Diversity & Inclusion

Walking the Talk Boldly Into the Future

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LGBT & ALLIES COMMITTEE

Co-Chairs
Anthony Andricks
Thompson Hine LLP
Anthony.Andricks@ThompsonHine.com

Danielle Doza
Empowering and Strengthening Ohio’s People
Danielle.Doza@gmail.com

Staff Liaison
Samantha Pringle
springle@clemetrobar.org

Goals
Our goals are (1) to provide educational and networking opportunities for LGBT and ally attorneys and law students, and (2) to create a network of attorneys better prepared to assist the members of the Cleveland area’s significant LGBT population with the complex and unique legal issues they face.

What Can Members Expect?
With the full support of the CMBA leadership, we offer attorney education often at little to no cost, networking, mentoring and volunteer opportunities for our members. We maintain an inclusive atmosphere where all are welcome to participate at the level of their choosing — ranging from basic participation to major planning and leadership roles.

Upcoming Events
We are planning a networking event for late June to celebrate the one-year anniversary of marriage equality. By the time you are reading this, you have likely already received an email invitation from the CMBA. Otherwise, please stay tuned for further details.

Previous Events
We seek to hold at least one major CLE each year. On October 30, 2015, we sponsored a very successful 4.0 hour CLE entitled Unfinished Business: The State of LGBT Rights Post-Obergefell, in the Moot Court room at Cleveland-Marshall College of Law, which CLE was attended by over 200 people, including 175 attorneys. Camilla Taylor, Marriage Project Director for Lambda Legal and member of the team of plaintiffs’ counsel in the consolidated cases of Obergefell v. Hodges, headlined an amazing lineup of speakers including Professor Emerita Susan J. Becker, General Counsel of the ACLU of Ohio, Professor Matthew W. Green Jr., Alana Jochum, Managing Director of Equality Ohio, Attorney Joy B. Savren, and Attorney Maria L. Shinn of Shinn Lanter LLP.

We encourage you to contact us if you would like more information or wish to join our committee.

DIVERSITY & INCLUSION COMMITTEE

Chair
Majeed G. Makhlouf
Berns, Ockner & Greenberger, LLC
mmakhlouf@bernsockner.com

Staff Liaison
Mary Groth
mgroth@clemetrobar.org

Goals
Promoting diversity and inclusion in the greater Cleveland legal community. Networking. Learning about the importance of diversity and inclusion.

Regular Meeting
First Wednesday of every month at 4 p.m. at CMBA Conference Center

Previous Events
Completion of the Diversity & Inclusion 2.0 Survey Project and Diversity & Inclusion Conference on May 20, 2016

What Can Members Expect?
They play a key role in the development and oversight of the CMBA’s diversity and inclusion programs and initiatives.

SOLO/SMLALL FIRM SECTION

Chairs
Ashely Jones
Ashely Jones Law Firm
ajones@ashelyjoneslaw.com

Vice Chair
David Truman
Truman Law
david@trumanlawllc.com

Regular Meeting
4th Thursday from noon to 1 p.m. at Shula’s 2 in Independence

Goals
To provide a forum for solo/small firm lawyers to learn how to grow their businesses through programming, networking, and business referrals.

What Can Members Expect?
Our group has a lot of camaraderie, and everyone is always willing to help, whether it be through providing a sample motion, advice, or a referral. It’s very laid back and fun, but we also focus on substantive topics.

Upcoming Events
Our full day Fall expo on September 23!

Previous Events
We just had our spring expo on May 13 which was a half-day CLE, including a really great judges panel on practical tips and pet peeves from the Bench.

Section and Committee membership is a great way to get plugged in at your local Bar!

For information on how to join a section or committee, contact Samantha Pringle, Director of CLE & Sections, at:
(216) 696-3525 x 2008 or springle@clemetrobar.org.
May 6, 2016

Kentucky Oaks Day

The Women in Law Section gathered on May 6 to enjoy southern comforts, before the running of the Kentucky Oaks race. We also enjoyed a fashion show featuring designs from students and models from Virginia Marti College of Art and Design. Fitting with Derby style, guests wore their finest hats and pink attire. Silent auction and ticket sales proceeds benefit the CMBF and Bright Pink, the only national non-profit focused on the prevention and early detection of breast and ovarian cancer in young women, while providing support for high-risk individuals. Special thanks to our event sponsors for their support of the event:

Marshall Dennehey Warner Coleman & Goggin
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Hahn Loeser & Parks LLP

May 10, 2016

Legends of the Insurance Bar

The Insurance Law Section met May 10 for their monthly meeting and “Legends of the Insurance Bar” presentation. Irene Keyse-Walker, Ed Duncan, and Kevin Young provided the audience with their insights, interesting cases and practical advice. Thanks to Tucker Ellis LLP for hosting the Section meeting. The Insurance Law Section meets the second Tuesday of each month. For more information on getting involved with the Section, please contact Section Chair James Sullivan at kjsullivan@calfee.com or Vice-Chair Dan Gourash at DFGourash@sseg-law.com.
It’s Time to Renew!

