safety as the key reason why people seek licensure. With every violent episode in the news, instructors see more people sign up for classes. With the scope of concealed carry license holders’ rights being broadened by legislation, instructors are seeing more people follow through and obtaining licenses after classes end.

Last summer, Ohio’s legislature passed laws allowing license holders to carry concealed handguns in bars, restaurants, nightclubs and sports arenas. This year, legislators are considering a bill that would allow for license holders to carry handguns on college campuses, in places of worship, daycare centers and some government buildings. Establishments are allowed to post signs prohibiting concealed carry of handguns, and it is always illegal to drink alcohol and carry a firearm. As the restrictions on license holders are eased, the ranks of those carrying continues to swell.

—www.cleveland.com
Feb. 26, 2012
Ohio foreclosure filings drop 16 percent in 2011

After experiencing a drop in the number of Ohio foreclosure case filings for the first time in 15 years in 2010, that number declined even further in 2011 by 16 percent, according to data released today by the Supreme Court of Ohio.

For 2011, common pleas courts across Ohio reported 71,556 new residential and commercial foreclosure case filings to the Supreme Court of Ohio, or 13,927 fewer foreclosure cases than 2010.

The Supreme Court of Ohio began collecting foreclosure data in 1990, and for 14 consecutive years through 2009 the number of foreclosure new filings rose. Not since 2006 have the foreclosure filings been in the range as the numbers recorded for 2011.

Only two counties saw increases in the number of year-over-year foreclosures in 2011. Coshocton County reported 317 foreclosures in 2011 compared with 163 in 2010 for a 94.5 percent increase. Guernsey County reported 198 foreclosures in 2011 compared with 188 in 2010 for a 5.3 percent increase.

On the other end of the spectrum, 75 of Ohio’s 88 counties reported double-digit decreases in 2011, and 10 counties reported 30 percent or greater declines.

Cuyahoga County continued to lead the state in the number of foreclosures with 11,544, although this figure represents a 10 percent annual decline, which followed a 9 percent decline in 2010.

Information contained in the reports is provided to the Supreme Court of Ohio on a monthly basis by all county common pleas courts.

—www.supremecourt.ohio.gov
March 14, 2012

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FTC says fraudsters ripped off $1.52B last year

The Federal Trade Commission (FTC) released numbers revealing the alarming scope and breadth of scamming in America. Last year, agencies registered 1.8 million scam complaints, which cost victims $1.5 billion dollars. Even more alarming is that fact that not all fraud victims report it to government agencies.

Identity theft is the number one complaint for the fifth year running, garnering 15 percent of complaints last year. Fraudsters are increasingly using high-tech means to bilk their victims, as Internet and email scams were most common. Telephone and mail scams still found victims, but in fewer numbers than in previous years.

In more than 25 percent of identity theft cases, government-document or benefits fraud were most common. Florida had the highest per-capita rate of identity theft, with Georgia and California close behind. Colorado led the nation in per-capita fraud and other types of complaints, followed closely by Maryland and Delaware. The median amount lost was $537, according to the FTC.

The FTC offers an array of materials on its website on how to avoid scams and also has a YouTube channel with video tips on how to avoid being a scam artist’s victim.

—www.dispatch.com
Feb. 29, 2012
Online piracy

Combating theft and censorship in the Information Age

by Nathan Douglas

The Internet has become an open gateway for downloading copyrighted materials. Recent legislation intensified the debate.

More than a decade ago, a trend began that nearly collapsed the entire recording industry. In 1999, a website called Napster pioneered peer-to-peer file sharing, which allowed users to share music files anonymously via the web. Users (peers) would connect computers and exchange music files from computer to computer. Napster was eventually shut down for copyright infringement, but the concept persisted and other sites changed the way peers connected to stay one step ahead of copyright laws. This eventually gave way to today's bittorrent software, which connects peers globally and allows them to exchange tiny bits of files instead of whole music, movies, video games or other forms of copyrighted intellectual property anonymously and for free. The bittorrent sites are based out of countries like Sweden and Montenegro that have lax copyright laws and are currently the bane of content creators in the United States.
January witnessed the indefinite shelving of two contentious pieces of legislation known as the Stop Online Piracy Act (SOPA) and the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, or PROTECT Intellectual Property Act (PIPA), each crafted to combat online piracy of copyrighted materials. Due in part to public outcry and a concerted blackout of popular Internet sites like Wikipedia, Reddit, Google and thousands of smaller sites, Congress was forced to indefinitely postpone the legislation.

**Dramatis personae**
To explain how the issue developed, Peter Swire, C. William O’Neill Professor in Law and Judicial Administration at OSU Moritz College of Law and chief counsel for privacy to the Clinton Administration, explains: “The content industry and the copyright owners were there first, and they put together a very strong political coalition that said we have to take action against piracy. They had both Democrats and Republicans, and they had both the House and the Senate, and they were moving forward saying they were against piracy.” The recording and film industries argued that Internet service providers should block access to foreign infringing sites, so-called rogue sites, which are the facilitators of online piracy. Peer-to-peer file sharing of movies and music has taken a toll on the industries’ bottom lines over the last decade, and the industries are targeting their efforts at the worst offenders.

User-generated content sites like Wikipedia, Reddit and YouTube then countered that the legislation’s language was too vague as to what exactly was meant by facilitating infringement. They were soon joined by online giants Google (which owns YouTube) and Facebook, among many others. These sites felt their entire business models were under threat, and the burden of policing infringers was too onerous and the consequences of not doing so soon enough were too severe. The anti-SOPA and PIPA contingent took to the court of public opinion in a campaign that marketed the legislation as stifling free speech and ending the Internet as users now know it. Swire says, “In the fall of 2011 there was enough developing opposition that they were able to slow the markup of the bill in Congress. Congress said it was going to wait and talk about it some more in 2012.”

Powerful lobbies on both sides of the debate attempted to influence Congress in their favor. Industry groups like the Recording Industry Association of America and the Motion Picture Association of America representing artists losing their copyrighted materials to foreign infringing sites, and sites like Google, spent nearly $105 million lobbying Congress in the fourth quarter of 2011, according to the Center for Responsive Politics. As Swire says:

When there is heavy-duty lobbying it tends to be extremely difficult to pass something in Congress. We can’t pass basic “run the government” bills in Congress right now, and passing something against the determined opposition of major industry groups and major parts of public opinion is really difficult. That is really the sign of success for the opponents that they have been able to mobilize public opinion over the last few months so effectively.

The conflict
What is actually in the bills that Web giants like Google, YouTube and Wikipedia find threatening? Swire says that the bills “wouldn’t end the Internet as we know it,” but that “there are some significant problems with what’s known as DNSSEC, Domain Name Systems Security.”

This is the technical system that allows us to have a unified Internet around the world. The bills propose some major changes to this system. According to Swire:

The registries that serve the key parts of the Domain Name System have a very complicated cryptography regime to make sure that changes are only coming from authorized sources, and when one gets updated they have a very strong scheme of authentication to make sure that it’s not some fake site that’s spoofing it. This is what is called DNSSEC. When you start having lawsuits from the Justice Department, the problem is that they’re not part of that DNSSEC system, and each judge would be basically an unknown possible hacker into the security of the Domain Name System. When you get a judicial order, it’s not a question whether the judge has legal authority; it’s a technical question whether the registry can trust that it’s really a judge instead of a hacker.

Web giants like Google and Wikipedia may have sold the public on the bills being about freedom of information and democratic ideals, and that is at least somewhat true, but Swire sees the main problem with the bills as a technical issue. Domain Name System Security may not have received as much attention as censorship, “But if you’re trying to motivate 20-year-olds to sign petition drives, you get the choice of ‘keep the Internet free’ or ‘we need an upgraded DNSSEC cryptographic protocol for judicial orders.’ I think the marketing people are going to go with ‘let’s keep the Internet free,’” says Swire. Web corporations, however, are only partly motivated by freedom of information and censorship. Their motivations are most likely financial as well, and the SOPA and PIPA bills would have made changes to Title 17 of the U.S. Code that would have had a resounding financial impact.

