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An interview with retiring OSBA Executive Director Denny L. Ramey

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My last column! I cannot believe nearly a year has gone by and my term will end on June 30. But I’m not going to let you members off the hook yet, I still want to hear from you on one subject I think you will feel is important. So please read on.

Before I ask you to respond to my request for your input—to which I hope to receive a response from as many of you as possible—I want to report on what your Board of Governors has been doing this year. So again, please read on.

What your Board has been doing
The Board has focused on important issues of policy and long-term planning to keep the Ohio State Bar Association indispensable to our members—which is exactly what a Board should be focused on. The Board is in the process of finishing a new strategic plan for the next five to 10 years of this organization. The prior strategic plan had been developed before the recent recession, and the Board felt the economics underlying the prior plan, a good plan though it was, needed to be reviewed and updated in light of the new economics affecting the practice of law.

The OSBA also led a campaign to protect the independence of the judiciary and is now in the middle of a campaign concerning the taxation of legal fees. Your Board of Governors is in the midst of task forces and committees putting together reports on issues such as judicial selection, governance and workspace, not to mention more benefits and programming for our members.

All of these task forces and committees, in other words, are looking ahead five to 20 years, just like a Board should be doing. And the Board is well supported by an excellent OSBA staff whose help is of the highest quality in supporting the efforts of the Board and the programming and benefits for each and every OSBA member.

The other important Board matter is searching for a successor to Denny Ramey, who has been our executive director since 1986. Denny, with the help of tens of thousands of OSBA members like you, in about 30 years, has taken this Association from a small organization with two cramped rooms at the Ohio State University Law School, to being one of, if not the, leading and most effective voluntary state bar associations in the United States. And for that all of us are grateful. Moreover, because of Denny’s leadership efforts and the staff he has assembled, and all of you members, whomever and whenever the Board of Governors appoints a permanent successor, this Association will prosper and grow even after Denny has retired from his position. That, in and of itself, is the sign of Denny as an excellent leader and executive officer.

My last request is for a response from as many of you as possible. I ask that you please take just five minutes to send a letter, a card or an email to Denny or just call at (800) 282-6556 and let him know how you feel about his more than 30 years of efforts on behalf of the OSBA. (And if you could please copy me on anything written that you send him, we will put your thoughts together in a book for Denny’s last day in office.) Or send me a humorous or cute story about Denny. And if you happen to see Denny at the convention in May in Cleveland or any other occasion, please let him know how much you appreciate his lifetime of service to the lawyers of Ohio.

On behalf of all the members of the Ohio State Bar Association, I say, “Thank you, Denny L. Ramey.” (See the interview with Denny on page 8.)

With utmost humility and gratitude
As for the job of president of the OSBA, I can certainly recommend it to all OSBA members, especially judges. Since World War II, as far as we can tell, only John Petzold and I have served in this position while also serving on the bench. And I believe that unique perspective can help the organization bridge the gap between the bench and bar—an important role for the state bar.

Most importantly, from the bottom of my heart and with the utmost in humility, I say thank you to all the OSBA members for giving me the opportunity to have served as your president this year. It has been my honor to serve you, a great year for me, and I hope a great year for you. And for the future, I wish each of you the best of luck and Godspeed. ■

Judge Patrick F. Fischer is president of the Ohio State Bar Association.

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Litigation bounces back; regulation hits high

After a one-year decline in 2011, litigation in 2012 returned to 2010 levels in both the United States and the United Kingdom, according to Fulbright’s 9th Annual Litigation Trends Survey. A five-year high in regulatory investigations, a stricter regulatory environment in both the United States and United Kingdom, and the financial crisis are largely to blame for the increased litigation demand. The largest number of disputes was in labor and employment and contract litigation.

Ninety-two percent of companies surveyed in the poll believe that litigation trends will stay the same or rise in 2013. Companies in the retail, energy and health care industries reported they would have the largest rise in number of disputes in 2013.

Law firm recruiting mostly flat after tumbling during recession

The recent trend of law firms limiting entry-level hiring has continued for the fourth straight year, according to the National Association of Law Placement (NALP). NALP’s report states that the legal sector had a very small net gain in job opportunities in 2012, and U.S. law firm recruitment on law school campuses remained flat in 2012 compared with recruiting from 2011.

The report also mentions that law firms continue to bring in small summer associate classes that are not much larger than recession lows. Offer rates for summer associates in 2012 remained high at 90.2 percent, falling only 1.2 percent from 2011. However, geographical differences were apparent for the results of this report, as areas vary in terms of legal market recovery from the recession.

Women make up majority of part-timers in 2012

There were few changes in the part-time legal market in 2012 compared with 2011, as the percentage of lawyers working part-time remained the same, and the majority of them are still women, according to a survey by the National Association for Legal Career Professionals. The survey states that 6.2 percent of the legal market worked part-time and 70 percent were women.

Out of all female lawyers, 13.5 percent worked part-time compared to 2.7 percent of male lawyers. Beth Kaufman, president of the National Association of Women Lawyers, stated that offering flextime schedules instead of part-time schedules may help women achieve full partnership status than part-time schedules, because this could allow women a different option that could allow them to work longer and more conveniently, especially in work like litigation or transactional practices.
Bankruptcy filings decline in calendar year 2012

The number of bankruptcies filed in federal courts in 2012 fell by 13 percent and totaled 189,562 less filings compared with the calendar year of 2011. In 2012, 1,221,091 bankruptcies were filed during the year.

Business and nonbusiness filings both fell from 2011 in 2012, with 16 and 13 percent reduction, respectively. First quarter bankruptcy filings for 2013 (i.e., the last three months of 2012) were down 13 percent compared with 2012. Chapter 7, 11, 13 and 12 bankruptcy filings all fell in 2012 in comparison with 2011.

—news.uscourts.gov

Report shows record number of licenses issued

Ohio Attorney General Mike DeWine released a report that states 76,810 Ohio concealed carry licenses were issued in 2012, and it is the most since 2004. The report notes that 64,650 new licenses were issued while 12,160 licenses were renewed, making it the largest amount of new licenses issued in a single year. The Attorney General’s Office compiles its annual report on licenses issued each year in accordance with law on new licenses.

—www.ohioattorneygeneral.gov

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Monitor’s report shows Ohioans received $280 million

A monitor report released by Ohio Attorney General Mike DeWine announced 7,465 Ohioans received more than $280 million in consumer relief because of the National Mortgage Settlement, which was announced a year earlier. The monitor report bases its findings off self-reported data from five mortgage services in the settlement.

Ally, Bank of America, Citi, JPMorganChase and Wells Fargo have provided relief through loan modifications, forgiveness or forbearance, lien modification, forgiveness to complete short sales, forgiveness to complete short sales in lieu of foreclosure, servicer payments, deficiency waivers and estimated consumer relief from completed refinances. Ohioans received an average of $37,519 for participating, and $45.83 billion was distributed nationally.

—www.ohioattorneygeneral.gov

Ohio courts participate in national video project

The National Court-to-Court Videoconferencing Project, a cost-savings project connecting dozens of courts to each other, is helping courts communicate with each other anywhere in the United States and is helping save time and money. Today, more than 40 courts use the system after its inception in 2009.

Ohio courts participating in the program include Montgomery Common Pleas Court, Greene County Court of Common Pleas and Willoughby Municipal Court. Karl Thoennes, the project’s founder and administrator at the Second Judicial Circuit in South Dakota, believes the project will continue to grow and has even expanded the project to the global level with video links to courts in Sweden, Canada, Australia, Japan and Sri Lanka.

—www.courtnewsohio.gov

It’s Monday, the First Day of the Rest of Your Life.

Too bad last Friday was the last day to file the Bergstrom motion.

Did you know that missing deadlines continues to be one of the most common mistakes leading to malpractice claims? The failure to file a document is the second most common alleged error and the failure to calendar properly was the fifth most common mistake leading to a malpractice claim*. A dual calendaring system which includes a firm or team networked calendar should be used by every member of your firm.

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A Legacy of Service

An interview with retiring OSBA Executive Director Denny L. Ramey

by Stephanie Beougher

On July 1, Denny Ramey will end his 33-year career at the Ohio State Bar Association. Since 1980, Ramey has been part of the OSBA, serving as its executive director for 28 of those years. He is nationally recognized as an innovative bar leader, focusing on providing service to the Association’s members, the public at large and the profession as a whole. In addition to his duties as OSBA executive director, Ramey also served as an officer and board member of many OSBA affiliated organizations. He oversees a staff of 70, an annual budget of $12 million and a membership totaling nearly 29,000 members.

Q: Take us back to how you became assistant executive director of the Ohio State Bar Association in 1980. What was your background before you came here?

A: I graduated from Ohio University with a degree in business administration. I came to Columbus and didn’t have a job. I became the administrative manager of a public warehouse on Columbus’ west side. Didn’t really enjoy that job but stayed there for two and a half years.

When I started looking around, the Ohio Society of Certified Public Accountants was looking for someone to run their continuing education program. We got together and I found that I liked association work. I was with them for about eight years and got to the point where I wanted to be the executive director or at least a career path where I’d become an executive director. While at OSCPA, I earned an MBA from Capital University. Fast-forward a little bit, I became aware of the Ohio State Bar Association assistant executive director position and got together with Joe Miller, who was Executive Director at the time, and the search committee and they offered me the job.

Q: How did you become executive director in 1986?

A: When I was hired, they said if things went well I’d be looked at seriously for the job when Joe retired. Things must have gone well because when Joe was almost 65, the executive committee met in executive session, and about half an hour later the members came out and started shaking my hand saying they’d decided I was to be the next executive director. I didn’t even know that was on the table. I would have been nervous if I had known that.

Q: How have the legal profession and the OSBA changed since you started with the Association?

A: The Association has gone through some pretty big changes in terms of the number of staff people, the things that we do, the types of affiliates we have and what they do. The profession has seen a
pretty big change as well. Back then, there were a lot of young lawyers. Today the same people who used to be the young lawyers are now the older lawyers and that's where a large group of people are in the profession right now—it's known as the graying of the profession.

It seemed to me, back in the ’80s, there was a reluctance to look at the practice of law as a business. I think now, while it’s still a profession, people are paying a little more attention to the business side of it than they did 30 years ago.

Q: What in the 30-plus years that you’ve been with the OSBA do you point to and say, “That is what I’m most proud of”?
A: We’ve done quite a bit, but the thing I’m most proud about is the staff, because the staff has made it all happen. Our ability to attract and retain terrific staff people is my proudest achievement.

Q: Do you have any regrets? Would you do anything differently?
A: No real regrets. We’ve done a lot of things that have made a difference and we’ve been cutting-edge on a lot as well.

Q: What cutting-edge project are you particularly proud of?
A: Two things in particular that I’m proud of. The first is OPEN, which stood for Online Professional Electronic Network. We started it in the ’90s with $1 million and some partners who were providing the technological expertise. We provided credibility to the state agencies. OPEN was a system by which lawyers could get public information from state agencies through their computers. Before we created it, lawyers had to make a call if they needed a Bureau of Motor Vehicles form or something like that, and they might be on the line for 45 minutes before they got to talk to a human being. OPEN provided a way to use the computer to obtain the information/forms.

We found out that lawyers weren’t the only ones who wanted access to that service, and we expanded the kind of information that was available to include things like arrest records. We found that banks, insurance companies and rental car companies wanted that kind of information as well.