July will mark the start of a new membership year. Renewal statements have been mailed and we look forward to having you as one of our valued members for another year.

To renew, simply renew with your statement or log in and renew at CleMetroBar.org.

This is also Member Appreciation Month. From surprise giveaways, to online contests, to early renewal incentives, we will be highlighting “30 ways in 30 days” that show you how much we appreciate you. Enjoy!

Don’t forget: Renew your membership before June 30 and be entered into a raffle to win a free membership for 2017–18.

#GreenCMBA

The Green Initiative Committee is pleased to welcome:

Matt Gray, Director, City of Cleveland’s Office of Sustainability
Jerry Crabb, Senior Director of Ballpark Operations, Cleveland Indians
Kathleen Rocco, Education Specialist, Cuyahoga County Solid Waste District

Join us to hear information on their sustainability initiatives as well as tips that are transferrable to other organizations for reducing our environmental footprints.

This annual luncheon will also honor new and renewing Green and Green+ Certified Firms and include the presentation of the first Green Sustainability Award.

David Webster

GREENER WAY TO WORK LUNCHEON

Friday, September 30 • Noon at the CMBA
Kari Burns
Firm/Company: CMBA
Title: Assistant Bar Counsel
CMBA Start Date: September 2015
College: Miami University
Law School: Cleveland-Marshall College of Law

IF YOU WERE NOT PRACTICING LAW, WHAT WOULD YOUR PROFESSION BE?
I would be a farmer! I have nothing but a small garden, so I have no actual idea how hard the work is or just how early I would have to wake up in the morning, but in my mind it sounds like the perfect job.

A RECENT MILESTONE FOR YOU OR YOUR FAMILY?
We’re having baby number 2 in November!

FAVORITE CLEVELAND HOT SPOT
Harbor Inn. Can I call that a hot spot? My grandpa was a Cleveland Police officer and used to go there after shifts. It has always held a special place in my family’s heart.

WHERE DID YOU GO ON YOUR HONEYMOON?
Vieques, Puerto Rico. It’s a small island off the mainland. It was remote and not all a tourist destination. The only company we had on perfect Caribbean beaches were a few friendly dogs. In fact, I had the idea of fixing us up. Instead of a blind date had never met before the dinner party.

WHAT CITY DO YOU LIVE IN, AND WHAT DO YOU LIKE ABOUT IT?
I live in Cleveland Heights near Coventry. We bought a 100-year-old house that needed a lot of work. It is a work-in-progress and a labor of love, but I love helping people transition from a bad situation to a better one.

Jessica Kubiak
Firm/Company: Phillips & Mille Co., LPA
Title: Senior Paralegal, Domestic Relations Division
CMBA Join Date: 2009
College: Lakeland Community College, CSU

WHAT DO YOU LOVE ABOUT YOUR JOB?
I love helping people. Although Domestic Relations can be extremely stressful, I like thinking that I am helping people find a way to keep up with my reading of modern European history.

FAVORITE CLEVELAND HOT SPOT
I love hanging out in downtown Cleveland. Playhouse Square, the Q, East 4th Street alone offer variety for both family activities and adult time.

EAST SIDE OR WEST SIDE?
I would have to go both. I was born and raised in Conneaut, Ohio, and I loved the small town feel and familiarity and often go back to visit family there. I moved to the west side about nine years ago and love the busy city life, shopping, restaurants and activities it offers as well.

TELL US ABOUT YOUR FAMILY.
I am married to David who is an electrician with his many avocations including community projects with Jack Kluznik. Jack is a great model, balancing his hard-working professional career with his family and with his many avocations including community projects like the Towpath Trail, running, hiking, gardening and rock n’ roll. He also listens when I tell him what movies to see.

WHAT DO YOU DO FOR FUN?
I love taking trips with my husband. We’ve been on cruises, and we always have a good time. We enjoy exploring new areas, snorkeling, and lying on the beach. It is the best break from day-to-day life.

Johns Hopkins University
Law School: Case Western Reserve University

IF YOU WERE NOT PRACTICING LAW, WHAT WOULD YOUR PROFESSION BE?
I would try to be a professor of French History. I was thinking about this seriously while in college, and loved the vivid quality of French history — the highs and lows — and there have been many! I have tried to keep up with my reading of modern European history.

EAST SIDE OR WEST SIDE?
How about both. I grew up in University Heights, and went to Cleveland Heights High School. When my wife and I married, we lived downtown at the Chesterfield for four years, then moved to the Edgewater neighborhood. Our neighborhood is a mix of a lot of people working downtown and others coming from other areas, but it is a great place to live. We both work downtown, and we have learned how to get around our new side of town, but we get back to the east side each weekend. We’re “bi-side-al.”