The Digital Millennium Copyright Act (DMCA) of 1998 amended Title 17 to make up for its limitations in the digital age. One aspect of the DMCA is the Notice and Takedown provision. Under current law, this gives Internet users their first round of copyright liability. Swire explains: “When you, yourself, put up an infringing set of materials on your own personal website, and the copyright owners can come after you and say, ‘Take that down. If you don’t take it down immediately we are going to sue you for infringement,’ that’s just copyright violation.” There is no financial burden on the Internet provider at this point, but there is then a second round of liability for Internet users. Swire explains: “You’ve posted a video on YouTube, for example, and it’s a direct infringement of a recent movie. YouTube didn’t know you were doing that, so when YouTube gets a takedown notice under current law, YouTube is then supposed to take it
down or give an answer about why they think it's not infringement. That's current law.” This is where the major problem arises for websites in the United States. The legislation would have added a third round of liability that would have had a major financial impact on the user-generated content site’s business model. Swire explains:

SOPA and PIPA go in the direction of whether YouTube was facilitating, I think that’s the key word, that it’s facilitating copyright infringement. The problem for YouTube is that can put their entire business model on trial, and then they get their entire site shut down if there’s enforcement against them. The problem is that it’s incredibly vague what will count as facilitating copyright infringement. That means that also the technology and platform providers would now be at risk for somebody deciding they’re facilitating infringement, and that’s why you’re seeing that side of the industry saying they can’t live with the bill.

If a content creator felt that a website had infringed on its copyright, the content creator could go to the U.S. Department of Justice (DOJ) with the complaint, which would then go to the site with a takedown notice. If the site did not comply in a timely fashion, the site with a takedown notice. If the site did not comply in a timely fashion, the DOJ could order Internet providers to block search queries for that website by DOJ could order Internet providers to block search queries for that website by DOJ could order Internet providers to block search queries for that website by	

domestic sites' staffs or copyright holders' radars. The burden of monitoring for infringing content falls on Internet sites' staffs or copyright holders' themselves. Swire refers to this problem as that of elephants and mice.

The elephants are very big, and it is very hard to hide an elephant, but they have thick skin so it’s very hard to hurt them. On the other hand, mice hide away and they breed really fast. So for the elephants, the big sites like Facebook and YouTube, they can't hide. They are going to have to deal with the big legal rules, so self-regulation is more likely to work for them because all the content owners are going to be aiming for them and monitoring their content. On the other hand, if you have a rogue site based in Montenegro, they are not going to play the self-regulation game. They’re not in the United States, and they don’t have any assets to grab on the United States, so the rogue sites overseas won’t play along with self-regulation.

Content creators are rightly angered that their copyrighted materials are available for instant download all over the Internet. Though the bills may be targeted at foreign infringing sites, the implications are that domestic sites would be affected due to their size and prominence. Most foreign bittorrent sites are very small and new ones would pop up in their place if they were blocked anyway. Blocking foreign sites in the United States raises another issue that should be of no small concern for U.S. citizens. According to Swire, “The advantage of having a technical way of administering the Domain Name System is that we put a real check on the ability of dictators in other countries to try to use this tool [of blocking websites] much more broadly. We are setting a bad example and it makes it harder to stand up for Internet freedoms in these other settings.”

Some simple solutions

The key, thus far, to combating piracy is what is known as the iTunes model. With this model, users pay for digital downloads either by the whole album or by single songs. The advantage is that the digital version is considerably cheaper than the physical version. For example, if a physical copy of an album costs $25 at a record store, it can be purchased online for usually half that price or less, and single songs can be bought for 99 cents or less. Content owners get paid for their copyright materials, and users have the satisfaction of not having broken any laws to hear their favorite songs.

It is not just music that is sold in the iTunes model, either. Movies, television shows, games, books and even scholarly materials ranging from kindergarten to university levels in all subjects are available for purchase and use on computers and mobile devices. Swire says that “Many people use iTunes, and SOPA and PIPA will push more rogue site users into the iTunes model.” The bills, though, failed, and many content owners will be seeking more solutions to their intellectual property issues.

Denouement? Unlikely

Therein lie the major concerns with the SOPA and PIPA legislation, and why they were shelved indefinitely until a bill can be crafted that addresses these shortcomings: serious threats to the Domain Name System that functions as the Internet’s address book, the vague language in the bill as to what facilitating infringement means, and the financial implications for domestic websites. Until revisions to the most controversial of the bill’s provisions can be hammered out or the alternative Online Protection and Enforcement of Digital Trade Act (OPEN Act) can garner public and congressional support, watch for continued debate on the legal implications of online piracy of intellectual property. Whatever the outcome, copyright and intellectual property attorneys can look forward to many more years of fruitful work.

Author bio

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Goliath

Representing oil and gas lessors

As Ohio becomes a new site for horizontal shale drilling purveyors, many landowners are finding themselves up against a giant. Understanding and navigating the challenges associated with this business are keys to avoiding financial disaster for the lessor.

by Alan D. Wenger
suddenly, downtrodden eastern Ohio is starting to look pretty good. The bleak post-industrial Appalachian ghost town image is being replaced by a mixture of Beverly Hillbillies, big oil companies, and a few J.R. Ewings thrown in with all stripes of company and independent “landmen,” brokers, and self-ordained experts and consultants. They promise all sorts of riches, threats to the hesitant, and curious explanations of oil and gas laws. The region has taken on the feel of the Wild West, including a few earthquakes.

Central to those fortunate enough to own acreage (though we have seen leases taken on as little as one-tenth of an acre) is the oil and gas lease. By and large, the “standard company lease” foisted on landowners is the same form that has been used for many decades for smaller, less-intrusive and conventional vertical-type wells. The new Utica leasing craze involves a completely different proposition: Huge, industrial-scale drilling operations on seven to 10-acre drilling pads accommodating six or more wells with thousands of truckloads of water, sand, and other fluids and materials, magnified environmental and infrastructural concerns, and significant impacts on communities and local government. The standard leases are dramatically slanted in favor of the lessee. The documents appear as several pages of tiny type containing arcane industry phraseology that few folks (including lawyers) understand and that most landowners do not even try to read. For many landowners, it comes down to a simple proposition: “Show me the money.”

To those landowners who at least ask some questions (or if they are represented and their lawyer basically just makes an appearance) the lessee will quickly offer addenda terms to address some of the more egregious standard language. These addenda provisions, which can quickly become longer than the basic lease itself and extend up to 40-50 clauses, are usually just part of the standard company language repertoire. It is a landman’s game: Start with the standard form lease, and then look like a “good guy” by throwing in a few gratuitous addenda clauses, like “we will replace any fence that we destroy,” and if pushed, a few more, but never anything other than “company-approved language.” Unfortunately, it seems that some attorneys dabbling in this field are fine with playing this game, perhaps out of fear of appearing to the client being an obstruction to the deal and the client’s receiving that pot of gold.

In what other multimillion-dollar, extremely complex real estate and industrial transaction that will go on for decades, would any self-respecting attorney approve of a document that consists of a short, obliquely worded form agreement, along with an addendum filled with dozens of confusing, contradictory, poorly worded clauses that appear to have meaning directly opposite to the language of the form agreement? We should do better than this for lessor clients. There have been a few notable exceptions, normally with collective lessor group negotiations where the lessee agrees to a fairer, comprehensive and cohesively drafted lease in consideration for the advantage of obtaining many acres in a single negotiation.

Here are some terms that appear in most all company leases, along with some suggested approaches more reasonable for the lessor.

**Overbroad leasing clause**

Standard clauses allow the lessee to exploit and use the surface and subsurface for any imaginable use remotely related to oil and gas, whether those uses are known or even presently not imaginable. These include pipelines, roads, storage yards, permanent compressor stations, underground gas storage rights, hazardous waste injection wells, use of and access to any water on the property, and more.

**Response:** Limit rights granted as to elevation (lease only regions below the base shale layer to horizontal drilling lessees). Lease only those rights necessary for oil and gas drilling; limit surface use; expressly prohibit storage and injection wells.

**The land grab**

The description of the leased land includes the property intended by the lessor (often only by parcel number and names of owners of neighbor parcels), and also includes by reference all other land owned by the lessor, contiguous or not, that may be located in the same county or township, to also be automatically included under the lease. These clauses go beyond the “Mother Hubbard” clauses formerly included in leases to address technical description errors. Rarely is it the lessor’s intention to include any property other than that described.