Our partners wanted to take OPEN nationwide. It would have taken extra money from us to do that. Instead we sold our share of OPEN to our partners. We had a million dollars invested in it and we got seven million dollars from the sale. That was a financial home run and the service is still there for lawyers and others.

The other thing that I’m proud of is Casemaker, which I think needs no introduction. It is online computer-assisted legal research that is worth way more than anyone has to pay in dues. Cincinnati lawyer Joe Shea created it, and he and I marketed it to 27 other state bars.

Q: One of the things that I’ve heard through the years that I’ve been here at the OSBA, is the membership dues are so affordable for all the benefits you receive. I get the impression that most people say that is because of your leadership.
A: I can’t take all the credit. I’d like to point back to the staff that I mentioned before. The other thing that I’ve always said is a key ingredient for our success is a good hand-in-glove relationship between the board and the staff. The board and I have given the staff what I call “permission to fail.” By that I mean, don’t be afraid to go out and try an entrepreneurial project just because you think there’s a chance that it might not work. If you do all your research and it looks like, first and foremost, it will result in something that will help lawyers and members in their practices and you think there’s at least a reasonable chance it will be successful even though there might be a little bit of risk involved, don’t be afraid to try to make it happen. I’d rather see someone try and fail than say “I don’t want to stick my toe in the water because there might be an alligator in there.” I think that attitude is a big part of the reason we’ve been successful.

To develop that kind of culture you have to have little successes along the way. Each success builds on the other so when something big comes along like investing a million dollars for OPEN or investing in the time, money and effort to do Casemaker, the board is pretty comfortable letting the staff run with it. It’s a team effort built on mutual trust and respect.

Q: The Ohio State Bar Association, whether it’s the individual programming or the benefits for its membership, has really risen to the top among other state bar associations. Why do you think the OSBA has that national recognition?
A: I love to take our leaders to national meetings of bar associations. I think when they hear us talk about being number one among bar associations they may think it’s a little self-serving. When they get to the meetings they find other people telling them the same thing. We do have a national reputation and it’s well deserved in my opinion, but again, it goes back to that culture I talked about with respect to the board, the staff and the entrepreneurial spirit that’s been built between the two.

The other thing is, several years ago we went through an exercise to discover our core purpose and our core values. We came up with a “BHAG”—big hairy audacious goal. The fact that we know our core purpose and gear everything toward accomplishing it gives us an incredible leg up. There are many associations out there that really don’t know what their core purpose is. I think knowing ours, having a strategic plan, which we do, and having a yearly operational plan, leads us in the right path. We’re very businesslike about the whole thing. I talked about the practice of law being seen more as a business, there are a lot of people who don’t think the association ought to be run like a business. I totally disagree with that. We always have to look at what we’re doing, what resources are needed to accomplish the goals, and what’s the best way to bring things together for the members of the Ohio State Bar Association.

Q: Speaking of the members, what is the one thing you’d like them to know about their state association?
A: That we’re always looking for ways to improve their professional lives. In fact, that is the purpose that we discovered. The Ohio State Bar Association exists to enhance the professional lives of its members and that’s what we are always trying to do. I would also like them to know that the money they pay in dues comes back to them in multiples based on the benefits that are available to them. For example, Casemaker, *OSBA Report, Ohio Lawyer*, our actions at the statehouse and with judicial organizations—there are just too many things to talk about right now in the short period of time we have. Somebody once told me that “you can’t sell from an empty wagon,” and our wagon is certainly not empty.

Q: In the past few decades, the public has developed a negative image of lawyers. What can the association do to fight that negative image of lawyers?

A: One of our past presidents, Dick Markus, once told me that part of the negative image stems from the fact that some people don’t like the law as it affects them and they want to blame the lawyer for how it impacts their lives. I think we need to do good things and tell people about them. The OSBA must continue its good public relations programs, and continue to encourage lawyers to be active in civic affairs, in their school system and in their community.

Q: You received many awards. Is there one in particular that means the most to you?

A: They’ve all been special, but I think the Ohio Bar Medal is the one in particular that’s the most meaningful to me. It’s the highest award of the Ohio State Bar Association and I’m the only nonlawyer to win it, so receiving it meant a great deal to me.

Q: Were you surprised when you received it?

A: I was very surprised when I received it. When I was informed that I was getting it I was taken aback and pretty much speechless—which almost never happens.

Q: Is there anyone in particular who has inspired you during your career?

A: I’ve always wanted my children (Beth and Brian) to be proud of me, and there have been so many people who have had an impact on my career here that it would be almost impossible for me to name any one in particular.

Q: What are your retirement plans?

A: I already have Denny Ramey Association Consulting LLC set up. One of our past presidents, Tom Bonasera, set that up for me. If no one calls for my advice I’m not
going to care (but I hope somebody calls). I’m going to play more golf—somebody said that’s impossible but I’m going to give it a shot. I’m also going to try to do community theatre. I think I’d make a terrific Henry Higgins.

I’m excited for my successor because whoever gets this job is going to get one of the best jobs in the world. I’m going to be available to him or her by phone—but I’m not going to come in here unless invited. I’m excited for the next stage of my life.

Q: With the knowledge you’ve gained in the 30-plus years on the job here, what advice would have for the next executive director of the OSBA?

A: First and foremost, enjoy every day of it—you get to work with some terrific people. I’d say be flexible, roll with the punches and don’t be afraid to fight for what is right. In any given situation, there’s the high road and there are all the others. Always take the high road. It may not feel great at the time, but in the long run you’ll never regret taking the high road.

Q: Tell us a little bit about the Denny L. Ramsey Education Fund that’s been established at the Ohio State Bar Foundation.

A: The fund is for students in southeast Ohio with concentration in Portsmouth, which is my hometown. I’m very proud of that because it’s going to do good things for folks down there. I’ve seen firsthand the importance of education. I am proud the Foundation is doing something to help people in that particular geographic area learn more about the law and have learning opportunities they wouldn’t otherwise have.

Q: If you could have people say one thing about Denny L. Ramsey and his time at the Ohio State Bar Association, what would it be?

A: That he always kept his eye on the ball with respect to the members of the OSBA.

A video interview with Ramey is available at www.ohiobar.org.

Stephanie Beougher is the communications and online media associate for the Ohio State Bar Association.
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Effective client screening

by Gretchen Koehler Mote

Believe it or not, one of the best ways to avoid a claim for legal malpractice happens before you, the attorney, even undertakes to represent the client. Effective client screening is key to a successful attorney/client relationship.

After the potential client meets the first step in the attorney/client relationship and clears checks for conflicts of interest, an evaluation of the client and the potential representation needs to take place. When reporting a legal malpractice claim, many attorneys have said, “I knew I shouldn’t have taken on that case. I just didn’t listen to that little voice that told me not to do it.”

While listening to “little voices” is not necessarily what is recommended here, going through some basic analysis about what you are getting into should be done. Some of these just involve common sense. Others reference the Ohio Rules of Professional Conduct. There are some basic questions to ask yourself before agreeing to represent a potential client.

Do I know this area of law?

Rule 1.1 Competence of the Ohio Rules of Professional Conduct requires that, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” It is notable that this is the very first of all the rules and sets out the
requirement in mandatory language. This does not mean you can never take on a case outside your usual practice area, but that it takes some extra effort if you do.

Comment [2] of Rule 1.1 states that, “A lawyer can provide adequate representation in a wholly novel field through necessary study.” Comment [2] also says that, “Competent representation can also be provided through association of a lawyer of established competence in the field in question.” The first question then is, do I know this area of law, and if not, am I willing to study to learn it or find an experienced attorney with whom to associate? If you associate with another lawyer who is not in your firm, be sure to comply with Rule 1.5(e) on how to divide fees.

Are there time considerations?
Even if the potential client’s problem is within your area of expertise, you should consider the time commitment you are making in taking on this client matter. What is the nature of the problem? What will you need to do? Is he or she coming to you at the last minute? If there are time deadlines looming, can you reasonably expect to get a complaint filed by the next day? Can you do an appellate brief in a week? Can you be up to speed for a hearing in a few days? How will this matter impact your responsibilities to the other clients you are already representing? If you have any doubts that you have adequate time, say a polite, “No, thank you” to the representation. If you do not have the time, the client will appreciate your giving him or her a list of attorneys who might take the case or the telephone number for the local attorney referral service. When doing this, be careful that you do not express an opinion on the matter or set out a specific time limit, other than to tell him or her that time may be of the essence and to immediately contact another attorney if he or she wishes to proceed.

How did this potential client find me?
If this potential client is a family member or friend, think long and hard about taking them on as a client. Especially if they are an older family member, they may always consider you as “a kid” in need of their guidance in their case—no matter how old you are. If you are asked to be a trustee of a trust in which family members have some beneficial interest, you may want to be sure it does not fall within the exclusions of your legal malpractice policy.

Family members have been known to become estranged and hold grudges for long periods of time, if not forever, and they, as well as friends, will sue you if they feel you mishandled their case. Do yourself a great big favor and turn down this representation. Your family and friends will appreciate a good referral and will remain on amicable terms with you. If the potential client comes to you after dumping his or her former lawyers or lawyers, this is a giant red flag. This is probably the most frequently ignored and most often lamented sign of trouble on the horizon. There is a reason this client has been through several lawyers before coming to you. Do you really need to find out why for yourself?

What is this person like?
We are not talking about whether they like the Reds or Indians here. This means how do the potential clients view their situation, and what needs to be done? Do they have reasonable expectations? Do they think the case is worth billions, and they will be set for life on what you will get for them? Do they say it is a MNO (money no object) case, and it is the principal of the matter? Are they angry or vindictive?

Potential clients’ views of their cases will often color their perspectives of your performance. If the matter does not resolve within their expectations, such a client will look for someone to blame. This type of client is often very difficult to work with. If you cannot stand them already at the end of the initial interview, signing on to represent them is probably not a good idea. They will become the client you do not want to talk to when they call and client relations will suffer enormously, leading to unpaid bills, potential bar complaints or legal malpractice claims. If they do not have reasonable expectations, no matter what you do, it will never be enough.

Can this person pay me?
While it is not “all about the money,” it is about the payment. You need to discuss your fees up front, and explain how you will bill and what your expectations are. Pro bono legal services are to be commended, but it is preferable they are intentionally pro bono. If the potential client cannot come up with a retainer fee, how will he or she pay your monthly invoices? If the case will involve experts or other extensive discovery, how will that be paid? What kind of fee agreement will you have signed? Rules 1.5 and 1.8 govern here; reading through them again is helpful. Your written fee agreement and engagement letter will set the tone for a successful attorney/client relationship.

The bottom line is if the potential client is not prepared to pay you and you do not want to do it for free, then you need to recognize that at the beginning. Waiting until the end of the representation and suing a client for fees almost always results in a claim for legal malpractice being filed against the lawyer.

In the long run, following these simple steps will give you happier clients, who will send other potential clients your way. If you have questions about these areas, feel free to contact the Ohio Bar Liability Insurance Company at contactus@oblic.com or (800) 227-4111.

The Lawyer’s Desk Guide to Preventing Legal Malpractice, 2nd Edition, ABA Standing Committee on Lawyers’ Professional Liability, and the writer’s own experience were used in writing these tips.