HOW DO YOU MEET YOUR SPOUSE?
This is a “Lawyers in Love” story. Someone who had worked with me as a legal law clerk (now staff attorney) at Common Pleas Court, and who then worked with Debra at a corporate law department, had the idea of fixing us up. Instead of a blind date we were both invited to a dinner party — it’s a great way to meet someone. Debra and I had grown up about a mile from each other, we went to the same religious school, my aunt and uncle knew her parents well, we both went to the Rolling Stones 1972 concert at the Rubber Bowl in Akron, but we had never met before the dinner party.

WHO HAS INFLUENCED YOU THE MOST?
There are several people who have influenced my professional life. First, would be Judge Ann McManamon, who I law clerked for after law school. Daily she emphasized the need to determine what is the law and then apply it. In the early 90s, I began doing insurance coverage work with Lou Paisley. He emphasized discovering the facts — and fast. Mark O’Neill also had an influence on my professional life. He was all about judgment — sizing up a case and making judgments about where to go and what to do. For the last decade, I’ve been involved with employment law working mostly with Jack Kluznik. Jack is a great model, balancing his hard-working professional career with his family and with his many avocations including community projects like the Towpath Trail, running, hiking, gardening and rock n’ roll. He also listens when I tell him what movies to see.

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Mentors and Sponsors: What’s the Diff?

Encouraging New Lawyers Is Not Enough

The difference between mentoring and sponsoring is quite simple, once you stop to consider it:

“You are great.”

“Shes great.”

A mentor says the first to the person being mentored (I just can’t get used to the made-up word “mentee”), encouraging and teaching, guiding and leading. A sponsor says the second to other leaders, guides, managers and delegators about the person being mentored. True service to the next generation of professionals and to our profession requires that experienced lawyers do both.

Perhaps I am the only one who has missed the media coverage, but it seems to me that we’ve been hearing a lot in the last few years about mentorship, and very little about sponsorship. What interests me about this dichotomy is the fact that some — perhaps intuitively — have been practicing sponsorship right along, while others seem never to have considered doing such a thing. Yet, for the less experienced person (am I really going to have to write “mentee”?), both are crucial.

For the 20-, 30-, 40- and 50-year practitioners among us, I bet we could reel off the names of at least three or four mentors across our careers without a moment’s thought. Remembering our mentors with gratitude, those who helped us learn the craft of law, as well as guiding us into our chosen path in the law, is second-nature. But what about our sponsors?

At a reception during the Ohio State Bar Association’s All-Ohio Legal Forum in late April, I met a lawyer who was a pro at sponsorship. Mike was my vintage or so, and had brought his new associate, John, to the Forum and to the reception. Mike was working the room, introducing John and mentioning his strengths to every bar and professional leader he could find. I can’t speak for others, but at least over the next few months, if John communicates with me and mentions Mike and our meeting, I will recall him favorably and be interested in how I can help him.

Sadly, many of us don’t sponsor anywhere near as well or as often as we mentor. Having looked at this issue for a while, I think the reasons are as straightforward as they are surprising. First, we don’t believe that we have as much power or “street cred” with other leaders as we have experience and practice tips to share with our less-experienced counterparts. We compare ourselves by means of graduation dates, size of recent deals or verdicts or settlements, salary, administrative position in department or specialty, and we wonder whether the other lawyer will listen to our proposals for advancement of the younger lawyer. Indeed, we wonder whether the other lawyer should listen to us.

Second, we as lawyers are always leery of being seen to “ask a favor” of another lawyer, because we know (rightly or wrongly) that as the night follows the day, we will have to do a favor in return for that lawyer — we will owe her one. Being on the red side of any ledger worries lawyers; with this ledger being as amorphous and inchoate as it is, it’s unclear what form payback might take, and that worries us even more.

Finally, we worry whether the lawyer whose skills we are touting and whose interests we are advancing is really the superstar we believe her to be. It’s one thing to advertise our own qualities for our own benefit — we each know how hard we can work and how well we will work when the chips are down. But as lawyers, it seems against our nature to trust that somebody else we’ve touted won’t let us down.

Sponsoring another lawyer requires us to put ourselves on the line in a way that mentorship does not. Let’s face it: in mentoring, we get to talk about ourselves and tell war stories, at least part of the time, and what lawyer doesn’t love that? But in sponsoring another lawyer, we are searching our own contacts for relationships that will help that lawyer advance and succeed. It requires us to stake our reputations on the success of another person, and this is scary. But it’s important to note that doing so has a surprising benefit for us: speaking for another marks us as persons of power and influence; we are big dogs.

Sponsoring is a bit like connecting, an activity I have always enjoyed: in connecting, one identifies potential positive relationships among one’s business acquaintances, and facilitates their meetings. For example, at one point, it seemed that everybody I met was involved in trusts, estates and charitable giving, in one way or another. I do not practice in that area and never have (except for a few carefully-supervised pro bono legal clinics), but I do know several talented attorneys in this area. So bringing accountants, charitable giving professionals, lawyers and others together for their benefit has been a largely no-cost effort to me, and it has been fun to facilitate these relationships.