**Response:** Include a provision clarifying that the lease only applies to the expressly described land and make sure the land is described by meets and bounds.

**Secondary lease term**

Leases have a primary term (original or as extended) and a secondary term continuing so long as “operations are conducted on the leased land or any lands pooled or unitized therewith.” Often “operations” are not all defined in the lease, and are poorly defined (from the lessor’s view) in case law. Sometimes lessee-skewed definitions are included, which may include mere “testing” or “planning” or “mapping,” leading to the fabled “stake in the ground” or “backhoe parked on the property” scenario that allows the lease to continue beyond the primary term, with little assurance of actual production and resulting royalties.

**Response:** Provide language that requires an actual well to be underway, such as “bit in the ground” for actual drilling of a well designed for horizontal shale layer production prior to the expiration of the primary term.

**Covenants, not special limitations or conditions**

Lessees want to avoid the possibility of being “evicted” from the leased premises. They construct protections that will not allow the leaseholder interest to be terminated so long as the lessee has any use or need for the property—even if lessee is in abject breach of the lease.

**Response:** Include reasonable default language, with prior notice and opportunity to cure, and then termination.

**Unlimited delay rentals; shut-in**

For a nominal periodic rental, the lease can be kept in force at the lessee’s discretion while the lessor receives no production royalties.

**Response:** Limit the cumulative period of time for which delay rentals and shut-in payments are permitted. The lease should terminate when that period is exceeded.

**Water**

Standard leases may not mention water contamination. The impact of fracturing
activities with their chemical additives, huge volumes of truck traffic, surface tanks and lagoons and the like (all basically exempted from environmental regulations) is rightfully a major concern for lessors and the public at large. With the rise of public scrutiny on this issue, most companies now include rudimentary water test baseline language in their addenda, and perhaps a provision for providing a supply of potable water if the lessor’s supply becomes contaminated. But the burden remains with the lessor to prove that the quality or quantity of water supply has been affected by the lessee’s activities, and not from some other cause. Sustaining that burden can be beyond the means of most lessors, i.e., David versus Goliath.

Response: Bind the company to furnish baseline water tests, and to provide a replacement supply without prior need to prove causation if water deteriorates after commencement of drilling activities. Place the burden on the lessee to prove that a change in water after drilling begins was not caused by the drilling activity. Provide for corroboration of the existence of a water problem by a neutral party, such as a local board of health. Lessors and their counsel must anticipate that problems will occur. Occasional accidents and spills will be an inherent part of drilling activity. The lease needs to address these risks.

Royalty determination
Leases often provide for payment to the lessor of a stated percentage of the “net revenue” realized by the lessee, and also provide that the royalty will be “less the costs” involved in gathering, transporting, treating, processing and marketing.

Response: Clarify and define any costs that are to be deducted, and be certain that the costs are quantifiable under industry indexes. Distinguish post-production from pre-production costs, in which the lessor should not have to share. Provide that any costs deducted must be based on costs actually paid by the lessee to an unrelated party.

No implied duties or warranties
Standard leases recite that the lessor waives any implied obligations of the lessee. Under common law, a lessee has an implied duty to develop the leased oil and gas rights for the benefit of the lessor.

Response: The lessee should be obligated to comply with all express and implied representations, warranties and obligations to the lessor, including the obligation to diligently extract and market the oil and gas.

Lessor title representations
Under standard lease language, the lessor warrants title to mineral rights. Normally a lessor (even one who is real-estate savvy) has little idea of the status of their mineral rights. These representations can leave the lessor exposed to claims for refund of bonus payments and potentially for lessee damages.

Response: Place the burden on the lessee to determine the quality of title to minerals, and provide that any bonus payments are nonrefundable.

Held by production
Standard lease language provides that if any portion of the leased acreage is included in a drilling unit, then all of the leased acreage is bound under the terms of the lease, even if no royalties are being paid on any of the acreage other than the portion in the drilling unit. For example, a 100-acre leased parcel can be “held by production” (HBP) if only five of its acres are in a royalty-producing drilling unit. The other 95 acres are still subject to the lease, including the potential of construction of pipelines, roads, storage and other uses allowed under the lease. The remaining acreage cannot be leased to another lessor so long as there is any production on the active five acres. This arcane HBP concept is a creation of the oil and gas industry and its customs formalized in standard leases. It has no basis otherwise in law, and it defies common logic.

Response: Include a “Pugh clause” or other “use it or lose it” provision. If the
The lessor has not included any portion of the leased acreage (or identifiable depths) in a drilling unit during the primary term of the lease, then those portions should be released.

**Unlimited unit size**
Ohio has no maximum drilling unit size. Theoretically a lessee could “hold by production” thousands of acres and tie up many separate property owners’ parcels with a single well, yielding miniscule royalties to those property owners. Because of the acreage required, horizontal shale wells do require larger units than vertical wells, probably in the range of 150 acres minimum per well. Standard company leases have unlimited unit size.

**Response:** Limit the unit size. A common negotiated limit is 640 acres, which can be expanded if and when the lessee actually drills multiple wells, so there is good rationale for the larger unit.

**Disputes**
Some company leases literally state that if the lessor has a complaint, the exclusive remedy is for the lessor to give notice of the complaint to the lessee, and on review, the lessee’s determination is final.

**Response:** Be sure there is a fair and impartial dispute resolution mechanism that is affordable for the lessor.

These are just some of the glaring issues with standard form oil and gas company leases. There are many others.

Lessor’s attorneys deal with agreements other than the lease. Routine documents and negotiations encountered include the following:

**Lease amendments**
The horizontal shale drilling companies active in eastern Ohio have purchased outright or taken partial assignment of deep drilling rights to hundreds of thousands of acres that were subject to existing leases that were originally intended by the parties for conventional vertical drilling. The horizontal drilling company holding lessee rights needs to adapt those leases to the differing demands for large horizontal shale wells. A common factor is unit size, which may be limited in pre-2010 leases to as little as 40 acres, or more commonly 160 to 200 acres. Lessor under those leases are being contacted in mass with requests for lease amendments for a greater unit size—preferably unlimited size from the lessee’s perspective. Lessor are bluntly told that they need to agree to the amend-
ment, or their property will be passed by and they will get no royalty benefit from the deep rights.

**Strategies:** Try to restrict the larger unit amendment to the deep rights only, and not the shallower regions where vertical wells are drilled, and limit the expanded unit size.

**Surface use agreements**
Older leases did not contemplate 10-acre drilling pads and the huge industrial-scale imposition on the surface owner that horizontal shale drilling entails. Depending on whether the existing lease requires consent of the lessor as to location of surface activities, lessees may seek to negotiate an agreement with the lessor to accommodate this expanded drilling activity, including the pad, access roads and other facilities. Again, the blunt message from the lessee to the lessor tends to be, “If you want the big royalties from this development, you will cooperate.” Lessors can usually negotiate some reasonable damages payment for the impacts on their property.

**Pipeline and water impoundment agreements**
Huge amounts of water are required for horizontal drilling and fracturing activities. Oil and gas needs to be transported to market, requiring networks of pipelines, both “gathering” lines on or near the drilling unit, and “foreign” pipelines outside the unit needed to transport product to main transmission lines. Companies have standard agreements for these functions that leave full discretion to the company as to location, size, construction, maintenance and use. Prices are negotiable and can vary dramatically. Standard agreements allow the company to place pipelines or water impoundments (above-ground ponds of several acres) anywhere the developer desires within the boundaries of the landowner’s property. Landowners’ rights must be protected with carefully negotiated agreements.

The horizontal shale drilling explosion in Ohio presents complex new challenges to lawyers who represent landowners. Failure to comprehend and address these issues could result in disastrous consequences for lessor clients.