Author bio
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Endnotes
1. See Rule 1.5 Comment [6A] on what is a retainer.
Professionalism dos and don’ts: Deposition tips from the Supreme Court of Ohio Commission on Professionalism

If there is one area of the practice of law that consistently gives rise to an inordinate number of complaints about lack of professionalism, it is the area of depositions. Depositions are an extremely important and valuable component of our adversary system, but, if abused and mishandled, they can engender unnecessary and costly strife that impedes and undercuts the entire process. To help correct this situation, the Commission on Professionalism published a set of deposition “dos and don’ts.” The commission believes that if lawyers follow these guidelines—which are consistent with, and to some extent provide specific amplification of, the Supreme Court’s Statements on Professionalism—lawyers will be able to use depositions to advance the legitimate interests of their clients, while at the same time treating all participants in the process, including deponents and opposing counsel, with courtesy, civility and respect. It is not the commission’s intention to regulate or to suggest additional bases for discipline but rather to facilitate the promotion of professionalism among Ohio’s lawyers. In short, by adhering to these guidelines, lawyers will be acting as professionals and in the manner that the courts expect. Therefore, as a lawyer who is scheduling, conducting or attending a deposition, here are a few guidelines:

Do

• Review the local rules of the jurisdiction where you are practicing before you begin.
• Cooperate on scheduling. Rather than unilaterally sending out a notice of deposition, call opposing counsel first and cooperate on the selection of the date, time and place. Then send out a notice reflecting the agreed date.
• If, after a deposition has been scheduled, a postponement is requested by the other side, cooperate in the rescheduling unless the requested postponement would be one of those rare instances that would adversely affect your client’s rights.
• Arrive on time.
• Be prepared, including having multiple copies of all pertinent documents available in the deposition room so that the deposition can proceed efficiently and expeditiously.
• Turn off all electronic devices for receiving calls and messages while the deposition is in progress.
• Attempt to agree, either before or during the deposition, to a reasonable time limit for the deposition.
• Treat other counsel and the deponent with courtesy and civility.
• Go “off record” and confer with opposing counsel, privately and outside the deposition room, if you are having problems with respect to objections, the tone of the questions being asked or the form of the questions.
• Recess the deposition and call the court for guidance if your off-the-record conversations with opposing counsel are not successful in resolving the problem.
• If a witness is shown a document, make sure that you have ample copies to distribute simultaneously to all counsel who are present.
• If a deponent asks to see a document on which questions are being asked, provide a copy to the deponent.
• Inform your client in advance of the deposition (if the client plans to attend) that you will be conducting yourself at the deposition in accordance with these “dos and don’ts.”

Don’t

• Attempt to “beat your opponent to the punch” by scheduling a deposition for a date earlier than the date requested by your opponent for deposition(s) that he or she wants to take.
• Coach the deponent during the deposition when he or she is being questioned by the other side.
• Make speaking objections to questions or make statements that are intended to coach the deponent. Simply say “object” or “objection.”
• Make rude and degrading comments to, or ad hominen attacks on, deponent or opposing counsel, either when asking questions or objecting to questions.
• Instruct a witness to refuse to answer a question unless the testimony sought is deemed by you to be privileged, work product, self-incriminating, or if you believe the examination is being conducted in a manner as to unreasonably annoy or embarrass the deponent.
• Take depositions for the purpose of harassing a witness or to burden an opponent with increased litigation expenses.
• Overtly or covertly provide answers to questions asked of the witness.
• Demand conferences or breaks while a question is pending, unless the purpose is to determine whether a privilege should be asserted.
• Engage in conduct that would be inappropriate in the presence of a judge.

For more information on the Supreme Court of Ohio Commission on Professionalism, go to www.supremecourt.ohio.gov/boards/cp/default.asp.
Protecting the record

by Paul D. Bryson

For the past two years, I worked in a court that uses an audio recording system instead of a stenographer or in-court reporter. Part of my job was keeping the audio record and transmitting exhibits to the official court reporter, who prepares transcripts for appeals. I frequently reviewed the audio record of proceedings to advise the judge. Working closely with the court reporter and with the audio record, I discovered that there is a vast difference between what happens in the courtroom and how it sounds on an audio record—and how difficult interpreting that audio can be.

No trial lawyer wants to make a record that is difficult to understand, and no appellate lawyer wants a transcript that is missing important information. But budget crunches and technology advances mean audio records are likely to become more prevalent. One day we may even see computerized, real-time transcripts. Here are five ways to ensure the most accurate and complete record when dealing with audio-only records:

1. Stay where the microphones can hear you. You might be a dynamo in the courtroom, marching across to confront witnesses on cross examination or darting to a whiteboard to draw the jury’s attention to a critical fact, but if you are not in range of a microphone, your words will be lost. You do not need to be tied to a table or lectern, just be aware of the placement of microphones and the limits of their range. Most of the time, a member of the court staff will be happy to help you get oriented.

2. Vocalize. When the court reporter and appellate judge have only your words, you need to make sure your words convey the entire message. This means that you sometimes will need to narrate your actions for the listener or give stage directions. It may be worth it to say, “I’m approaching the witness with Defense Exhibit 5,” or “For my next question, I’m going back to time-stamp 37:40 on the CD marked as Plaintiff’s Exhibit C.” This is especially important when dealing with recordings as exhibits. The official record might distort the words or have low volume. The court reporter can make a better transcript if he or she knows what exhibit is being played and where to find the content. That will make that damning (or saving) statement that was recorded more accessible to the appellate court and easier to quote in your brief.

3. Admit/proffer your exhibits. If you are going to have a witness read an exhibit into the record or you are going to play a recording for the jury, offer it into evidence. If it turns out to be inadmissible, the actual text or the recording will be available to the court reporter only if the exhibit is proffered for appellate purposes. That may be your best chance to ensure the appellate court understands what evidence you offered. Do not make the panel dig out the exhibit and read it; make sure you have the relevant content correctly set forth in the transcript.

4. Be concise. You may be a marvelously complex writer and thinker, with dependent clauses and insightful parenthetical statements aplenty. But in oral presentation, many lawyers have the tendency to rush through or state subpoints sotto voce. Although that may be an excellent dramatic technique, it does not serve you well in a recording or on paper. To ensure a timely, accurate and persuasive transcript, make sure you can be heard and understood. Short sentences and questions help. Lost words matter less when what you intend is clear. Your oral presentation or witness examination is not an Elizabethan monologue or Victorian intrigue, and it will not come across dramatically in a cold transcript.

5. Be aware of the recording. Be aware when and where you are being recorded. You likely do not want the transcript to reflect your obscene muttering over an evidentiary ruling, the off-record comments you make to opposing counsel or your second chair regarding your client’s mental state or hygiene. Make sure you take appropriate steps to prevent those mishaps or the unintended disclosure of confidential information. Some courts begin the recording before the hearing and end the recording after the hearing. If you do not know if you are being recorded, ask.

Author bio

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Outsmarted by a smart phone

The Supreme Court of Ohio dials in on the admissibility of cell phone records

by Jared Klaus

Cell phone records often play a critical role in the prosecution’s case against a criminal defendant. Every time we use our cell phones to place or receive a call, our wireless provider records the number that we dial or that dials us, the time of the call, and how long it lasts. Data retained by wireless providers can help pinpoint a caller’s geographical location at a given time based on the specific towers that were used in transmitting the caller’s voice or data. Also, smart phones often log specific latitude and longitude coordinates associated with any photographs snapped by cell phone users—a lesson that John McAfee recently learned the hard way while trying to evade authorities in Guatemala.

On Dec. 3, 2012, the Supreme Court of Ohio sent a clear signal regarding the admissibility of cell phone records in a criminal case. In State v. Hood, the Court, in a 6-1 decision authored by Justice Paul Pfeifer, held that cell phone records must be properly authenticated as business records, most likely by a representative of the cell phone company, to be admissible under the Ohio Rules of Evidence. Failure to lay the proper foundation in this manner renders the records inadmissible hearsay and violates the defendant’s Sixth Amendment right to confrontation.

The Hood opinion reads like a true-crime thriller. In the early morning hours of Jan. 26, 2009, a group of 11 friends gathered in the basement of a home in Cleveland for a birthday celebration. Suddenly, four masked men carrying guns stormed the party. The assailants ordered the party-goers to strip off their clothes, and took the victims’ money and cell phones. When police arrived on the scene, they found a man dead in a yard near the scene of the robbery. He had been shot twice, execution style. He was later identified as one of the robbers. Hood was arrested shortly after the robbery when police tracked the robbers’ getaway car to a local restaurant and found the defendant—as well as cash, a mask, and two of the robbery victims’ cell phones—inside the vehicle.

The defendant was tried on various charges stemming from the robbery, including murder for the death of his accomplice. Although the prosecution could not prove that the defendant was the trigger man, he was tried for felony murder based on his participation in the criminal acts that led to his accomplice’s death. An accomplice cooperated and provided detailed testimony against the defendant, which was corroborated by the testimony of the victims. The prosecution’s case was also bolstered by the troublesome fact that the defendant had been found by police in the getaway vehicle just after the robbery in possession of the fruits of the crime.

At trial, the prosecution attempted to introduce call-logs showing calls between the defendant and his co-conspirators at the time of the crime, including a log of cell phone tower records placing the defendant in the vicinity of the crime scene. Detectives had obtained the records by subpoenaing the defendant’s wireless provider, Verizon. Rather than call a Verizon representative to authenticate the records, the prosecution called one of the detectives, who testified about how he had subpoenaed the records as well as his experience interpreting cell phone records. Defense counsel objected to the admission of the records based on insufficient authentication—an objection the trial judge apparently found at least mildly persuasive, remarking that “my gut reaction is to subpoena Verizon.” Ultimately, the judge overruled defense counsel’s objection and admitted the records based on the detective’s foundation testimony. The jury found the defendant guilty of murder and other charges, and the judge sentenced Hood to 21 years to life in prison.

The defendant appealed his conviction on the basis that the trial court had violated his Sixth Amendment right to confrontation by admitting his cell phone records without the proper authentication. The defendant’s argument rested on strong legal footing. In State v. Craig, the Supreme Court had held that properly authenticated business records were “non-testimonial.” This meant that, under the U.S. Supreme Court’s 2004 holding in Crawford v. Washington—the pivotal Confrontation Clause case that created the testimonial/non-testimonial dichotomy—a
criminal defendant did not have a Sixth Amendment right to confront the person who prepared the records. Of course, Craig's holding applied only to business records for which the proper foundation was laid under Evidence Rule 803(6). That rule requires that the record was created in the regular course of business by a person with knowledge of its contents at or near the time of the transaction being recorded and that these elements be established through the testimony of the record's “custodian” or “other qualified witness.”

Hood's appeal turned on the last of these four elements: Could the detective be considered the “custodian” or “other qualified witness” with respect to records generated and kept by Verizon? On direct appeal, the prosecution conceded that the cell phone records had not been properly authenticated and instead argued harmless error. The Eighth District Court of Appeals agreed with the prosecution and held that, even if the admission of the records was error, the error was harmless because the overwhelming evidence against Hood would have ensured his conviction even without the cell phone records. The Supreme Court accepted Hood's discretionary appeal.