The difference between sponsoring and connecting, though, is significant. When I connect people, I am putting no credibility on the line; I am saying to two peers who haven’t happened to meet yet, “here is somebody in your field. How about that?” When I sponsor a junior lawyer in
conversations with another experienced lawyer, I am saying, “Here is somebody whose work impresses me and whom I believe to have great potential.” Suddenly, I am on the line — if the junior lawyer flames out and crashes, my colleague might look at me and wonder what I was thinking.

That said, we can’t just avoid sponsorship. Others are doing it, and if we want the junior lawyers we see and admire to succeed, we must do it, too. With a moderate exercise of common sense, good judgment and compassion, we should be able to identify those following us who should be helped up the ladder of success. Then, we should strategically and persistently sing their praises to the people who can help them in ways we can’t. That is how we shape the profession to what we believe it should be, long after we’ve left the law behind.

Anne Owings Ford has over 25 years’ experience in the world of litigation, from her first judicial clerkship to, most recently, her partner status at a national law firm. She has been a CMBA member since 1991. Anne currently is a litigation consultant, and she can be reached at aoford@roadrunner.com.
On May 20, the Diversity & Inclusion Committee shared the results and key takeaways from our Diversity & Inclusion 2.0 Organizational and Individual Survey Project, designed to establish benchmark data to show where we stand as a profession and as a community. In addition, the conference included information on a successful and innovative best practice model program combining collective commitment, goal setting, action and accountability. The CMBA was thrilled to welcome nationally-recognized author and keynote speaker, Vernã Myers for a dynamic and insightful talk on unconscious bias and its role in impeding progress. The CMBA also announced the 2016 Inclusion Innovation Awards recipients:

Meena Morey Chandra, Regional Director, Cleveland Office of U.S. Department of Education’s Office for Civil Rights

Pernel Jones, Jr., Director of Community Relations, Pernel Jones and Sons Funeral Home, and Vice President of the Cuyahoga County Council

Carole S. Rendon, Acting U.S. Attorney for the Northern District of Ohio

Carole Rendon, Pernel Jones, Jr., and Meena Morey Chandra
For more than 20 years, the CMBA has been diligently and creatively developing programs, events, awards, and dialogues about diversity. At the same time, employers of lawyers have devoted their own significant resources to support diversity initiatives. All of these efforts have been undertaken for one goal: to create a genuinely diverse and inclusive community for all who wish to pursue careers within greater Cleveland’s legal community. So, have these efforts made a difference?

For the first time, as described in detail in the Diversity & Inclusion Committee’s report “Where We Stand” released on May 20, 2016, we have real data to help answer that question. Some of the data reported — like the data on this page — come from the ABA, the Cleveland Plain Dealer and the Ohio State Bar Association. The rest of the data — see pages 13 and 14 plus the full report — come directly from our 2016 Benchmarking Survey. Phase I focused on employers of lawyers, while Phase II focused on individual attorneys. The bottom line: our individual efforts have been working — slowly.

**Women in Large Firms**

<table>
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<tr>
<th>Year</th>
<th>Associates</th>
<th>Partners</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>40%</td>
<td>14%</td>
</tr>
<tr>
<td>2011</td>
<td>43.1%</td>
<td>18.5%</td>
</tr>
</tbody>
</table>

**Women State Judges**

Increased from 14.8% in 1993 to 25.3% in 2010.
PHASE I
Demographic Breakdown in Cleveland

Sent Surveys vs. Responses

20% Response Rate

POSITIONS

5.4% 28.9%

10.3% 50.7%

21.5% 54.7%

LEADERSHIP

20.9% 33% 55.4%

3% 23% 36%

LAW FIRM PROMOTIONS 2010 – 2015

Equity Non-Equity Equity Non-Equity

23.5% 54.7%

5.4% 28.9%

10.3% 50.7%

21.5% 54.7%

KEY

Caucasian Minorities Men Women

Large Firms 77%
Medium Firms 39%
Small Firms 12%
Corporate Counsel 18%
Courts 50%
Public Sector 26%

Corporate Counsel
Courts
Public Sector

Caucasian
Minorities
Men
Women

23% 3% 36%
In addition to seeing the world through the eyes of law firms, corporate legal departments and public sector employers, the Diversity & Inclusion Committee also wanted to learn about the experience of practicing in greater Cleveland from the perspective of individual lawyers and legal professionals. Approximately 8,500 individuals received invitations to participate, and more than 600 heeded our call. From that group we learned that while one out of five reported experiencing some form of unfair treatment within their workplace, respondents are generally satisfied working in the profession and in their individual workplaces. They are also generally satisfied with the support they receive from their employers related to professional development, individual advancement, and diversity and inclusion.
Working Together is Success

We have been on quite a journey this year. As the preceding pages show, we have spent a significant amount of time, talent and resources gathering a tremendous amount of data that is shedding credible light on what our legal community looks like and feels like from the inside out. The Diversity & Inclusion Committee’s report, “Where We Stand,” provides great insight as to where our community has been, where we are today and how we compare to others. And from the data, we can see that the face of our bar, from the associate levels to the leadership ranks, has been changing over time. Slowly, but changing nonetheless.