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**Author bio**

Alan D. Wenger is a 1977 graduate of Case Western Reserve Law School and chairs the oil and gas practice group of Harrington, Hoppe & Mitchell, Ltd., which has offices in Youngstown, Warren and Salem. Wenger is counsel to several large Ohio landowner groups, including the Associated Landowners of the Ohio Valley (ALOV), which he recently represented in lease negotiations with BP America on behalf of 1800 Trumbull County lessors. He is frequently consulted by media professionals and public officials for perspective on matters related to oil and gas law.
With a guilty plea comes an array of lasting repercussions for the client. Assuring that your client is aware of these resulting consequences can protect counsel from backlash.

From Oct. 1, 2009 to Sept. 30, 2010, 83,946 individuals were charged with a federal felony or Class A misdemeanor. An astonishing 96.8 percent of them pled guilty, a rate slightly higher than, but roughly consistent with, each of the previous 10 years. The plea rate in Ohio’s common pleas courts is somewhat lower—about 80 percent—although this is largely due to other forms of case disposition. Of 69,014 new criminal filings in fiscal year 2010, some 55,373 were resolved by plea agreement, but only 2,123—or about 3 percent—were resolved by bench or jury trial.

Despite the nearly routine decision to plea bargain in criminal cases, defense counsel must remain vigilant in ensuring that clients fully appreciate the sweeping consequences that flow from a guilty plea, particularly to a felony. Failure to do so can expose defense counsel to claims of malpractice or ineffective assistance, though such claims face their own uphill challenges in succeeding.

Although some consequences, such as loss of the right to bear arms or to vote, are often recognized, many others are often overlooked or unknown until it is too late. Some are a function of state law; others are imposed by federal law or regulation. Some consequences flow only for certain types of offenses, such as sexually based crimes. While the following is by no means comprehensive, it is intended to sensitize criminal defense practitioners to the
need to address this topic actively with the client during discussions regarding any proposed plea agreement.

Voting
State law, not federal, dictates the consequences of a felony conviction on the right to vote. In Ohio, R.C. 3502.21(A) provides that a voter’s registration is cancelled following conviction of a federal or state felony. Furthermore, R.C. 2961.01 prohibits an incarcerated felon from voting. That right is restored automatically on the offender’s release from incarceration, although re-registration is necessary because of the effect of R.C. 3502.21(A).

Bearing arms
Federal and state laws dictate limitations on a felon’s right to bear arms. Federal law prohibits a felon from knowingly acquiring, having, carrying, or using any firearm or ammunition. A similar prohibition extends to possession of explosives. Ohio law provides a similar bar for those convicted of a violent or drug-related felony. However, those rights may be restored by application to an appropriate court of common pleas.

Holding public office
In Ohio, felons are prohibited from holding an office of “honor, trust or profit.” This includes state or local elective office, state boards and commissions, public official and employee positions, prosecutor and peace officer. Under federal law, a felony conviction for treason bars an individual from holding any office under the United States. A conviction for bribery of a public official or witness may, at the sentencing court’s discretion, result in a prohibition on holding any office of honor, trust, or profit under the United States.

Jury service
Felons are ineligible to serve on a federal grand or petit jury, unless their civil rights have been restored. State jury service is also prohibited in Ohio.

Witnessing documents
Revised Code 2961.01(B) prohibits a felon from “circulating” or serving as a witness for the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition.

Loss of state licenses
Revised Code 2961.03 provides that a felony conviction for theft results in the automatic revocation of the licenses of those working as secondhand dealers, junk dealers, transient dealers, peddlers, itinerant vendors and pawnbrokers.

Federal benefits
The U.S. Department of Housing and Urban Development has a “zero tolerance” policy, under which any conviction involving drugs or violence is grounds for eviction from public housing. Persons convicted of drug-related felonies are subject to a lifetime ban on Temporary Assistance to Needy Families and food stamps. Similarly, a drug-related conviction disqualifies an individual from receiving federal education grants, loans and work assistance. Completion of a drug-rehabilitation program can restore the person’s eligibility.

Immigration
Nonresident aliens convicted of a felony are subject to deportation. Interestingly, Ohio judges are specifically required to warn defendants of this possibility prior to accepting a plea of guilty or no contest to any offense other than a minor misdemeanor.

Military service and benefits
Federal law prohibits felons from enlisting in any branch of the armed forces of the United States; however, the secretary of defense has the discretion to authorize exceptions. Persons convicted of mutiny, treason, sabotage, rendering assistance to the enemy or other specifically enumerated offenses are barred from receiving all forms of veteran’s benefits, such as pension, disability, hospitalization and burial in a national cemetery.

Federal contract exclusion
Many federal agencies have adopted regulations providing that persons convicted of felonies are excluded from participating in contracting opportunities. Of note, health care providers convicted of program-related fraud can be excluded from Medicare and Medicaid, and persons convicted of fraud or any Department of Defense contract are excluded for working on a defense contract for at least five years.

Federal employment and licensure/security restrictions
Federal law automatically excludes felons from serving or continuing to serve as a law enforcement officer, without exception. Persons wishing to serve as airport security screeners, or who need access to secure areas of an airport, must not have been convicted during the previous 10 years of a wide variety of felonies. Similar restrictions exist for persons whose employment requires a Transportation Worker Identification Credential. Merchant mariners also must not have been convicted of certain enumerated offenses, including federal “dangerous drug laws.” Airmen certificates can be revoked for certain convictions, particularly those involving drugs.

International travel
Conviction of state or federal felony drug offenses (and certain misdemeanor drug offenses) results in passport revocation if the offense involved use of the passport or the crossing of an international border. Even after passport rights are restored, convicted felons contemplating overseas travel must not forget to verify their eligibility for a visa from the destination country. Notably, a conviction for DUI—even as a misdemeanor—may be a barrier to entry to Canada. Some professional athletes have found it necessary to address this issue.

Undoubtedly, there are a wide variety of collateral consequences to a criminal conviction. In fact, one report noted that Ohio law alone imposes 404 different consequences following a felony conviction, 72 percent of which relate to employability. Defense counsel would be well served to ensure that clients are educated on this issue. It may also be appropriate for defense counsel to document in writing that the subject of collateral consequences has been discussed with clients before a plea agreement is accepted. Both the American Bar Association and the U.S. Department of Justice have issued comprehensive reports on the subject of collateral consequences that are excellent resources for defense counsel.

Author bio
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Endnotes


4 8 U.S.C. §921(g)(1).


6 R.C. 2923.13.


8 R.C. 2961.01(A).

9 R.C. 2929.192(F)(1).


12 28 U.S.C §1865(b)(5).

13 R.C. 2961.01.

14 42 U.S.C. §1437d(k).


17 Id.


19 See R.C. 2943.031.


28 See 14 C.F.R. §61.15.


31 Carey Carr and Dennis Moore, “Ohio’s ‘Going Home To Stay’ Reentry Initiative,” Columbus Bar Lawyers Quarterly 46 (Fall 2009).

Interview with candidates for OSBA president-elect

In an effort to better acquaint Ohio State Bar Association members with the candidates for OSBA, president-elect, Jeffrey T. Heintz, Akron, and Jonathan Hollingsworth, Dayton, were asked to respond to several questions about their qualifications and goals for the OSBA.

What is rewarding about being an OSBA member?  

Hollingsworth: What I find most rewarding about my OSBA membership is having 25,000 colleagues and friends around the state that share my passion for the law and my love of the legal profession, all of whom are thankful for the opportunity to be able to make a difference in the lives of our clients, and to celebrate our successes and learn from our failures as a family.

Heintz: Good lawyers become great lawyers by learning from other great lawyers. Perhaps the most distinctive characteristic of our profession is our collective inclination to help each other improve. As individuals, we always advocate zealously on behalf of our clients. At the same time, however, the best lawyers I know are always ready to share ideas and strategies and to serve as mentors and role models helping to make other lawyers better. The OSBA provides the statewide forum where this can happen. It is one of our most important functions and all our activities should be undertaken with this in mind.

What makes you the best person to lead the OSBA?  

Heintz: The last eight years of my life have been dedicated to leading my law firm through the most challenging economic times most of us can remember. We all hope they are behind us, but our survey shows that things are still difficult in the legal economy, making OSBA member benefits more important than ever. In 2013, the current Casemaker contract expires, and we’ll have to find a way to continue delivering this indispensable tool free to our members. My experience as a business lawyer and managing partner will help us do that.