Justice Pfeiffer's opinion started out sounding like a victory for the defendant. The trial court had clearly erred by admitting the cell phone records based on the detective's testimony, the Court held. Agreeing with the defendant, the Court held that admission of the records failed the test of Rule 803(6) because the detective was neither the “custodian” of the records nor did he count as some “other qualified witness.” Quoting Weinstein's Federal Evidence treatise, the Court stated that a “qualified witness” for purposes of Rule 803(6) would be someone with “enough familiarity with the record-keeping system of the business in question to explain how the record came into existence in the ordinary course of business.” Although the Court stopped short of explicitly holding that the testimony of a Verizon representative was needed, the Court tellingly pointed to the trial judge's failure to follow through on his stated "gut reaction" to subpoena Verizon.

The prosecution's failure to properly authenticate the cell phone records as business records, the Court held, violated Hood's Sixth Amendment right to confrontation because without that authentication, the records could not be considered non-testimonial under Crawford. Unfortunately for Hood, the Court's decision did not end there. Justice Pfeiffer agreed with the Eighth District that admission of the records had been harmless error because, essentially, there was so much other evidence against Hood that the cell phone records were but one more nail in an already sealed coffin. The Court thus affirmed Hood's conviction.

For practitioners, the lessons of Hood are simple. If you are attempting to introduce cell phone records into evidence, call a representative from the phone company to lay the proper foundation. If you fail to “dot the I's” and “cross the T's” in this respect, you may find yourself with a confrontation clause problem. Do it by the book, on the other hand, and you may just be able to catch the defendant red-handed—or, should we say, red-thumbed.

Author bio

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Endnotes

2 The Court later modified its opinion on reconsideration to clarify that it was the prosecution's failure to authenticate the cell phone records as business records, not the hearsay nature of the records, that violated Hood's right to confrontation. State v. Hood, Slip Opinion No. 2012-Ohio-6208. Further references in this article will be to the modified opinion.
3 State v. Craig, 2006-Ohio-4571.
Disputed settlement agreements

by Joel M. Frederic

When a trial court enters judgment enforcing a disputed settlement agreement, it is first required to hold an evidentiary hearing (*Rulli* hearing).

Indeed, it is a reversible error to enforce a disputed settlement agreement without first holding an evidentiary hearing. But is an evidentiary hearing mandatory if the court refuses to enforce a disputed settlement agreement and enters judgment?

In the lawsuit underlying the disputed settlement agreement in *Artisan v. Beiser, et al.*, Artisan sued former employees alleging that they had breached a non-compete agreement. The noncompete case was conditionally dismissed, as the parties agreed to negotiate the terms of a settlement agreement. Without a *Rulli* hearing—and without one being requested—the trial court entered summary judgment against Artisan concluding that no settlement agreement existed. Artisan appealed and argued, among other things, that the trial court failed to hold a *Rulli* hearing before entering judgment denying enforcement.

The 12th Appellate District affirmed the entry of summary judgment holding that though the parties had engaged in negotiations, no meeting of the minds occurred and that the case was distinguishable from the line of *"Rulli cases."* Judge Powell, writing for the majority, specifically noted, unlike the situation in *Rulli*, the trial court in this case refused to enforce what Artisan purported to be an enforceable, oral settlement agreement between the parties, after finding that the parties had never actually reached a settlement agreement * *** therefore, nothing in *Rulli* required the trial court to hold an evidentiary hearing before entering summary judgment [denying enforcement].

*Artisan* moved to certify a conflict to the Supreme Court of Ohio, and the 12th Appellate District sustained the motion, holding that its decision in *Artisan* conflicted with *Michelle M.S. v. Eduardo H.T.* and *Moore v. Johnson.* The appeals court certified the following question of law:

When there is a factual dispute between the parties over the existence of a valid settlement agreement, is the trial court required to conduct an evidentiary hearing regardless of whether it enforces or denies enforcement of the agreement and enters judgment pursuant to the Ohio Supreme Court decision in *Rulli v. Fan Co.?*

The Supreme Court accepted jurisdiction on the above question but after oral argument dismissed the case as having been improvidently granted. Because the Court dismissed the appeal without opinion, the question remains: In Ohio, is the trial court required to conduct an evidentiary hearing regardless of whether it enforces or denies the enforcement of a disputed agreement and enters judgment?

As noted above, under *Artisan*, the law in the 12th Appellate District is that trial courts are not required to conduct an evidentiary hearing when it denies the enforcement of a disputed settlement agreement and enters judgment. But in *Myatt v. Myatt*, the 9th Appellate District impliedly ruled that an evidentiary hearing is required whether the trial court upholds or denies the motion to enforce: “it is necessary for the trial court to conduct an evidentiary hearing prior to ruling on the motion to enforce the settlement agreement.”

The 3rd Appellate District, likewise, impliedly ruled that a hearing must be held before enforcing or denying enforcement.

It is unclear how other Ohio appellate districts might rule on the question of whether a *Rulli* hearing is required before a trial court denies the enforcement of a disputed settlement agreement and enters judgment. I would submit that the 12th Appellate District got it right in *Artisan* and is the best and most efficient approach. A *Rulli* hearing is justified only when a court enforces a disputed agreement and enters judgment because the law disfavors the enforcement of ambiguous contracts, particularly those that aim to memorialize a settlement agreement between adversarial litigants; a settlement on which final judgment has been entered eliminates the right to adjudication by trial; when a court denies the enforce-
ment of a disputed settlement agreement it is not binding the parties to perform under ambiguous and/or disputed terms to which they may not have agreed; and trial courts should retain discretion to rule on discovery issues as they see fit.9

The question whether an evidentiary hearing is mandatory when the court refuses to enforce a disputed settlement agreement and enters judgment is one that necessarily implicates two distinct legal concepts: the first dealing with discovery, which is generally a matter of trial court discretion, and the second being the entry of summary judgment, which is a matter of law. In the first instance a trial court’s discretion to refuse to hold a hearing should not be divested in denial of enforcement cases. Thus, whether to hold a hearing before denying enforcement of a disputed agreement is a matter best left squarely within the trial court’s vested discretion to govern discovery, as it sees fit. With respect to the entry of judgment denying enforcement of a disputed settlement agreement, there is the underlying principle that Rulli did not abrogate the Ohio Civil Rules concerning the trial court’s authority to enter judgment. That is, on a summary judgment motion Ohio trial courts may still enter judgment denying enforcement against the party contending that a settlement agreement existed—even on a pending motion for a Rulli hearing. After all, summary judgment may only be entered if no genuine issues of material fact exist and judgment is appropriate as a matter of law. Further it seems that a blanket ruling, such as that implied in Myatt v. Myatt, hampers judicial economy when no genuine issue of material fact exists or where the alleged evidence is not probative of the existence of a disputed settlement agreement or its terms.

It makes sense that the party seeking enforcement of a disputed settlement should bear the burden to proffer and identify extrinsic evidence demonstrating the existence of an agreement or clarifying disputed terms. In practice, the party seeking enforcement of a disputed settlement agreement should identify evidence that it believes to exist that might be instructive on the question whether an agreement was reached and request an evidentiary hearing before the trial court. Significantly, if a party does not request an evidentiary hearing in the trial court, on appeal, it waives the opportunity to argue that the trial court erred in failing to hold a Rulli hearing.10 Of course, if the party requesting a Rulli hearing cannot articulate what evidence exists, or is believed to exist, demonstrating a genuine issue of material fact that may be gleaned from a hearing, then it would be difficult to argue that the trial court erred by failing to hold the hearing before denying enforcement and entering judgment. What if extrinsic and probative evidence of an agreement is asserted and the trial court still refuses to hold a hearing and enters judgment denying enforcement? An Ohio appellate court might reverse such a ruling if probative evidence was alleged to exist that substantiated the existence of a disputed settlement agreement or clarifying its terms, and the trial court was aware of such evidence but denied an evidentiary hearing and entered judgment denying enforcement. A trial court should not ignore evidence substantiating the existence of a disputed settlement agreement if such tangible and probative evidence in fact exists.11 Again, in cases where enforcement of a disputed settlement agreement is denied and judgment entered, the trial court is in the best position to determine whether a hearing is necessary to gather evidence demonstrating the existence of a valid settlement agreement—the terms of which must be reasonably certain and clear. Of course, that an evidentiary hearing is necessary to determine disputed terms may militate against a finding that such terms are sufficiently certain and clear to deem an agreement to have been reached.

If a court denies enforcement of a disputed settlement agreement and enters judgment, the aggrieved party may always move for relief from judgment under Ohio Civ.R. 60(B) in the underlying dismissed action. But should the original dismissal be set aside when the parties have agreed to dismiss the lawsuit with prejudice but failed to agree on the terms of the conditional dismissal? What about under the conditional-dismissal language used by the trial court in Artisan: either party “may, on good cause shown, within sixty days, request further action if settlement is not consummated *** and that on agreement, and within sixty days, the Parties may submit a supplementary entry outlining details of the settlement.”12 Does equity favor a party who fails before the deadline expires to notify the court that a signed settlement agreement has not been consummated? Probably not, but perhaps a factual scenario could be posited demonstrating excusable neglect or otherwise justifying Civ.R. 60(B) relief.

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Endnotes
1 Rulli v. Fan Co., 79 Ohio St.3d 374, 1997-Ohio-380, 683 N.E.2d 357.
2 12th Dist. No. CA2010-02-039, 2010-Ohio-5427.
4 Rulli v. Fan Co., 79 Ohio St.3d 374, 1997-Ohio-380
5 Id. at ¶ 41; see generally Mack v. Polson Rubber Co., 14 Ohio St.3d 34, 470 N.E.2d 902, syllabus (1984); FirstMerit Bank, N.A. v. Ashland Lakes, L.L.C., 5th Dist. No. 11-COA-017, 2012-Ohio-549, ¶ 19 and 22 (“In the absence of a legitimate factual dispute, the trial court was not required to conduct an evidentiary hearing before refusing to enforce a disputed settlement agreement.”).
7 See, B.W. Rogers Co. v. Wells Bros., Inc., 3rd Dist. No. 17-11-25, 2012-Ohio-750, ¶ 23, (Where issues of fact remain, “the trial court was required to hold an evidentiary hearing before making a ruling.”)
8 See, also, FirstMerit Bank, N.A., supra.
9 Rulli supra, citing 1 Corbin on Contracts (Rev.Ed. 1993) 525, Section 4.1; James Ward & Co. v. Wick Bros. & Co., 17 Ohio St. 159 (1867); Columbus, Hocking Valley & Toledo Ry. Co. v. Gaffney, 55 Ohio St. 104, 61 N.E. 152 (1901).
Ohio’s missing evidence rule

Re-visiting the importance of document retention in today’s electronic era

by Jonathan Krol

It goes without saying that cases are, by and large, won or lost on the facts. Not surprisingly then, trial attorneys direct each phase of litigation at compiling evidence to establish facts most favorable to the client’s case. But amidst the hustle and bustle of case handling focused primarily on gathering admissible evidence, it is not hard to lose sight of the importance of those pieces of evidence that are unavailable. While it may come as a surprise to even seasoned practitioners, cases can be decided on evidence not present at trial, due in large part to the common law “missing evidence” doctrine.

As technology evolves, methods of retaining, vetting and producing evidence—particularly electronically stored information (ESI)—become more efficient. But, all the while, these improvements result in more extensive, expensive and burdensome discovery. Despite technological advances—and, perhaps, at times because of them—relevant data can be lost, misplaced or prematurely discarded. Ohio courts have devised methods of managing these situations, premised largely on the use of permissive inferences and jury instructions. It is important for any litigator to understand the missing evidence doctrine, how it works and how the doctrine differs from spoliation.