While the infographics on these pages are cool, the details contained in the full report are even cooler. Ok, maybe not cooler looking (although there are some colorful charts), but the substance is richer in the full report. There is MUCH to think about and discuss. If you have not yet had a chance to review the report, I encourage you to do so. Take some time over the summer when you are enjoying a day at the beach — ok, maybe it’s not exactly beach reading — but make the time to digest the big picture and some of the details. I know I am biased and occasionally prone to hyperbole, but the information contained in the report is illuminating.

For ease of access all summer long and beyond, you can find the full report on our website at CleMetroBar.org/Diversity.

The data contained in the report clearly demonstrate that devoting time and attention to creating a more diverse and inclusive legal community has worked in our community. Not at the pace many would have hoped, but attorneys of color and women have been gaining ground across the profession. We can only imagine how much slower the pace of progress would be if there had been no spotlight on the issue of diversity and no efforts to address it. The results from our first-of-its-kind survey make it clear that growing Greater Cleveland into a thriving diverse legal community is not an illusory target, but rather, a very achievable one.

As described in detail in “Where We Stand,” many communities have faced the same diversity challenges. And some have figured out how to accelerate movement along the road to genuine diversity and inclusion. For example, in Columbus, a group of 20 law firm managing partners, general counsel, law school deans and others joined the Columbus Bar Association in 2001 to sign a five-year commitment to attract minority law candidates to the city, increase the number of minorities hired out of law school, and create an atmosphere that encourages minority attorneys to advance in their firms and ultimately become partners. The project, dubbed the “Columbus Managing Partners’ Diversity Initiative” produced impressive outcomes in its first five years — including the doubling of minority attorneys joining law firms and twice as many minority partners.

Now in its second decade, the Columbus initiative continues to report significant advancements:

- In 2000, 14 partners of color practiced law in Columbus and by 2014, the number of partners of color climbed to 41.
- In 2000, minority associates totaled 31 and by 2014, the number of minority associates increased to 44.
- In 2000, Columbus had 18 minority summer associates and by 2014, the number of minority summer associates increased to 38. One of the lessons learned from Columbus — and repeated in other communities across the country — is that individual efforts, standing alone, can only take a community so far. True progress comes from collective action. More than a century ago, Henry Ford saw just that: “Coming together is a beginning; keeping together is progress; working together is success.”

Now that we know where Greater Cleveland stands, it’s time to move toward togetherness. Immediately following the Diversity & Inclusion Conference, 25 Greater Cleveland managing partners, partners-in-charge, general counsel and other senior legal officers accepted a proposal advanced by Majeed G. Makhlouf, the CMBA’s Vice President of Diversity & Inclusion, to sign a Commitment to Collective Action. Each signatory has pledged to work cooperatively between now and August 31, 2016 to develop a five-year Working Plan that will set forth both our legal community’s benchmarks for further diversifying Greater Cleveland’s legal talent and organizations, and also a defined strategy for action that will enable us to achieve those benchmarks. What those benchmarks will be is up to us. All of us.

Are you interested in joining the dialogue and helping to chart the next chapter in the future of our community? Come join us. There is room at the table for all.

Not sure if your organization has already committed? A complete list of all current signatories can be found on our website at CleMetroBar.org/Diversity.

When we launched the diversity surveys — which included questions that made some people uncomfortable — many answered. We thank you all for your courage and your trust. We know sharing detailed demographic information gave some of you real pause. As recently said so well by Adrian Thompson, D & I Committee member and chief diversity officer at Taft Stettinius & Hollister, “Discussing racism, sexism — all the ‘isms’ — is not easy. For [employers] to truly look at that, you have to look inward at what you’re doing. You have to dig deeper than the numbers.”

There’s still time to answer the call for collective action as we dig deeper as a community. Come meet us at the Bar as we move together toward success.

Rebecca Ruppert McMahon is the Executive Director of the CMBA and the CMBF. She has been a CMBA member since 1995. She can be reached at (216) 696-3525 or rmcmahon@clemetobar.org.
Changes in Special Needs & Elder Law Bring New Opportunities, New Obstacles for the Elderly & Disabled

BY DAVID S. BANAS

This year brings dramatic changes in the area of Elder and Special Needs Law, as Ohio transitions from a 209(b) state to a 1634 state. This transition will change the way Medicaid eligibility is determined at all levels, and will require thousands of individuals to establish a Qualified Income Trust or risk losing Medicaid benefits. New income requirements and the elimination of the “spend-down” program will require many individuals to seek health insurance through expanded Medicaid or on the exchange. Also this year, Ohio will implement the ABLE Act and create “STABLE” accounts for certain disabled individuals, providing a 529-type savings account for qualifying disability expenses. In some cases, these “STABLE” accounts and the availability of expanded Medicaid may provide practical alternatives to the use of Special Needs Trusts, but Special Needs Trusts and third party trusts will remain vital tools in most Special Needs estate plans. Other recent changes include the passage of the Disabled Military Child Protection Act and the proposed Special Needs Trust Fairness Act, which provide new and hopeful avenues for special needs planners, individuals with disabilities, and parents with disabled children.