Hollingsworth: At this time in the life of the OSBA, I believe I am best suited to help move the organization forward. I am a team player, consensus builder, and impeccable with my word! Invaluable experience with the OSBA—former Governor; Committee chair (Membership; ACDI); member—Audit Committee; additionally, 18 years with a large firm, 11 years with a small firm and adjunct faculty at two universities (Antioch and UDSL) allows me to identify with and appreciate the needs of the 55% of the OSBA members from small and solo firms and the 35% from large firms, government and academic practices.

How do you plan to keep young lawyers involved in the OSBA?  

Hollingsworth: By continuing to support the OSBA’s Young Lawyers Section and the great work that it is doing to introduce young lawyers to the value of bar affiliation at the local, state and national levels. I will appoint more young lawyers to leadership roles in the committees and sections to help educate them on the value of bar affiliation and demonstrate a role for them in the life cycle of the bar association. Additionally, integrating young lawyers as presenters in the CLE programs would help demonstrate their role and value to the future of the bar association.

Heintz: To keep young lawyers involved in OSBA, we first have to get them involved. Free membership in the first year after law school is a great start, and I think that program should continue. Communicating with young lawyers in ways that are familiar to them (Facebook, Twitter, etc.) is another important skill that we’ve got to be good at. Finally, we’ve got to let young lawyers know that, in our organization, your opinion is important no matter how long, or how briefly, you have practiced and that OSBA is willing to evolve with the times.

How do you plan to increase and retain members of the OSBA?  

Heintz: The OSBA aspires to be indispensable to every Ohio lawyer. Right now, we’re batting about .500, which is to say about half of Ohio lawyers are members. That’s not good enough for a goal as lofty as ours. We have got to do a better job of making it clear that OSBA has the resources (economic, political and otherwise) to be an effective advocate on behalf of the profession, while at the same time providing tangible member benefits, like the old standbys, Casemaker and OBLIC, and the new initiatives, like Ohio Docs.

Hollingsworth: Educate members/non-members on the extensive array of member benefits and the value of bar membership by improving upon the delivery of the message. OSBA studies demonstrate that once a lawyer in practice for 10+ years becomes a member of the OSBA, that person is a member for life. Therefore, the greatest opportunity for growth in OSBA membership is the lawyers in the 1-10 year experience range. Additionally, OSBA inclusion programs should introduce the association to a group of lawyers that may not have previously appreciated the value of membership in both a local affinity bar and state bar.

Why is it important to maintain a relationship with other Ohio bar associations?  

Hollingsworth: Lawyers serve the needs of clients from small rural towns to large urban centers, statewide, nationally and internationally. Therefore, the support lawyers need varies and no one bar association can meet the needs of all lawyers. Local bar associations provide that hometown feeling you get from interacting with lawyers you see on a regular basis. Statewide bar associations provide the size and compelling advocacy that is needed to make sure that the scales of justice remain balanced and the needs of the public at large are met. An accommodating bar association is indispensable to its members.

Heintz: The OSBA’s formidable statewide presence can be partnered with the grassroots capabilities of the local bars to provide a full-spectrum professional experience. At the same time, our profession has become significantly more diverse over the past 40 years. It is not surprising, therefore, that various communities have lawyer-members who wish to advance their interests separately from OSBA. We should reach out to affinity groups, unconditionally, with support and assistance. Issues that affect them today may be the ones that affect all of us tomorrow.
What is the OSBA’s relationship with the Ohio State Bar Foundation?

Heintz: The Foundation is the charitable arm of the bar, its partner in fulfilling our duty to make the profession better and give back to the community. As a result of hard work by the leadership of both organizations, and by the task force on which I am proud to have served, the relationship between the two organizations has never been stronger or better, to the benefit of all.

Hollingsworth: The OSBF is the charitable arm of the OSBA and, as an “outlet for civic minded lawyers,” its stated purpose is “to improve public understanding of the law and build a better justice system.” It provides OSBA members a way to give freely of their time, talents and resources in an effort to educate the citizens of our local and state communities about the role of lawyers in the Constitutional Democracy and to have everyone understand and respect the Rule of Law and role of lawyers in the legal system and the administration of justice.

Cast your vote for president-elect at the 2012 OSBA Annual Convention in Cincinnati May 2-4. For more information, go to convention.ohiobar.org.

CareWorks and OSBA reduce workers’ compensation costs

The OSBA is proud to have worked with CareWorks as the preferred workers’ compensation Managed Care Organization (MCO) for our members since 1997. CareWorks customer service philosophy, effective return to work strategies and quality medical management efforts can provide significant benefits to employers. In addition, CareWorks can also deliver substantial medical savings through provider network discounts. These discounts can help employers reduce claim costs and help control future premiums.

Call for articles

Ohio Lawyer is seeking submissions of feature articles and “Did You Know,” “In My Opinion,” “Beyond the Courtroom,” “Practice Tips” and other items for publication in upcoming issues. Please see the Ohio Lawyer Editorial Policy, located at www.ohiobar.org/editorialpolicy, before submitting.

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JEFF HEINTZ

FOR OSBA PRESIDENT-ELECT
Council of Delegates to consider proposals

The OSBA Council of Delegates will meet May 2, 2012, at 1:30 p.m. at the Duke Energy Convention Center in Cincinnati. The full reports are available on the OSBA website at www.ohiobar.org in the Special Reports section under Publications.

The Estate Planning, Trust and Probate Law Section will propose the following:

- A proposal to amend R.C. 2111.121 to update and clarify the appropriate formalities required to nominate a guardian for (i) the nominator, (ii) the nominator’s minor children, or (iii) the nominator’s adult incompetent children.

The Real Property Law Section will propose the following:

- A proposal to amend R.C. 3953.32 dealing with closing protection letters, specifically to enlarge the period of time that such protection must be offered by the title insurance company or agent.

- A proposal to amend R.C. 5301.234 to codify intended purposes of mortgage subrogation and priority as rooted in Ohio common law.

The Taxation Law Committee will propose the following:

- Multiple proposals to amend certain chapters and sections of Ohio Revised Code Title 57 related to the Board of Tax Appeals.

Check for Council of Delegates meeting updates in the OSBA Report or on the OSBA website.

OSBA Committee and Section News

Corporation Law Committee

Jack Kurant, Pepper Pike, Chair

On Feb. 21, 2012, Governor Kasich signed two bills proposed by members of OSBA's Corporation Law Committee.

H.B. 48 (co-sponsored by Reps. Mecklenborg and Carney) modernizes Ohio’s corporate dissolution laws and laws governing corporate “dissenters’ rights.”

H.B. 267 (sponsored by Rep. McKenney) generally does two things: (1) enacts more comprehensive organizational and procedural guidelines for unincorporated associations in Ohio, including terms for organization, authority, internal governance and dissolution of these entities; and (2) adds to laws governing non-profit corporations allowing these organizations to merge and consolidate with a variety of other types of entities, both domestic and foreign.

Environmental Law Committee and Natural Resources Committee

Kristin L. Watt, Vorys, Sater, Seymour and Pease, Chair, and Sandra H. Ramos, Ohio Department of Natural Resources, Chair

The 27th Annual Ohio Environment, Energy and Resources Law Seminar was presented by the Environmental Law Committee in conjunction with the Natural Resources Law Committee in April. Topics included hydraulic fracturing, climate change, air quality, and regulatory and permitting updates. The conference features nearly 30 exhibitors and 250-plus participants.

The Environmental Law Committee also presented the OSBA Environmental Law Award to M. Zack Hohl, a third year student at the University of Toledo College of Law during the seminar luncheon. The OSBA Environmental Law Award call for papers sought manuscripts that advance the application and practice of environmental, energy or resources law in the State of Ohio. Hohl received the OSBA Environmental Law Award and a prize of $1,000, donated by McMahon DeGulis LLP. David Emerman, of the Cleveland-Marshall College of Law, received an honorable mention.