Missing evidence versus spoliation of evidence

Although Ohio courts necessarily analyze “missing evidence” in the context of spoliation claims, judges and lawyers often conflate the two and overlook fundamental distinctions. This is not surprising, considering attorneys regularly use some aspect of the missing evidence rule in conjunction with claims of spoliation. Still, to fully grasp the concepts, one must review the missing evidence rule in isolation.

The missing evidence doctrine is akin to an evidentiary rule, or more precisely, a method of indirect proof (i.e., a type of circumstantial evidence). It is a principle that governs how and when a party can request the jury to make an inference about the evidence that is no longer available. Simply stated, Ohio courts generally require an aggrieved party to demonstrate malfeasance (or at least gross neglect) before including a jury instruction on a permissible adverse inference relating to specific missing evidence.1 If there is no showing of wrongdoing, courts generally do not instruct the jury on negative inferences directly but rather include a general instruction on inferences.2

Spoliation of evidence, on the other hand, is recognized as a tort in Ohio, an element of which incorporates missing evidence. Ohio is one of a growing minority of states that recognizes spoliation as an independent cause of action. The prima facie case requires pending or probable litigation involving the plaintiff; knowledge on the part of defendant that litigation exists or is probable; willful destruction of evidence by defendant designed to disrupt the plaintiff’s case; disruption of the plaintiff’s case; and damages proximately caused by the defendant’s acts.3 If for no other reason, spoliation claims are significant because they may give rise to punitive damages.

Practical ramifications of missing evidence

The missing evidence doctrine is important for two reasons: to determine whether the trial judge will permit counsel to argue to the jury that an adverse inference can be drawn from the missing evidence and whether the judge will give specific instructions to the jury on adverse inferences related to missing evidence.

Even without a showing of malfeasance, the court may permit an aggrieved party to argue that the jury can, and should, make a negative inference based solely on the fact that evidence formerly in possession and control of the opposing party is no longer available. The trial judge should only do so if the other party cannot offer a reasonable explanation.4

In effect, once one party demonstrates that evidence within the sole custody of another is “missing,” the burden then shifts to the opposing party to offer a reasonable explanation. Failure to meet this burden will result in the judge permitting an aggrieved party to argue adverse inference to the jury—regardless of whether a specific jury instruction is given (when malfeasance or gross negligence is established).

Like other evidentiary decisions, trial courts are given much leeway in handling these situations, and appellate courts will only reverse on finding an abuse of discretion. Naturally, what constitutes a “reasonable explanation” is subject to varied interpretation. While the case law on this issue is not well developed, an excuse that evidence is “not ordinarily retained” may not be sufficient to preclude an adverse party from arguing that the missing evidence was detrimental to the party who “discarded” it.5

Be prepared

Although navigating the intricacies of the missing evidence doctrine is certainly not the most vital (or exciting) aspect of each trial, a firm grasp on the doctrine should be an essential part of any practitioner’s toolbox. After all, issues relating to missing evidence can and do arise at trial without warning. Perhaps more important, attorneys should recognize and counsel clients on the importance of sophisticated document retention and production policies. Preventative measures are the best way to reduce the chances of damaging inferences from missing but otherwise innocuous evidence.

Author bio

Jonathan Krol practices in the Cleveland office of Reminger Co., LPA. He concentrates his legal practice in the areas of Professional Liability, Employment and Labor Law, and General Liability. He is a member of the Ohio State Bar Association and the Cleveland Metropolitan Bar Association.

Endnotes

1 See, e.g., Schueller v. Maguire, Hamilton App. No. C-020555, 2003-Ohio-6917, ¶24 (“Ohio courts normally would require a strong showing of malfeasance—or at least gross neglect—before approving such a charge.” (Quotation omitted)).
2 See, e.g., Ohio Jury Ins. CV 207.07.
3 See Smith v. Howard Johnson Co., Inc., 67 Ohio St.3d 28, 29 (1993); Ohio Jury Ins. CV 437.01.
5 See, e.g., Branch v. Cleveland Clinic Found., Cuyahoga Cty. No. 95475, 2011-Ohio-3975 (permitting counsel to argue adverse inference despite testimony presented to establish that the missing evidence was not ordinarily retained).
Practice guide for the Court of Claims

by Randall W. Knutti

The Ohio Court of Claims hears a wide variety of cases against state departments, boards, offices, commissions, agencies, institutions, colleges and universities, but it remains unknown to many lawyers and little known to many more. This guide seeks to change that. Here, in brief, is what any lawyer practicing in the Court of Claims should know.

The court's function

The Court of Claims has two main functions: to decide claims against the state and determine whether state employees are entitled to personal immunity for their conduct. Claims against the state seeking $10,000 or less are determined administratively by the clerk, who reviews investigative reports prepared by the state along with the plaintiffs' responses to those reports and issues a decision along with findings of fact and conclusions of law. Either party may appeal the clerk's decision to the court, but no further appeals are allowed. All other claims for money damages against the state are heard by judges in bench trials, though third-party claims and claims by the state may be heard by juries. The Chief Justice of the Supreme Court appoints sitting common pleas or court of appeals judges, sitting Supreme Court Justices, or retired judges or justices to temporary assignments on the Court of Claims.

In immunity hearings, the Court of Claims determines whether state employees may be sued personally. At common law, plaintiffs normally elect whether to sue employers, employees or both. Through the Court of Claims Act, though, the state agreed to assume liability for its employees' conduct unless those employees acted “manifestly outside the scope . . . of [their] employment” or employees that acted with “malicious purpose, in bad faith, or in a wanton or reckless manner.”

 Plaintiffs seeking to sue state employees must first file suit in the Court of Claims, which has the exclusive, original jurisdiction to determine whether the employees' conduct warrants their being stripped of the personal immunity to which they are entitled under R.C. 9.86. If the court finds that the employees are not entitled to immunity, any suit must be filed in a common pleas court. Both the Ohio Rules of Evidence and the Ohio Rules of Civil Procedure apply in the Court of Claims, and all appeals are heard by the 10th District Court of Appeals.

Jurisdiction and defenses available to the state

There are five main limitations on the jurisdiction of the Court of Claims. First, the court has no power to hear purely equitable claims, though it does have jurisdiction to hear equitable claims when they are combined with claims for money damages. In general, claims for restitution of a determinate, but not previously fixed amount may be equitable rather than legal. For example, in Santos v. Ohio Bureau of Workers Compensation, the Supreme Court of Ohio stated: “A suit that seeks the return of specific funds wrongfully collected or held by the state is brought in equity. Thus, a court of common pleas may properly exercise jurisdiction over the matter as provided in R.C. 2743.03(A)(2).” Second, the Court of Claims has no jurisdiction to hear claims that could be brought against the state before the Court of Claims Act became law in 1975. Third, the state consented to be sued in the Court of Claims only “in accordance with the same rules of law applicable to suits between private parties.” Because private parties do not set public policy, the state remains immune from suits challenging legislative or judicial functions and from suits challenging high-level policy decisions. The remedy for plaintiffs who quarrel with that type of discretionary decision-making lies at the ballot box, not in the Court of Claims. The state can, however, be found liable for negligence in implementing policy decisions. Likewise, because private parties cannot be sued for violating constitutional provisions that apply only to the state, the state cannot be sued for those claims in the Court of Claims. But the state can be sued in the Court of Claims for constitutional claims that apply both to the state and to private parties, such as the minimum wage provisions of the Ohio Constitution.

Fourth, the state cannot be sued for violating purely public duties—such as licensing, inspecting, auditing and law-enforcement duties—unless the court determines that the state and the plaintiff had a “special relationship” characterized, among other things, by the state’s affirmative undertaking to act on the plaintiff’s behalf and by the plaintiff’s reliance on that undertaking. Finally, the Court of Claims has no jurisdiction to enforce or even to interpret the terms of a public collective bargaining agreement.

In addition to jurisdictional issues, the state has a number of defenses that normally do not apply outside the Court of Claims. For example, the statute of limitations in the Court of Claims is the shorter of two years or the period that would otherwise apply. Recoveries against the state are reduced by collateral recoveries received by the plaintiff, and that includes insurance proceeds, disability awards and judgments in suits against other parties. And, in the case of public colleges and universities, non-economic damages are capped at $250,000.
Examples of jurisdictional limitations
A claim seeking the return of excess child support payments is an example of a purely equitable claim for restitution.14 Claims that were permissible before the Court of Claims were created in 1975—and, therefore, are not within the Court of Claims’ jurisdiction—include claims against the Ohio Public Employees Retirement System, the Ohio Public Employees Deferred Compensation Program, the Ohio Building Authority and the Ohio Turnpike Commission.15 Mandamus actions were likewise permissible before 1975 and are likewise not within the Court of Claims’ jurisdiction.16 Claims involving high-level policy decisions for which the state remains immune from liability—and therefore cannot be sued in the Court of Claims—are likewise not within any relevant, shorter period. If the Court of Claims is found to lack jurisdiction, the savings statute will apply, and the case can be refriled in the appropriate court. However, a plaintiff who sues in another court within the statute of limitations that normally applies in that court, but later than two years after the claim accrued, does not benefit from the savings statute.

Immunty determinations
The issue in an immunity hearing is whether a state employee acted “manifestly outside the scope of [his or her] employment” or “malicious purpose, in bad faith, or in a wanton or reckless manner.”19 The scope of an individual’s employment is broadly construed. “An employee’s wrongful act, even if it is unnecessary, unjustified, excessive or improper, does not automatically take the act manifestly outside the scope of employment. * * * The act must be so divergent that it severs the employer-employee relationship.”20 And the standard of proof required to strip a state employee’s immunity on grounds of malicious conduct is similarly high. “The standard for showing reckless or wanton misconduct is high. Mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.”21

Author bio
Randall W. Knutti is the principal attorney for Ohio Attorney General Mike DeWine’s Court of Claims Defense Section.

Endnotes
1 R.C. 2743.10(B), (C), and (D).
2 R.C. 2743.03(B).
3 R.C. 2743.02(F).
5 R.C. 2743.02 (A)(1).
6 R.C. 2743.02(A)(1).
7 E.g., Reynolds v. State, 14 Ohio St. 3d 68, syllabus at 1 (1984).
8 Article 2, §34 of the Ohio Constitution.
9 R.C. 2743.01(E) and 2743.02(A)(3)(b).
10 E.g., Gudin v. Western Reserve Psychiatric Hospital, Case No. 00AP-912, 2001 Ohio App. LEXIS 2634 at *6-*7 (10th Dist. June 14, 2001).
11 R.C. 2743.16.
12 R.C. 2743.02(D).
13 R.C. 3345.40(B)(3).
14 E.g., Dunlap v. Ohio Dept. of Job & Family Services, 2012-Ohio-1378 (10th Dist.).
15 E.g., R.C. 145.09, 145.72, 152.14 and 5537.04.
16 E.g., Krug v. Ohio Dept. of Natural Resources, 100 Ohio App.3d 444 (10th Dist. 1995).
17 Wallace v. Ohio Dept. of Commerce, 96 Ohio St. 3d 266, 278 (2002).
18 E.g., Longstreet v. Industrial Comm’n of Ohio, 2007-Ohio-1883 (Ct. of Claims).
19 R.C. 2743.02(F).
21 Caruso v. State, 136 Ohio App. 3d 616, 622 (10th Dist. 2000); see also Marinucci v. Ohio Dept. of Transp. (Jan. 18, 2000), Franklin App. No. 99AP-500, 2000 Ohio App. LEXIS 93 at *5 ("the term ‘reckless’ is often used interchangeably with the word ‘wanton’ and has also been held to be a perverse disregard of a known risk.").
Interview with candidates for OSBA president-elect

Why did you choose to be a lawyer?