The 1634 Transition, Elimination of the Spend-Down, and Qualifying Income Trusts

On July 1, 2016, Ohio implements Section 1634 of the Social Security Act, which will unite the disability determination system for Supplemental Security Income (SSI) and Medicaid. Individuals who are eligible to receive SSI will automatically qualify for Medicaid.

The Ohio Department of Medicaid (ODM) will use SSI eligibility rules for income and assets, meaning that the current Medicaid resource limit of $1500 will increase and come in line with SSI’s resource limit of $2000. Individuals residing in the community will have an income limit of 75% of the federal poverty level (increased from the current 64%). For those who receive nursing home care or Medicaid through a Waiver program, the “special income limit” will remain 300% of the FPL, or $2,199.

While the transition will simplify eligibility determinations, Ohio will no longer allow individuals to “spend down” on a monthly basis if their income exceeds the program income levels. For individuals receiving long-term care in a nursing home or through the Waiver programs, individuals with income exceeding the special income limit of $2,199 will need to create a Qualified Income Trust (QIT), also referred to as a Miller Trust. The QIT is a type of Medicaid Payback Trust that only receives income from the Medicaid recipient, and the trust then pays for the individual’s medical care. 42 U.S.C. § 1396p(d)(4)(B). The QIT is a distinct entity, separate and apart from any “traditional” special needs trust benefitting the disabled individual. Ohio’s proposed regulation O.A.C. 5160:1-6-03.2 requires that the trust be irrevocable; that the grantor or primary beneficiary cannot be the trustee; that only the beneficiary’s income can be transferred to the QIT, and that no other property or resources besides income can be placed in the QIT.

The proposed rule demonstrates that the monthly logistics of properly managing a QIT will be daunting, even for the initiated. The rule requires monthly transfers of the beneficiary’s income to the trust account. Once received, the trustee of the QIT will make distributions for the monthly personal allowance for the beneficiary, maintenance allowance for the beneficiary’s spouse or dependents, medical expenses incurred by the beneficiary, and up to $15 per month for bank fees, attorney fees, or other administrative costs. However, this assumes that the beneficiary had capacity to establish the trust, the support of another to act as trustee, and the legal advice required to draft and execute the trust.

ODM states in its Disability Determination Redesign publication (which may be downloaded at http://medicaid.ohio.gov/INITIATIVES/DisabilityDeterminationRedesign.aspx): “The ultimate goal of disability determination redesign is for every Ohioan with a disability to have a clear path to a stable source of health care coverage they can afford.” Further, Ohio Medicaid has requested a six-month waiver of renewals to give impacted individuals, as well as the county agencies, time to find their places through this transition. ODM estimates this change will impact over 400,000 individuals.

State Treasury Achieving a Better Life Experience (STABLE) Accounts

Not all of the change that is taking place is so ominous and uncertain. In December of 2014, President Obama signed the Achieving a Better Life Experience (ABLE) Act, which amended section 529 of the Internal Revenue Code, creating financial accounts established by or for a person with special needs. The person must have a disability as determined by the Social Security Administration or some equivalent disability determination that occurred before the person reached age 26. Ohio’s enabling legislation, which passed both the house and the senate without a single vote in opposition, has produced the STABLE Accounts, which are the first ABLE accounts in the country to be operational. See Ohio Rev. Code § 113.50 to 113.56. The Treasurer’s office estimates that STABLE accounts will be available for enrollment later this summer.

Like assets placed in a Medicaid Payback Trust, money in STABLE accounts does not count against the person’s eligibility for Supplemental Security Income (SSI),
Medicaid, Supplemental Nutrition Assistance Program (SNAP or “food stamps”), Section 8 housing, and other means-tested public assistance programs. STABLE accounts can pay for “qualified disability expenses,” such as education, housing, transportation, assistive technology, health & wellness expenses, and many more. Earnings in the account are not taxable as long as the distributions are for qualified disability expenses.

However, there are limitations. A person can have only one STABLE account. Annual contributions to a STABLE account are limited to $14,000 (in 2016). If the account balance exceeds $100,000, the person’s SSI benefits will suspend until the account balance is below $100,000 again. The maximum account balance is approximately $414,000, which is the current cap for 529 College Savings Accounts. Any money left in an account at the death of the owner of the account must be used to pay back the state of Ohio in an amount equal to the value of any Medicaid benefits received by that person, whether the funds were contributed by the beneficiary or not.

In particular, the annual contribution limit of $14,000, the account cap of $414,000, and the Medicaid payback provision underline the continuing necessity of “traditional” special needs planning that incorporates 42 U.S.C. 1396p(d)(4)(A) Medicaid Payback Trusts and third-party Wholly Discretionary Trusts as defined at §801.01(Y). Still, STABLE accounts will undoubtedly serve to empower individuals by encouraging saving, promoting independence, and unraveling the misconception that a person with a disability must be poor to receive necessary services through Medicaid and SSI. Eligible individuals, parents, or legal guardians will soon be able to enroll at www.stableaccount.com to set up an account.