Judicial Administration and Legal Reform

Justice Robert R. Cupp, Supreme Court of Ohio, Chair

On Feb. 3, 2012, the Judicial Administration and Legal Reform Committee held a forum on judicial apportionment and consolidation. Presenters Larry Long, executive director, County Commissioner’s Association of Ohio; Judge Jim Manning, presiding and administrative judge, Montgomery County Municipal Court Western Division; Jo Ellen Cline, legislative counsel, Supreme Court of Ohio; and Steve Hollon, court administrator, Supreme Court of Ohio, discussed what is involved in this process and what is driving the change.

The committee is accepting nominations for the Innovative Court Practices Award until May 31, 2012. The purpose of this award is to bring greater visibility to exemplary programs in Ohio’s courts and facilitate the transfer of those programs to other courts in the state. Visit www.ohiobar.org/Pages/OSBACommittee.aspx?itemID=1901 for more information.

Senior Lawyers Section

Reginald S. Jackson, Connelly Jackson & Collier LLP, Chair

The Senior Lawyers Section Council held its first meeting in February 2012. The section is presenting “Transition to Retirement for Lawyers” at the Annual Convention in May. Attendees will be given the opportunity to sign up for a free year of membership in the section.

Legislative resources for committee and section members

Stay informed about public policy and legislative initiatives by visiting the recently revamped “Legislative Resources” page at www.ohiobar.org/Members/Pages/Legislative.aspx.

Join a committee or section today

The Ohio State Bar Association has 50 committees and sections. For more information on their activities or to join, please contact Committee and Section Manager Jessica Emch at jemch@ohiobar.org.
Addressing the decline in IOLTA/IOTA revenue

by Eugene P. Whetzel

“I can’t afford a lawyer.” This is a refrain with which I am very familiar—my office receives hundreds of letters a year with this complaint. The Bar has responded both on organized and ad hoc bases to the need for representation in civil cases by performing services pro bono. Unfortunately, that is not sufficient.

Increasingly, people who cannot afford a lawyer are appearing pro se. While this is certainly within their rights, it causes undue stress on the legal system. This stress can be seen at a number of levels—the one with which I am most familiar is the number of grievances filed with the Legal Ethics and Professional Conduct Committee by pro se litigants. Most of these grievances are prompted by the litigant’s unfamiliarity with legal procedures and the Rules of Evidence. But, all of them require the expenditure of time and other resources, and frequently create angst for the grieved-about judge—even when the grievance is dismissed on intake.

Creation of the Legal Services Corporation (LSC) and the Ohio Legal Assistance Foundation (OLAF) was intended to address the unmet civil legal needs of the poor. Unfortunately, that goal has not been fully realized. While the need for services has increased, legal aid societies have frozen salaries and laid off lawyers. It was just reported that the Legal Aid Society of Cleveland realized a $1.4 million cut in services. Largely, such actions have been the result of lower Interest on Lawyers’ Trust Accounts (IOLTA) and Interest on Trust Accounts (IOTA) revenues.

IOLTA/IOTA revenues were intended to fund the legal aid societies. In part, they do so; however, IOLTA/IOTA revenues declined by almost 77 percent between 2007 and 2010—and these revenues continue to trend downward. More recently, Congress has reduced funding for the Legal Services Corporation (Ohio receives 25 percent of its funding from LSC) by 14.8 percent for the remainder of 2012.

These are indeed difficult times for Ohio’s legal aid societies—just as they are for many lawyers and others. However, we can do something to assist OLAF with no cost to ourselves—deposit IOLTA/IOTA funds in a bank that pays the highest interest on those funds.

Prime Partners Program

OLAF is attempting to address the issue of declining IOLTA/IOTA revenue by creating the Prime Partners Program. The program is described on the OLAF website:

The Prime Partners Program offers financial institutions an exciting new opportunity to be recognized for commitment to the Foundation’s mission of improving access to justice for struggling Ohioans. The Program will highlight institutions that demonstrate a commitment to civil legal services by paying a premium rate on IOLTA and IOTA accounts; by providing volunteers to legal aid programs, including board members; by donating resources to legal aid clinics or other community activities; and by any other efforts which promote access to justice in Ohio.

Financial institutions offering IOLTA and IOTA accounts are invited to submit an application detailing charitable giving, employee involvement and corporate support for Ohio’s legal aid programs, along with more detailed information about support for IOLTA and IOTA products.

For assistance finding such banks, you should contact OLAF by telephone at (614) 752-8919, or email at mail@olaf.org.

In addition, OLAF is working with the Ohio State Bar Association to facilitate local pro bono committees in each of Ohio’s appellate districts. For more information about how to get involved in this effort, contact OLAF using the above information.

New technology and trust account scams

While lawyers will hopefully deposit trust account funds in banks that are part of the Prime Partners Program, they should also be aware of one of the more recent iterations of scams using technology. Although these scams conceivably go beyond trust accounts, lawyers should be aware that unscrupulous clients are using technology—apps on smart phones in particular to scam lawyers. The basic thrust of these is that the lawyer issues a trust-account check, which the recipient then scans using an application that allows deposit on scanning. (This occurs while the lawyer is out of the room or, in some cases, where the person leaves the lawyer’s office with the check.) Claiming some defect in the check, or perhaps a desire to receive funds electronically, instead, the client returns the original check. The lawyer then destroys the check and issues a replacement. Of course, both checks are deposited and the trust account takes a double hit.

Eugene P. Whetzel is general counsel for the Ohio State Bar Association.

Endnote

1 One of my lawyer colleagues is fond of asking the question, “Could we afford to hire ourselves?”
Follow the money

by Terry D. Zimmerman

When asked why he robbed banks, Willie Sutton replied, “Because that’s where the money is.” Bank attachments, more formally known as “garnishments of other than personal earnings,” are filed for the same reason.

The statutory requirements for garnishments of other than personal earnings are found in R.C. 2716.11. This is a post-judgment remedy, and the section requires three forms to be used: the actual garnishment form, notice to the debtor and request for hearing. The notice sets forth the various exemptions that a debtor may be entitled, pursuant to R.C. 2329.66, and a debtor may request a hearing to demonstrate that the funds fall into one of the exempt categories.

The statutory framework of garnishments of other than personal earnings is straightforward—the more interesting discussion is how to file them effectively. While this procedure is often referred to as a bank attachment, the word “bank” is not limited to banks but also includes credit unions, brokerage houses or any other entity currently holding funds that belong to the debtor.

You or your client should always make copies of debtor checks, which provide the bank with the account number of the debtor’s account. When a check is received from a debtor, it is critical to pay attention to the name on the check. If the name does not match the name you are using for the debtor, it will be necessary to file or amend your pleadings. This will often be the case with franchises, i.e., ABC Inc. d.b.a. Tuffy Muffler. If a check is received from a third party other than your judgment debtor, it is not appropriate to file an attachment; the fact that a third party is making payment does not mean they become the debtor.

Many banks have a procedure for funds verification that can help in filing an attachment at a time when there is money in the account. Without the account number, but with the knowledge of the bank, the best times to file attachments are often paydays.

When you are aware of a specific account number, rather than simply the name of the bank, language should be used: “Account number 1234 and any other accounts of the debtor.” This will not limit the attachment to the specific account named, but all accounts of the debtor including savings, payroll or other accounts. If the only money in the account consists of trust funds, this money is not reachable through a bank attachment; it will be necessary to file a creditor’s bill, which is a separate postjudgment lawsuit.

The bank attachment process can be contested when a debtor requests a hearing and presents information about possible exemptions. The basic rule is that funds such as wages do not lose their exempt status when placed in the bank. It is also significant that the first $425 in the debtor’s bank account is exempt from attachment and that the amount of this particular exemption changes semi-annually.
Any claim that the funds subject to the attachment are exempt must be raised by the debtor; this claim cannot be raised by the bank. It is noteworthy, however, that since May 1, 2011, the bank must withhold two months of direct deposit Social Security or other federal benefits that are in the account, and not send those to the court. The amount of money to be sent is to be determined at the time the bank is served with the attachment. If the bank disburse funds to the debtor after they are served with the attachment, the bank can be held liable to the creditor and found to be in contempt of court.

Finally, the cases are mixed as to whether jointly held funds are attachable, with the burden of proof on the debtor to show the source of the funds. The creditor argument is that if the debtor has access to the funds so does the creditor. The debtor’s argument goes back to the tracing cases cited above.