MM: I can’t honestly say I chose to be a lawyer, because I don’t remember a time when I didn’t want to be a lawyer! I could not think of a better career for me in which to combine intellectual stimulation with the gratification that comes from helping others. While at John Carroll, where I majored in English, I started to prepare for a law career. Learning to read and write properly helped me in law school and has become an asset in my career.

BB: When I was a freshman in high school I joined the speech and debate team. I enjoyed advocating for my “client” and learning the new information required for each case. So, I thought I would enjoy being a trial lawyer. I geared my studies in that direction and have now been a trial lawyer for 26 years. I love it. It has been the perfect career for me.

The OSBA’s goal is to be indispensable to lawyers. With that in mind, what is one thing the OSBA can do to help lawyers in their practices every day?

BB: The OSBA becomes indispensable when it offers anything that helps lawyers become more efficient. Because of the glut of lawyers, global market forces and the availability of “do-it-yourself” legal products, lawyers are under tremendous pressure to do everything fast and for a low price. As a result, lawyers need to be super-efficient so they can remain competitive while still making a decent living. Thus, the OSBA should continue to offer products such as OhioDocs, online seminars, and the OSBA Report smartphone app and continue to be innovative in developing other efficiency-enabling products.

MM: It is essential that OSBA continue to cultivate relationships with the local bar associations and specialty bars, which are better poised to know each of their members and those members’ needs. OSBA can then take the knowledge garnered from these associations and tailor its programs and services to complement those available at the local and specialty level, and to advocate for each and every one of its members. Pro bono is an area in which collaboration with local and specialty bars would be appropriate as well.

What new innovations for non-dues income or other benefits to the association would you promote?

BB: Vote for me and I’ll tell you … just kidding! Other bar associations have an entrepreneurial committee whose sole function is to identify research, analyze and, if it appears to be a good risk, implement income generating programs. These committees have been successful because of their limited focus and their members, who come from diverse practice areas and nontraditional legal careers. Their members usually serve three-year staggered terms and may be reappointed for a second term. They basically are a rotating creative think tank. The OSBA should establish such a committee.

What is the biggest issue/concern in the legal profession and what role should the OSBA play in addressing it?

BB: The number of unemployed, underemployed and “not-practice-ready” lawyers. The OSBA has already implemented strategies for addressing this issue, such as assisting law schools in producing fewer but better equipped new lawyers. What we’re missing is a mentoring program for lawyers who have been in practice for two to 10 years. In the first year of practice, the Supreme Court of Ohio offers a mentoring program. After that first year, most attorneys still need a mentor. It is particularly important for the many new attorneys forced to open their own practices. The OSBA should have a mentoring program for those attorneys.

MM: The proliferation of new lawyers faced with student loan balances and no job prospects is a major concern. Two of my children are attorneys, and I want to see them derive the same benefits that I have been able to enjoy from my career and long bar association involvement, both at the state and local level. I have always supported, and continue to support, the OSBA Young Lawyers Section and its efforts to involve young attorneys at the local, state and national levels. It is imperative that these young people get, and remain, involved via bar associations, and find employment.

Cast your vote for president-elect at the 2013 OSBA Annual Convention in Cleveland, May 8-10. For more information, go to convention.ohiobar.org.
Committees and Section News

Committees and sections at the OSBA Annual Convention

Visit us at the Committee and Section Involvement Booth at the OSBA Annual Convention in Cleveland, May 8-10. Learn more about committees and sections, and you could walk away with a new iPad mini, courtesy of the Senior Lawyers Section. For a complete meeting schedule, visit www.ohiobar.org/convention.

Solo, Small Firms and General Practice Section

Please watch for the 2013 Economics of Law Practice Survey in your inbox. Your participation in this survey enables the section to generate detailed analysis of the current economic conditions for lawyers. This award-winning triennial report provides the timeliest and most pertinent reference guide for attorneys, law firms, government agencies, the judiciary, in-house counsel and other legal organizations in Ohio.

Kathy A. Stoneman, chair
kathy@stonemanokkeylaw.com

Military and Veterans’ Affairs Committee

The OSBA Military and Veterans’ Affairs Committee partnered with the Ohio National Guard to support and promote the Ohio Military and Veteran Legal Assistance Program (OMVLAP). Several legal professionals and community leaders were invited to participate in an orientation flight on April 11, 2013, at Rickenbacker Air National Guard Base in Columbus. Attendees learned about the contemporary role of the Ohio National Guard and the evolution and goals of OMVLAP while flying on board a KC-135 “Tanker” and observing another military plane being refueled in the air.

COL. Duncan Aukland, chair
duncan.aukland@us.army.mil

The Ohio State Bar Association has 43 committees and sections. For more information on their activities or to join, please contact OSBA Committee and Section Manager Jessica Tobias at jtobias@ohiobar.org.

OSBA enhances webcasts with new OSBA CLE Studio

Beginning in 2014, the Supreme Court of Ohio’s continuing legal education changes will allow lawyers to earn half of their 24 hours through self-study credit hours. In response to this change, the Ohio State Bar Association launched its new recording studio to further enhance lawyers’ self-study experiences. The studio allows OSBA to create shorter, more niche prerecorded topics and also broadcast live seminars that will be more convenient and timely for participating lawyers.

The new studio offers the ability to support smaller audiences, has HD quality and allows participants to ask questions during live programs. Both prerecorded and live programs will be offered, running one to two hours in length. The live programs offer participants the ability to email with questions during the seminar and have their questions answered during the program.

Additionally, the studio allows OSBA to communicate with its members in faster and innovative ways. The studio can be used for recording information clips on OSBA products, services and events from staff members and others associated with the organization. This will allow OSBA’s members to stay connected and be more involved with the organization.

Any speakers who are interested in volunteering for CLE presentations should contact the OSBA for more information. The OSBA’s goal is to give its members the best experiences possible, and this new studio will provide better quality and more specific topics to keep lawyers up to date on legal developments while also making self-study programs shorter and more convenient.

For more information, go to http://osba.inreachce.com/?TabName=Webcasts to view a list of the OSBA’s scheduled webcasts.

Become an OSBA Certified Specialist

The deadline for applying to become an OSBA Certified Specialist is June 30. Thanks to OSBA committees and sections for their work and development of the OSBA Specialty Boards for Certification in:

- Administrative Agency Law
- Appellate Law
- Business Commercial and Industrial Real Property Law
- Estate Planning, Trust and Probate Law
- Family Relations Law
- Federal Taxation Law
- Insurance Coverage Law (New)
- Labor & Employment Law
- Residential Real Property Law
- Workers’ Compensation Law

More information can be found at www.ohiobar.org/specialization or by calling OSBA Certification Manager Melissa Quick at (614) 487-4411.

OCLRE thanks volunteers

On behalf of the Ohio Center for Law-Related Education, “thank you” to the volunteers who served as coordinators for the 30th annual Ohio Mock Trial Competition. This season, 365 teams representing more than 180 high schools competed at 31 District sites; 104 teams advanced to 12 Regional Competition sites. Each district and regional competition was administered by a local volunteer coordinator whose time and efforts are invaluable to the success of this truly statewide program.

Inside OSBA
Above is the motto shared by Mick L. Proxmire and his firm, Reminger Co., L.P.A., and one he certainly demonstrates through his work with clients, his dedication to family and his many mission trips as a member of the Church of Nazarene.

Proxmire, who specializes in the areas of workers’ compensation and employer defense, originally worked in Trucking Risk Management before pursuing a career in law. This experience added insight to the business side of his law practice, but his mission trips have also contributed to his work as an attorney. Proxmire has participated in numerous trips around the world to improve the lives of the less fortunate and to share his faith with others, and he continues to return home with meaningful lessons and memories to share.

In Africa, Proxmire laid bricks to assist building a new church; in Mexico, he worked as a medical assistant for a physician; and in Nicaragua, he helped his team run electricity into a school. Proxmire believes, throughout these many manual tasks, the most important is the opportunity to “interact with the people and share the message of Jesus Christ to give them hope.”

Most recently, Proxmire visited Chiapas, the southernmost state of Mexico. This tremendously poor area formerly relied on drinking water from muddy lakes and streams nearby; therefore, the mission involved the installation of water filtration units to ultimately bring fresh water to areas in two separate villages. During his time in Chiapas, Proxmire became aware of just how grateful these people were for the help and assistance but admired that they were never looking for a handout. “Their individual work ethic and physical capacity to work at any job is awe-inspiring,” said Proxmire.

Reflecting on these trips it was easy for Proxmire to recognize that the United States and its citizens are very blessed. “What we consider poor here is nothing to the world’s standard or definition,” said Proxmire. During his trips, he saw that, despite the less fortunate’s often “meager means and existence,” they push forward and are able to make do with what they have.

“I believe it is the role of the individual to help those less fortunate. What better way to help than to go, do and experience,” said Proxmire. “The experience is always humbling and keeps me grounded in who I am.”

Proxmire’s experiences have given him the chance to help the less fortunate and share his faith with people around the world, but many lessons learned on these trips were just as importantly brought back home. “The humility and inspiration I receive from participating spills over into my interaction with injured workers, employer clients and my colleagues.”

Of the many places he has traveled, Proxmire said that while “the trips [he has] participated in have varied in their scope and physical goal—the spiritual goal is always the same.”

So far two of Proxmire’s three sons have accompanied him on a mission trip and the experience is one of great importance to him. For Proxmire, “it is hard to describe what it means to a father to watch his boys become men. We go on the trip not as father/son but as brothers in the same cause.”

Proxmire encourages others to experience this kind of mission work for themselves. “I have been blessed with so much physically and materially. Others are not so fortunate.” Proxmire hopes all will have the chance to travel to make a difference for places in need around the world.

Catharine Lewis is a student at The Ohio State University and served as intern in the Ohio State Bar Association publications department.
Benjamin Franklin said, “In this world, nothing is certain but death and taxes.” With regard to the latter, I rely on the expertise of our government affairs staff to perhaps decrease the certainty to which Dr. Franklin refers. The former, however, is a 100 percent certainty.1

Increasingly, lawyers are considering, if not a way to avoid death, at least a way to mitigate the effect of our unavailability on clients to whom we owe a fiduciary obligation and our family and staff.