Disabled Military Child Protection Act & The Special Needs Trust Fairness Act
In addition to the ABLE Act, in December of 2014 President Obama signed the Disabled Military Child Protection act, allowing military parents to name special needs trusts as beneficiaries of Survivor Benefit Plans (SBP). Prior to this change, military parents who elected to defer a portion of their retirement in order to provide a survivor benefit to their spouse or children were required to name an individual as the beneficiary, which did not include trusts. For military parents of disabled children, choosing to name a child with special needs as the beneficiary meant that the child would likely lose SSI or Medicaid.

The new law permits military parents to assign the SBP to a 42 U.S.C. § 1396p(d)(4)(A) Medicaid Payback Trust or a 42 U.S.C. § 1396p(d)(4)(C) Pooled Trust, eliminating the concern that the SBP will eliminate the disabled child’s eligibility to receive Medicaid or SSI.

Currently pending in Congress, the Special Needs Trust Fairness Act (S. 349/H.R. 670) is bipartisan legislation that seeks to rectify a nearly 25-year-old drafting error. Currently, 42 U.S.C. § 1396p(d)(4)(A) permits individuals to transfer their own funds to a Medicaid Payback Trust and those assets are not counted for eligibility purposes. But only a grandparent, parent, court, or legal guardian can establish a Medicaid Payback Trust (not the individual themselves). Since individuals themselves cannot establish Medicaid Payback Trusts, court involvement and the associated legal fees prohibit individuals who do not have a living parent or grandparent, and who are not under guardianship, from utilizing the Medicaid Payback Trust. The proposed amendment would allow an individual to establish a trust.

Obstacles & Opportunities
ODM’s Disability Determination Redesign reveals the extent and complexity of the 1634 transition. This change brings tremendous obstacles to all involved: the disabled population in maintaining benefits and navigating these complex changes, often without support; parents of disabled children attempting to estate plan and provide for a child; and ODM and the county agencies in administering this change with integrity, efficiency and fairness. Perhaps these obstacles will provide an opportunity for all involved to continue to come together as a community to serve the disabled population, just as the stakeholders did in the creation of the STABLE accounts, the passage of the Disabled Military Child Protection Act, and the proposals of the Special Needs Trust Fairness Act.

Attorney David S. Banas joined Hickman & Lowder Co., LPA in January of 2015. He focuses on legal issues facing older adults and individuals with disabilities, Special Needs Trusts, Medicaid, and long-term care planning. Dave has been counsel in multiple federal actions regarding the rights of elderly couples in relation to Medicaid. He has been a CMBA member since last year. He can be reached at (216) 861-3113 or at dbanas@hickman-lowder.com.
New CMBA Endorsed Case Management Order

The CMBA’s Court Rules Committee has been working on various proposed changes to Loc. R. 21 since early 2013. As those of you who practice in Cuyahoga County know, many of the provisions in Loc. R. 21 Case Management and Pretrial Procedure are outdated and rarely followed by most of our 34 judges. For example, Part III: Final Pretrial Conference (E), requires that each party shall submit a pretrial statement at least seven days in advance of a final pretrial conference. Rarely, if ever, are pretrial statements filed. In addition, Loc. R. 11 Hearing and Submission of Motions (I), provides that motions for summary judgment made pursuant to Civ. R. 56 may be filed as permitted by Civ. R. 56(C) with opposing briefs filed within 30 days of service of the motion; and reply briefs filed in support of the motion within 10 days of service of the brief in opposition. Nowhere in the civil rules or our local rules is there any provision setting forth when a summary judgment motion shall be ruled on.

In many areas of civil practice, such as employment and business litigation, motions for summary judgment are frequently filed, yet there has been no uniform practice as to when a ruling will be made and how that ruling date might impact final trial preparation and costs. Rarely are oral arguments on such motions scheduled even though the impact of a ruling by the Court has the potential to deprive the parties of their day in court.

With the above background in mind, this Committee, consisting of practicing attorneys and Judges of the Cuyahoga County Common Pleas Court, set out to improve pre-trial procedures in Cuyahoga County and to provide a level of trial date certainty and a more efficient manner for civil cases to be managed so as to minimize the potential of unnecessary trial preparation expenses. Our committee recognized that no rule of practice can solve all issues and each judge has to retain his or her discretion to achieve a fair resolution on a case-by-case basis.

Initially, our committee proposed the adoption of a new Loc. R. 21.0 relating to case management procedures for civil cases. This proposed rule would have essentially eliminated many, if not all, of the provisions of Loc. R. 21 (amended April 1, 2004). Recognizing that many aspects of that rule were outdated, not followed, and inconsistent with how most of the judges handled their civil cases, our committee, working in conjunction with the Rules Committee of the Cuyahoga County Court of Common Pleas, filed a proposed local rule amendment. This proposed rule was extensively vetted with local plaintiff and defense attorneys and was presented at committee meetings with the local judges. (For further history on our efforts, see previous article written in October of 2014 on proposed Loc. R. 21.)