A garnishment of other personal earnings is an underused technique in collecting a judgment. Even when unsuccessful, or partially successful, it can get the debtor’s attention and lead to a resolution of the matter.

Endnotes
1 Goralczyk v. Taylor (1991), 59 Ohio St.3d 197.
3 R.C. 2716.13(B).
5 Title 31, Part 212 Code of Federal Regulations.
8 City of Columbus Division of Income Tax v. Capital Data Systems and Robin Jones (2010), 186 Ohio App.3d 775; General Motors Acceptance Corp. v. Deskins (1984), 16 Ohio App.3d 132.
Did You Know?

Law reviews: An undervalued resource

by Jared Klaus

Law reviews are getting a bad rap. New York Times reporter David Segal, in a November 2011 article criticizing the current state of legal education, wrote that “citable law review articles are vastly outnumbered, it appears, by head scratchers,” “intra-academy tiffs,” and “high-brow edu-tainment,” none of which are “of much apparent help to anyone.” United States Supreme Court Justice Stephen G. Breyer said in a 2008 speech that law reviews “have left terra firma to soar into outer space.” And Chief Justice John Roberts, as quoted in a May 2011 New York Times article, said that legal scholarship “is largely of no use or interest to people who actually practice law.” Ouch.

This criticism is nothing new for law reviews. Some legal writing professors teach their students to use them much as a gourmet chef would use instant mashed potatoes—only when you have nothing else. In their book Making Your Case: The Art of Persuading Judges, Supreme Court Justice Antonin Scalia and Bryan Garner write that you should not “expect the Court, or even the law clerks, to read your secondary authority.”

But recent studies (published, ironically, in law reviews) have begun to cast doubt on the current thinking. Law professors Lee Petherbridge and David Schwartz analyzed 7,730 U.S. Supreme Court decisions going back 61 years and found that the Court “uses legal scholarship in roughly 1 of every 3 decisions.”

So how does the Supreme Court of Ohio view legal scholarship? I conducted a study to find out, searching the Court’s opinions over the last 10 years for every instance in which the Justices cited to a law review. By no means was this study an exhaustive or scientific analysis on the scale of the Petherbridge and Schwartz study, but the results are no less illuminating.

Not only does the Supreme Court of Ohio cite to law review articles in its opinions, but the Justices (or their clerks) actually read and engage with the articles. This observation is apparent from cross-referencing the Court’s opinions with the briefs in each case. In most instances where law review articles are cited in the opinion, the Justices cite to articles that the parties and amici never mention. Even when the briefs do cite law reviews, the Justices frequently cite to different ones in their opinions. But there are also occasions when a law review cited by one of the parties is instrumental in shaping the Court’s opinion. In the 2006 case Arrington v. DaimlerChrysler Corp., Justice O’Connor’s majority opinion upholding the use of videotaped trials cited six times to an Ohio Northern University Law Review article cited in the appellant’s brief. In short, my research shows that law reviews are an underexploited and valuable resource to be mined in the Supreme Court of Ohio.

As with any other valuable commodity, however, law reviews must be used wisely and sparingly. Among the hundreds of opinions it issues each year, the Court cites to law reviews in only a handful of them. But a closer look at that handful of opinions shows that there are certain types of cases in which the Court is very likely to cite to legal scholarship. Cases involving issues of first impression or on which the lower courts are split are prime candidates. When precedent does not provide a clear answer, the Justices do not hesitate to look to academia for guidance. Take, for example, the 2004 case Danziger v. Luse, in which the Court for the first time confronted the issue of whether shareholders of a parent company have the right to inspect the books of a subsidiary. The appellants, the shareholders suing for inspection rights, cited no law reviews in their briefs. In his majority opinion holding for the appellants, though, Justice Pfeifer cited five law review articles.

The Court is also likely to cite law reviews in cases involving issues of significant societal importance. In fact, the number of law review articles the Court cites in an opinion seems to directly correspond to the weightiness of the issue. In the 2006 case Nordwood v. Horney, the seminal eminent domain decision holding takings for solely economic development reasons unconstitutional, the majority opinion by Justice O’Connor cited 13 law review articles. Two of these cites came from amicus briefs, but the rest were cited for the first time in her opinion. Surprisingly, the appellants, who prevailed in the case, did not cite to any law review articles in their briefs.

Law reviews are, of course, still worth citing in those tough cases where authority is stacked against you.
of defendants who were mentally ill when they committed their crimes.10 In the 2002 case State ex rel. AFL-CIO v. Ohio Bureau of Workers’ Compensation, Chief Justice Moyer cited five law review articles in his sharply worded dissent arguing that the Court’s decision in State ex rel. Ohio Academy of Trial Lawyers v. Sheward was wrongly decided.11

So what law review carries the most weight at the Supreme Court of Ohio? Harvard? Yale? One might think so. Scalia and Garner write that “the force of the persuasion will vary directly with the prominence of the author.”12 But my research shows that the Justices of the Supreme Court of Ohio are none too enamored with the Ivies. In the last decade, the Justices cited the Akron Law Review more than any other journal. ■

Author’s Bio

Jared Klaus is an associate in Porter Wright’s litigation department and a member of the firm’s appellate practice group. He holds several honors, including a CALI Award in criminal law and the Joshua Dressler Award for Excellence in Criminal Law. Jared graduated first in his law school class and has a master’s degree in journalism.

Endnotes

2 Id.
7 109 Ohio St.3d 539.
8 103 Ohio St.3d 337.
9 110 Ohio St.3d 353.
10 129 Ohio St.3d 512.
11 97 Ohio St.3d 504; 86 Ohio St.3d 451.
12 Scalia and Garner, supra note 4, at 127.
New Fellows invest in impact

The Ohio State Bar Foundation is proud to welcome 54 Fellows at the New Fellows Orientation and Evening Reception on May 8, 2012, at OSBA Headquarters. Incoming Fellows will spend the afternoon learning about the Foundation’s mission to promote public understanding of the law and improvements in the justice system in Ohio. President Heather G. Sowald and Chief Justice Maureen O’Connor are the Foundation’s Masters of Ceremony.

These Fellows will be joining our 920 members to renew their passion for the law. Fellow contributions fuel the Foundation’s grantmaking efforts. Since the early ’90s, the Foundation has invested more than $7 million in grants to causes that align with our mission of advancing the law and building a better justice system across the state. OSBF grants reached 1.3 million Ohioans in the past year alone.

This year, 2012 Fellows will enjoy a unique opportunity to fulfill the Foundation’s mission in a new way. The OSBF Membership Committee is developing experiences that will involve its Fellows in the work of the Foundation, rekindle their passion for justice and introduce them to other outstanding lawyers from around the state.

To learn more about the Ohio State Bar Foundation, visit www.osbf.net or contact Beth Gillespie at (800) 282-6556 or bgillespie@osbf.net.

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2012 Awards Nominations due June 1

For awards criteria and a nomination form, visit www.osbf.net/what-we-do/awards or contact Beth Gillespie at bgillespie@osbf.net (614) 487-4474.
Books and Bytes


Three of Ohio’s last five presidents have died while serving in the White House: Warren G. Harding, William McKinley and James Garfield. Incredibly, each of those deaths may have been prevented by proper medical treatment. In Candice Millard’s *Destiny of the Republic: A Tale of Madness, Medicine and the Murder of a President*, she recounts the sordid life of Garfield’s assassin and the agonizing details of the president’s last days as he lay dying after being shot at a Washington, D.C., train station.

Besieged by those seeking a political appointment after his election as the 20th president in 1880, Garfield lamented, “My day is frittered away by the personal seeking of people, when it ought to be given to the great problems which concern the whole country.” Among those patronage seekers was Charles Guiteau, Garfield’s eventual assassin.

Millard paints an unseemly portrait of Guiteau, a lawyer. Guiteau’s law practice in New York and Illinois were dismal failures. He frequently moved offices to avoid paying rent, and repeatedly cheated his clients.

While passing through a train station in Washington, Garfield was shot twice at close range by Guiteau, who had stalked the president for weeks before the assassination. Guiteau was quickly captured at the scene of the crime.