If we do nothing, the Supreme Court of Ohio has established a default provision to address such situations:

Appointed Attorney to Inventory and Protect Clients. Whenever an attorney is suspended for mental illness or pursuant to Section 5a of this rule, cannot be found in the jurisdiction for a period of sixty days or more or such shorter time as ordered by the Supreme Court, dies, refuses to meet or work with a significant number of clients for a period of sixty days or more, or fails to comply with division (E) of this section, and no partner, executor, or other responsible party capable of conducting the attorney’s affairs is available and willing to assume appropriate responsibility, the Disciplinary Counsel or chair of a Certified Grievance Committee may appoint an attorney or attorneys to inventory the files of the attorney and take action, including action set forth in division (E) of this section, as is necessary to protect the interest of clients of the attorney. Upon approval by the Secretary of the Board, reasonable fees may be paid to the appointed attorney or attorneys from the Attorney Registration Fund. Except as necessary to carry out the order of appointment by the Disciplinary Counsel or chair of a Certified Grievance Committee, the appointed attorney or attorneys shall not disclose any information contained in inventoried files without the written consent of the client to whom the files relate. An appointed attorney may not represent that client.2

The inventory authorized by this section, in my view, is a blunt instrument when something more sophisticated is better suited to our needs, and the Court has given it to the bar in the phrase italicized above. As the bar ages, the need for the alternative increases.

I have seen photos of deceased lawyers’ file rooms that contain 12 to 15 eight-drawer cabinets that no one knows much, or anything, about. I know of other situations where the lawyer dies and the postal carrier is the first to raise a concern when two or three weeks of mail stack up outside the office door. In such situations, the lawyer did a disservice to both clients and family.

The Ohio State Bar Association’s Masters at the Bar Task Force recognized the significance of this issue and in 2011 issued a report that recommended a means to address it.

Perhaps the most frequently discussed issue, among the members of the Task Force and by nearly all presenters and consultants, is the need to consider changes in several rules of the legal profession. It is clear that many lawyers, young and old, and particularly solo practitioners, do not have a plan or “exit strategy” in case of sudden death, disability, or absence. This can cause serious, even devastating, effects on the client, lawyer, local bar, and community. In fact, some liability insurance carriers require such backup arrangements. Similarly, certified grievance committees across the state are seeing more solo lawyers, including those just starting out and “practicing from a laptop,” who simply abandon their “practice,” creating numerous problems. This problem of client abandonment is exacerbated by the fact that existing Gov. Bar R.V, Section 8 (F) requires a certified
grievance committee to wait 60 days to intervene if a lawyer is unable or unwilling to continue practice.

The Task Force unanimously recommends that the Supreme Court of Ohio amend Rule V and VI of the Rules for the Government of the Bar of Ohio (Registration of Attorneys) to require each lawyer in Ohio to designate a “Surrogate Attorney” to take over the practice in case of sudden death, disappearance, disability, or incapacity, including, under certain circumstances, disbarment or suspension from the practice of law.3

As noted in the report, the remedies suggested were amendments to Gov. Bar R. V and VI requiring the appointment of a “Surrogate Attorney.” The Supreme Court declined to propose such amendments. However, and significantly, such action does not foreclose attorneys from acting individually to address this situation. In other words, so long as the Rules of Professional Conduct are complied with, lawyers may adopt practices to limit harm to clients in the event of their death, disability or disappearance. The details of such a surrogate attorney relationship are relatively complex and cannot be addressed in this short article. I anticipate a more detailed article in the next issue.

In the interim, there are some matters that should be taken into consideration when contemplating such an arrangement. First, who should be the surrogate attorney? (Here is where the relationships established through committee and section work may be helpful.) Second, when do the surrogate’s responsibilities begin; on what basis or evidence is it determined that a lawyer has disappeared or become permanently incapacitated and what about HIPPA? Third, what are the surrogates’ specific powers?

May the surrogate access the office, open mail, be a signatory on financial accounts, notify clients, make insurance decisions, pay staff, etc.? Or, is some other type of arrangement better suited? The answers to these questions are, as noted, neither simple nor self-evident. I hope to explore the issues further in a later article, and, if unable to do so, I have a surrogate available to help.

An ounce of prevention

It is a fact that the bar is aging. Our records show, for example, that nearly 56 percent of OSBA members are 50 years old or older. As professionals, we have an obligation to assure that clients are not harmed because of a lack of preparation especially preparation for something that is reasonably certain to occur. Think about how your clients would fare if something untoward befell you. Turning once again to Dr. Franklin, “An ounce of prevention is worth a pound of cure.”

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

Endnotes

1 Based on my own observations.
2 Gov. Bar R. V §8(F)
3 Report from Masters at the Bar Task Force, at page 7.
4 The broader the powers, the more likely that the Rules of Professional Responsibility will present significant issues, e.g., client confidences or consent and conflict of interest.

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I believe Judge Frank G. Forchione’s article in the September/October 2012 issue of Ohio Lawyer comes up short in the analysis of what the problem is with the current status of the law with regard to properly considering the damages to plaintiffs in personal injury cases.

Having practiced law in Ohio for more than 46 years, more than 16 of which I have served as a magistrate or judge in common pleas courts, I have had a front row seat to the development of the law in this area.

The problems in this area of law are not related to the true parties in interest—the plaintiffs and defendants—but revolve solely around the interests of insurance companies and their profits.

The law rightfully makes a person who is negligent responsible for the damages caused to others by their negligent acts. In addition to the pecuniary loss, it also rightfully makes the defendant liable for less easily measured losses such as pain and suffering, etc., which is the truly difficult part for juries to evaluate.

Needless to say, jurors, for lack of another clear method to evaluate these losses, look to the length and expense of treatment to arrive at a fair way of affixing a value to these damages of a plaintiff.

Ideally, who is paying the costs of the plaintiff’s medical and other out-of-pocket expenses should not even be addressed to the jury. It is the jury’s function to determine liability and affix damages, which does not require the jury to know anything about insurance for which either the plaintiff or the defendant may have contracted to provide a source of protection from their expenses of loss.

As I have watched the evolution of the law with regard to the issues of insurance in these cases, it is clear the interests of insurance companies have overshadowed the true intent of protecting one person from the negligent acts of another and making the negligent person liable for the damages he or she causes to another.

In the case of medical bills, the patient is a forgotten entity. If he or she does not have insurance, the bill is for what is considered the full cost of treatment. However, if he or she has insurance, or are covered by Medicare or Medicaid, the health care provider enters into an agreement with the insurance companies or government—not the patient—to reduce the patient’s charges for the same service.

Under the current system, the responsible patient is penalized by paying for insurance to cover the costs of treatment that the defendant, by the law, should be responsible for paying. The plaintiff is not reimbursed for his or her cost of having insurance to reduce the amount paid to the provider, which works to the benefit of the defendant, not the injured party.

While it is appropriate for the jury not to know if the defendant has insurance while carrying out their duty to affix the liability and damages, based on the facts and law, and not the “deep pocket” theory, it is not appropriate to interject the insurance issues into muddying the waters for the jury in affixing damage values to the injured party’s losses. Clearly, the jury should not be led to speculate on whether either party in the litigation has insurance. The jury should be clearly instructed that whether a collateral source has agreed to make either the plaintiffs or defendant’s payments for their obligations should not affect their determination of damages.

There is a relatively easy way to fix the problem of the collateral source issue of double payment without adversely affecting the jury process. It is not a solution that the courts should undertake because courts should not legislate.

However, the legislature could easily fix this problem by making the issue of balancing of collateral source payments a matter for the court to decide, and not the jury, after the jury has reached a verdict on liability and damages, using the maximum charge any provider will charge any patient, without regard to insurance. Provider write-offs should not be considered because that just passes the responsibility of the negligent person off onto the rest of society, who pays for those expenses in increased medical charges.

The court could then reduce the verdict by the amount the bill is reduced because of Medicare, Medicaid or insurance adjustments but adding back into the damages the cost of the plaintiffs medical insurance coverage that benefitted the defendant by obtaining the adjustments in the payment of the patient’s bills to the maximum of any total adjustments.

Clearly, the issues in this area of the law have forgotten the true parties in interest, the plaintiffs and defendants, by placing the interests of the collateral sources ahead of the parties to the legal action.

This needs to stop.

Ronald G. Kaufman is the senior member of the law firm of Kaufman, Kaufman & Associates Co. L.P.A. in Sandusky. He has practiced law for 47 years. Kaufman previously served as an Erie County probate judge and as a magistrate of the Huron County Common Pleas Court.
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Current OSBA Certified Specialists

Sonia Sotomayor, the first Hispanic woman appointed to the U.S. Supreme Court, has joined with the majority again. Her first book, My Beloved World, aligns her with four other current justices who have published a book since joining the high court.

The daughter of immigrant Puerto Rican parents, Sotomayor was born in 1954 in New York City. Her father labored as an uneducated factory worker and died when she was nine. Her mother worked as a nurse, raising Sotomayor and her younger brother in the Bronx housing projects.

My Beloved World is a gritty autobiography, told with refreshing candor. Some memories are searing and painful to recall. She laments feeling a sense of shame for events beyond her control. The sudden death of her alcoholic father, her constant fear of lapsing into a diabetic coma, the difficulties in conquering the nuances of the English language while raised in a Spanish-speaking household, her mother’s battles with depression and Sotomayor’s own pangs of guilt over her divorce after graduating from Yale Law School are addressed bluntly and in detail.

She is not afraid to offer some self-deprecating comments, confirming opinions that she was a “nerd” and “built like a brick shit-house.” Determined to overcome her “gawky and ungraceful” appearance, she took dance lessons to be able to get on the dance floor. She writes, with flashes of humor, “I don’t claim to be flawless. I’m a New Yorker, and I jaywalk with the best of them.” She practiced throwing a baseball for 20 minutes a day for several weeks while in her first term on the U.S. Supreme Court before throwing out the ceremonial first pitch at a New York Yankees baseball game so that she could hurl a competent strike.

It is this sense of determination, an obsessive desire to succeed among adverse circumstances, and garner proven results, that makes My Beloved World an inspiring work and unique among books by a member of the federal judiciary.

After graduating from Yale Law School, Sotomayor litigated many cases while working with the New York District Attorney’s Office. She later worked with Pavia & Harcourt, a boutique Manhattan law firm, before joining the federal bench in New York while still in her 30s.

During the vetting process for her first appointment to the judiciary by the interviewing committee for New York Sen. Daniel Moynihan, she was asked,

“Don’t you think learning to be a judge will be hard for you?” I took a deep breath to gather my thoughts, and then the answer poured out:

“I’ve spent my whole life learning how to do things that were hard for me. None of it has ever been easy.

You have no idea how hard Princeton was for me at the beginning, but I figured out how to do well there and ended up being accepted to one of the best law schools in the country. At Yale, the DA’s office, Pavia & Harcourt wherever I’ve gone, I’ve honestly never felt fully prepared at the outset. Yet each time I’ve survived, I’ve learned, and I’ve thrived. I’m not intimidated by challenges. My whole life has been one. I look forward to engaging the work and learning how to do it well.”

Sotomayor deliberately omitted much discussion of her judicial career, writing, “[I]t seems inappropriate to reflect on a course still taking shape, let alone on the political drama attending my nomination to the High Court, however curious some may be about that.” She does offer some glimpses into her life-long ambition to be a judge, fueled by her devotion to watching episodes of the Perry Mason television show while growing up. “My idea of heroism in action was a lawyer, the judge being a kind of superlawyer. The law for me was not a career, but a vocation.”

My Beloved World, despite the inspiring title, begins as a sad tale of a deprived, sickly, and poor youth, but concludes with a fairy tale ending. Sotomayor has many stories still to tell. An obvious sequel looms in the future.

—Bradley S. Le Boeuf
Akron

ABA opinion offers guidance on judges and social media

The American Bar Association determined that judges’ use of social media does not compromise their ethical obligations if they are careful when using these various outlets. The ABA stated that judges may have to disclose prior relationships that exist on social media sites if overseeing a case where the prior relationship is involved. However, a social media connection does not indicate how close the judge may be with the individual or group on trial, according to the ABA.

The ABA also suggested tips for judicial candidates using social media outlets during an election. The ABA advises to avoid personally maintaining social media campaigns and to leave those duties to campaign managers, to be aware that “liking” something on other sites may run afoul of prohibitions against endorsing or opposing candidates, and to manage privacy settings to restrict the amount of people that can access the social media outlet.

—www.courtnewsohio.gov
Foundation News

Foundation welcomes new Fellows

The Ohio State Bar Foundation will welcome a dedicated group of new Fellows at the 2013 Fellows Reception and Induction Ceremony on June 5 at the Thomas J. Moyer Ohio Judicial Center. President Thomas D. Lammers and Chief Justice Maureen O’Connor will preside over the program and officially welcome new members.

These Fellows will join the ranks of 972 civic-minded attorneys from across the state to renew their passion for the law. While new Fellows will have the opportunity to work on a number of law-related volunteer projects, their contributions will fuel the Foundation’s grant-making efforts. Since the early ’90s, the Foundation has invested more than $8 million in grants to causes that align with its mission of advancing public understanding of the rule of law and building a better justice system across Ohio.

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.


Judge Eve V. Belfance  Tricia C. Bell  Susan Blasik-Miller  Jennifer L. Bouhall  Melinda K. Burton  Christopher F. Cariño

Kendra L. Carpenter  Patrick B. Cavanaugh  John C. Childers  John D. Clark  Sarah A. Corpening  Christopher F. Cowan

When you honor, celebrate or recognize the significant people in your life with tax-deductible gift to the OSBF, you support outreach, education and justice. One hundred percent of your tribute gift supports statewide OSBF grants. Dedicate your gift today by visiting OSBF.net and clicking “Donate Now,” or by calling (614) 487-4477.

**HONOR. REMEMBER. CELEBRATE.**

When you honor, celebrate or recognize the significant people in your life with tax-deductible gift to the OSBF, you support outreach, education and justice. One hundred percent of your tribute gift supports statewide OSBF grants. Dedicate your gift today by visiting OSBF.net and clicking “Donate Now,” or by calling (614) 487-4477.

**IN HONOR OF**

Denny Ramey
Thomas J. Bonasera
Duke W. Thomas

Stephen F. Tilson
Patrick Frye


**Recognize Excellence**

**NOMINATIONS DUE JUNE 1**

Those who make strides to improve the law deserve praise. The Ohio State Bar Foundation honors lawyers, community members, and organizations that build a better justice system. For awards criteria and a nomination form, visit [www.osbf.net/what-we-do/awards](http://www.osbf.net/what-we-do/awards) or contact Beth Gillespie at bgillespie@osbf.net (614) 487-4474.
According to the American Bar Association’s 2012 Legal Technology Survey Report released in July 2012, 89 percent of attorneys reported using a smartphone for law-related tasks while away from their primary workplace.

As for tablets, such as the iPad, 33 percent of lawyers said they used a tablet computer this year for law-related tasks while away from their primary workplace, which is up considerably from just 15 percent in 2011.

While this technology might be changing the way you practice, the OSBA also believes it can change the way you interact with your Association. There are two member benefits that the OSBA is particularly excited to offer that cater to both smartphones and tablets—the OSBA Report Online and the OSBA eBook Library.

**OSBA Report Online and app**
The *OSBA Report Online* takes the familiar green book and turns it into a daily or weekly index of Ohio case summaries through a customizable email and mobile-enabled website.

The *OSBA Report Online* is available as a daily or a weekly email—you get to choose which option you prefer. You can even choose which practice areas and courts you want to include. The Report also features breaking OSBA and legal news and the latest job listings from our online career center. Case summaries are available six to nine weeks sooner than they appear in the print version—a feature that could prove invaluable when preparing for a case.

In September, the *OSBA Report Online* won a 2012 National Association of Bar Executives (NABE) Luminary Award for excellence in electronic publications during the NABE Communications Workshop in Denver, Colo.

There is also an *OSBA Report* mobile app for iPhone and Android devices that offers all of the features of the email and the website, and it is always there on your phone, ready when you are.

**OSBA CLE eBook Library**
Another exciting new member benefit is the Ohio State Bar Association eBook Library. OSBA members who have registered for at least one live CLE seminar have access to all of the eBooks in the library, which includes eBooks from all CLE seminars, district meetings and convention seminars. Available formats include pdf, epub (for use with most e-readers) and mobi (for Kindles). The library currently includes more than 220 books and is fully searchable by author, title, contents and practice area.

Check out the library at www.ohiobar.org/ebook.

To learn more about these member benefits, go to www.ohiobar.org/agooddecision.
**Akron**

*Peter T. Cahoon*, Buckingham Doolittle & Burroughs LLP, has been selected for fellowship at the American Board of Criminal Lawyers.

**Cincinnati**

*Thaddeus Driscoll*, Frost Brown Todd, has been accepted into the Board Orientation & Leadership Development Program by the United Way of Greater Cincinnati.

*David H. Lefton*, Barron Peck Bennie & Schlemmer, has been selected as secretary for the Solo, Small Firm and General Practice Division of the American Bar Association.

*Gerron L. McKnight*, Frost Brown Todd, has been selected into this year’s HYPE C-Change Class by the Cincinnati USA Regional Chamber.

*Jill P. Meyer*, Frost Brown Todd, is co-chair of the American Heart Association’s 2013 Go Red for Women Luncheon in Cincinnati.

**In Memoriam**

<table>
<thead>
<tr>
<th>Name</th>
<th>Age</th>
<th>City</th>
<th>Date</th>
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<tr>
<td>Mary E. Welsh</td>
<td>59</td>
<td>Dayton</td>
<td>Jan. 31, 2012</td>
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<td>Robert E. Anstaett</td>
<td>90</td>
<td>Upper Arlington</td>
<td>May 17, 2012</td>
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<tr>
<td>Judson Critchfield</td>
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<td>Millersburg</td>
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<td>Cecilia Schultheiss</td>
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<td>Middletown</td>
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<td>John Anderson</td>
<td>57</td>
<td>Delaware</td>
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<td>Andrew Ray Leeper</td>
<td>56</td>
<td>Loveland</td>
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<tr>
<td>Julien C. Renswick</td>
<td>89</td>
<td>Medina</td>
<td>Dec. 7, 2012</td>
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<tr>
<td>Kennedy Legler Jr.</td>
<td>89</td>
<td>Bradenton, Fla.</td>
<td>Dec. 9, 2012</td>
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<tr>
<td>Bruce Huffman</td>
<td>87</td>
<td>Toledo</td>
<td>Jan. 18, 2013</td>
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<tr>
<td>James Magee</td>
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<td>Cincinnati</td>
<td>Jan. 25, 2013</td>
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<td>Glenn Torch</td>
<td>64</td>
<td>Akron</td>
<td>Jan. 29, 2013</td>
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<td>Rudolph A. D’Amico</td>
<td>88</td>
<td>Kettering</td>
<td>Feb. 17, 2013</td>
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<td>W. Leo Keating</td>
<td>91</td>
<td>Warren</td>
<td>March 8, 2013</td>
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<td>James R. Manley</td>
<td>68</td>
<td>Willoughby</td>
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<td>Jack Gallon</td>
<td>82</td>
<td>Toledo</td>
<td>March 9, 2013</td>
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<tr>
<td>William Carle</td>
<td>83</td>
<td>Lakewood</td>
<td>March 12, 2013</td>
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<tr>
<td>Judge Ted D. Klammer</td>
<td>66</td>
<td>Lake County Probate Court Concord Township</td>
<td>March 13, 2013</td>
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<tr>
<td>John H. Hermanies</td>
<td>90</td>
<td>Cincinnati</td>
<td>March 16, 2013</td>
</tr>
<tr>
<td>Eugene Fellmeth</td>
<td>88</td>
<td>Canal Fulton</td>
<td>March 18, 2013</td>
</tr>
<tr>
<td>Robert E. Fleck</td>
<td>81</td>
<td>Lyndhurst</td>
<td>March 18, 2013</td>
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CLE Calendar

To register or for more information, call (800) 232-7124 or (614) 487-8585 or visit our website at www.ohiobar.org.

Diversity and Inclusion
5.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 3 p.m.
5/2 - Columbus - Ohio State Bar Association

Live Simulcast
Document Management
6.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
5/14 - Cleveland, Columbus

Diversity and Inclusion
5.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 3 p.m.
5/2 - Columbus - Ohio State Bar Association

The Sharper Lawyer
6.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
5/29 - Columbus - Ohio State Bar Association
5/30 - Cleveland - The Ritz Carlton

EEO
6.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
6/5 - Columbus - Ohio State Bar Association

Family Law Institute
12.0 CLE credit hours
Registration Day 1: 8 a.m.
Program Each Day: 8:30 a.m. - 4 p.m.
6/6-7 - Columbus - Ohio State Bar Association

Live Simulcast
Intermediate Word: Word and Legal Drafting Don't Mix
3.5 CLE credit hours (AM)
Registration: 8 a.m.
Program: 8:30 a.m. - 12:15 p.m.
6/11 - Cleveland, Columbus

Live Simulcast
Advanced Microsoft Word: Don't Get Mad--Get Even
3.5 CLE credit hours (PM)
Registration: 12:30 p.m.
Program: 1 p.m. - 4:45 p.m.
6/11 - Cleveland, Columbus

Taking and Defending Effective Depositions
6.0 NLT credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
6/12 - Columbus - Ohio State Bar Association

Live Simulcast
Professionalism, Law Office Management and Client Funds Management
3.0 NLT credit hours (AM)
Registration: 8 a.m.
Program: 8:30 a.m. - 11:45 a.m.
6/13 - Akron, Cleveland, Columbus, Fairfield, Perrysburg

Live Simulcast
Ohio Notary Law
2.5 CLE credit hours (PM)
Registration: 12:30 p.m.
Program: 1 p.m. - 3:45 p.m.
6/13 - Akron, Cleveland, Columbus, Fairfield, Perrysburg

24th Annual Estate Planning Conference on Wealth Transfer
6.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4p.m.
6/13 - Columbus - Hilton Hotel Easton

Live Simulcast
Basics of Estate Administration
6.0 NLT credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
6/14 - Akron, Cleveland, Columbus, Dayton

Ethically Creating an Innovative Legal Practice in the Digital Marketplace
6.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
6/18 - Cleveland - The Ritz Carlton
6/19 - Columbus - Ohio State Bar Association

iPad for Legal Professionals
3.0 CLE credit hours (AM)
Registration: 8 a.m.
Program: 8:30 a.m. - 11:45 a.m.
6/20 - Columbus - Ohio State Bar Association

Live Simulcast
Titles to Real Estate in Ohio
6.0 NLT credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
6/21 - Cleveland, Columbus, Fairfield, Perrysburg

5th Annual Ohio Agricultural Law Symposium
6.0 CLE credit hours
Registration: 8 a.m.
Program: 8 p.m. - 4 p.m.
6/24 - Newark - Cherry Valley Lodge
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