The president was shot in the arm and back. It was the rear entry wound in his spine that caused him the most agony and his eventual death several weeks later. Millard notes that Garfield complained that “the pain felt like tiger’s claws on his legs.”

The state of the medical profession’s knowledge in the early 1880s of good hygienic practices was astonishingly primitive. Millard vividly describes the scene at the shooting when the first attending doctor, Smith Townsend, arrived at the depot. “As the president lay on the train station floor, one of the most germ-infested environments imaginable, Townsend inserted an unsterilized finger into the wound in his back, causing a small hemorrhage and almost certainly introducing an infection that was far more lethal than Guiteau’s bullet.”

The infection ravaged his body for weeks, so much that “he was literally rotting to death.” Within two months of the shooting, the president’s weight had plummeted from 210 pounds to 130 pounds.

Millard’s criticism of Garfield’s medical treatment is harsh. The egos of the various doctors treating Garfield seemed more intent on glorifying their role as the attendant of their famous patient rather than curing the victim. The president lingered for more than two months before succumbing to the gunshot wounds. Meanwhile, the doctors regularly probed the wound with dirty hands and unsterilized instruments, vainly searching for the elusive bullet lodged in his mid-section. The bullet was never recovered before Garfield died at the age of 49, barely six months into his first year in office.

During Guiteau’s murder trial, he was crafty enough to try to shift the blame for the president’s lingering death onto a third party. Guiteau interrupted a witness’s testimony about the train station shooting and said, “I deny the killing, if your honor please. We admit the shooting.” He was found guilty, and received the death penalty by hanging.

The death of Garfield comes as no surprise in this biography. Millard’s portrayal of Garfield as a brilliant and ambitious self-made man, whose life was cut short by a delusional killer and poor medical care, is a tantalizing read, with Guiteau lurking in the background throughout the book in a creepy foreshadowing of doom.

—Bradley S. Le Boeuf
Akron

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LawFacts

The OSBA offers a series of LawFacts pamphlets to help educate your clients and the public at large about important areas of law from “Administering an Estate Without a Will” to “Your Rights if Questioned, Stopped or Arrested by the Police.” These are available for purchase to distribute to your clients or to download free of charge from the OSBA website.

Legal Basics for Small Business

Written especially for Ohio’s small business owners, Legal Basics for Small Business is a compilation of articles written and edited by 80 volunteer Ohio attorneys and presented in easy-to-read language. It is available on the OSBA website, or call the Member Service Center at (800) 232-7124 for a print copy.

The Law and You

A layperson’s guide to legal matters, the 13th (2006) expanded and updated edition of this publication covers a broad range of subjects and Ohio-specific information, and includes Web references, chapter summaries, a glossary and an index.

Fine Print

A brief, quarterly newsletter written by lawyers that can help you provide your small business clients with valuable legal information. Fine Print features newsworthy developments in key areas of business law and basics for addressing these issues. It is available on the OSBA website.

Law You Can Use

Previously published newspaper columns written in question/answer format for the general consumer on a wide variety of legal topics are available for your use through the OSBA website.

Now You’re 18

A brochure and Web links provide information about rights and responsibilities that accompany the onset of adulthood. Instructions are available through the website for those who wish to develop a “Now You’re 18” program in a local school or for an extracurricular group.

Legal Handbook for Ohio Journalists

This handbook, available on the OSBA website, provides general legal information about media issues directly affecting Ohio’s journalists.

Specialization certification

The OSBA is accredited by the Supreme Court of Ohio to certify attorney specialists in certain designated fields of practice. OSBA certification allows you to demonstrate a high level of professional competence and distinguish yourself in your field. Only certified specialists can advertise and promote themselves as specialists. Certification is offered in the following areas: administrative law; appellate law; estate planning, trust and probate; family relations law; federal taxation; labor and employment law; residential real property; commercial, industrial and business real property; workers’ compensation law; and paralegal certification.

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Cincinnati

Todd Cooper, Squire Sanders, has been named to the Southwest Ohio Regional Transit Authority’s board of trustees.

Douglas R. Dennis, Frost Brown Todd LLC, has been honored as the inaugural honoree to receive the Distinguished Service Award from the University of Cincinnati Law Review.

Cleveland

J. Philip Calabrese, Squire Sanders, has been appointed chairman of the Sixth U.S. Circuit Court of Appeals’ Advisory Committee on Rules.

Harry W. Greenfield, Buckley King LPA, has been inducted into the American College of Bankruptcy.

Columbus

Larry H. James, Crabbe, Brown & James LLP, is the 2012 American Red Cross of Greater Columbus Humanitarian of the Year.

Elizabeth J. Watters, Franklin County Common Pleas Court, has received the Distinguished Service Award from The Ohio State University.

In Memoriam

Myron N. “Mike” Krottinger, 97 Beachwood Jan. 27, 2012

Richard B. Hauser, 64 Norwalk Jan. 29, 2012

Michael M. Hughes, 74 Shaker Heights Feb. 7, 2012


Gary W. Lyons, 72 Columbus Feb. 11, 2012

Fred Stevens, 63 Brecksville Feb. 16, 2011

James B. Stubbins, 93 Zanesville Feb. 21, 2012


Harvey A. Immerman, 86 Cincinnati Feb. 26, 2012

Addison Dewey, 91 Bexley Feb. 29, 2012

Joseph Zieba, 87 Lorain March 2, 2012

William Milligan, 88 Columbus March 3, 2012

Gray W. Bennett, 51 Eaton March 4, 2012


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Program: 1:15 p.m. - 5 p.m.
5/9 - Akron, Cleveland, Columbus, Perrysburg

Death Penalty Defense
12.0 CLE credit hours
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Program Day 1: 8:30 a.m. - 4 p.m.
Program Day 2: 8:30 a.m. - 4 p.m
5/10 & 11 - Columbus - Ohio State Bar Association

Live Simulcast
Trust Accounts 101
2.5 CLE credit hours (AM)
Registration: 8:30 a.m.
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5/16 - Akron, Cleveland, Columbus, Fairfield, Perrysburg, Steubenville

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Ethics for Title Agents and Attorneys
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5/16 - Akron, Cleveland, Columbus, Fairfield, Perrysburg, Steubenville

Land Use and Zoning
6.0 CLE credit hours
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5/17 - Columbus - Ohio State Bar Association
5/23 - Cleveland - The Ritz Carlton

NLRB Region 8 Labor Law Seminar
6.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
5/17 - Cleveland - The Ritz Carlton

Live Simulcast
Advising Corporate Directors and Officers
6.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
5/18 - Columbus, Columbus

Live Simulcast
Business Litigation
6.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
5/24 - Columbus, Columbus

Class Action Litigation
3.25 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 12 p.m.
5/30 - Columbus - Ohio State Bar Association

Live Simulcast
Bluffton Bus Crash Case: Start to Finish
3.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 11:45 a.m.
5/31 - Akron, Cleveland, Columbus, Dayton, Perrysburg

Taking and Defending Effective Depositions
6.0 NLT credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
6/6 - Columbus - Ohio State Bar Association
6/13 - Cleveland - The Ritz Carlton

Live Simulcast
Basic of Estate Administration
6.0 NLT credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
6/7 - Cleveland, Columbus, Dayton, Perrysburg, Steubenville

Live Simulcast
Advanced Topics in Family Law
6.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
6/8 - Akron, Cleveland, Columbus, Fairfield, Perrysburg, Wooster

Live Simulcast
Mastering Microsoft Word in a Law Office - Level 1
3.25 CLE credit hours (AM)
Registration: 8 a.m.
Program: 8:30 a.m. - 12 p.m.
6/12 - Akron, Cleveland, Columbus, Perrysburg

Live Simulcast
Mastering Microsoft Word in a Law Office - Level 2
3.25 CLE credit hours (PM)
Registration: 12:30 p.m.
Program: 1 p.m. - 4:30 p.m.
6/12 - Akron, Cleveland, Columbus, Perrysburg

Live Simulcast
Professionalism, Law Office Management and Client Funds Management
2.5 CLE credit hours (AM)
Registration: 8 a.m.
Program: 8:30 a.m. - 11:15 a.m.
6/14 - Akron, Cleveland, Columbus, Fairfield, Perrysburg
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