After various discussions and meetings with attorneys and judges, proposed R. 21.0 was revised to take into account the concerns and comments by all. Yet, due to some continuing resistance to the passage of a new Local, a decision was made to go a different initial direction. With the support of a number of our local judges, we sought the endorsement of the Cleveland Metropolitan Bar Association to proposed Local Rule 21.0. A modified, revised and updated version of the proposed rule was submitted to the leadership of the Cleveland Metropolitan Bar Association in the fall of 2015. The matter was referred to the Public Advocacy Endorsement Committee (PAEC) to vote on whether the rule should be considered for endorsement. In early 2016, the PAEC voted to approve the rule. Thereafter, it was presented to the Executive Committee and the Board for consideration and the Board of the Cleveland Metropolitan Bar Association voted unanimously to endorse the rule.

Recognizing that “Rome wasn’t built in a day,” it was decided that the CMBA endorsed Loc. R. 21.0 on Case Management and Pretrial Procedures, would be renamed as the CMBA-Endorsed Case Management Order (CMO). All provisions in the Proposed Local Rule 21.0, now renamed as the CMBA Endorsed CMO remain as approved by the Board. To date, Administrative Judge John Russo, Judge Brendan Sheehan, Judge Hollie Gallagher, Judge Deena Calabrese, Judge Matt McMonagle and Judge Michael Donnelly have adopted and posted on their websites the CMO. It is hoped that as time progresses, each of our local judges will adopt this order as part of their individual litigation preferences. To view the Civil Case Management Order, visit one of the above judges’ websites.

The goal of the Case Management Order and the previously proposed Loc. R. 21.0 was and remains trial date certainty and a mechanism to avoid unnecessary and potentially avoidable expense in the handling of civil cases. As the endorsed Case Management Order is implemented by the various judges, it is the hope of this Committee that this Case Management Order will replace and officially supersede Local R. 21. We are very proud of all the hard work that went into this Order and hope that it will become a model for courts throughout the State of Ohio in terms of handling case management conferences and motions for summary judgment.

Howard D. Mishkind is the founding shareholder of Mishkind Kulwicki Law Co., LPA. His practice is concentrated primarily in the area of personal injury litigation, consisting of the representation of injured patients and their families in medical malpractice, legal malpractice and catastrophic injuries arising out of motor vehicle and truck collisions. He serves on various committees of the CMBA, including the Court Rules Committee and the Certified Grievance Committee. He has been a CMBA member since 1980, and he can be reached at hmishkind@mishkindlaw.com.
One of the fun and rewarding benefits of being involved in an active metropolitan bar association is the opportunity to share with our younger citizens — the student members of our community — the beauty of the rule of law and how it works. In addition to teaching civics and career counseling in Cleveland’s high schools for all ten years (so far, and counting) of the CMBA’s 3Rs program, and the privilege of serving as this year’s Chair of its oversight committee, I have also taken advantage of the opportunity offered by the CMBA to serve as a mock trial judge for the Ohio Mock Trial Competition at the District and Regional stages hosted by the CMBA as well as the State Championship tournaments held in Columbus. I look forward to it every year. With this article, I want to share with my fellow CMBA members the rewarding experience I’ve found in serving as a Competition judge at each of these levels — and particularly at the State Championship Tournament held in Columbus — and to perhaps encourage other CMBA members to join in.

The Ohio High School Mock Trial Competition, which is run under the auspices of the Ohio Center for Law Related Education (OCLRE), just completed its 33rd year. As described on the OCLRE website, the Ohio Mock Trial Competition offers an innovative and engaging way for high school students to learn about law and how our legal system works. Guided by teachers and volunteer legal advisors from the community, students participate in an original, unscripted simulated trial based on a new case problem written each year by attorneys. The stated purpose of the mock trial Competition is four-fold: to improve critical thinking, reading, writing, public speaking, and listening skills among the participating students; to develop understanding and appreciation for the law, court procedures, and the judicial system; to understand constitutional rights and responsibilities; and to recognize and reward students’ academic and intellectual achievements. There is perhaps a fifth purpose — for the students to have fun acting out a “real” courtroom drama in which they are invested.

The mock trial case problem always focuses on constitutional rights, and is based on a fact pattern involving and pertinent to high school students. This year’s problem concerned a police officer’s use of deadly force to subdue what turned out to be a high school student brandishing a realistic-looking bow and arrow in a convenience store parking lot, and perceived by the police officer to be threatening bystanders and ultimately the police officer. Past problems have presented issues based on student first amendment rights to protest school policies, confiscation of student property, injuries sustained at a juvenile detention facility, and discrimination among student groups.

Teams begin preparing for the competition as soon as they receive the mock trial problem and supporting materials in September, including the case hypothetical, witness statements, photos of physical exhibits, documents related to the case problem, case law, and the mock trial rules of evidence (a simplified version of
over the nine years I have served as a mock Lake, and Lorain Counties. surrounding District Competitions in Geauga, as well as six other teams advancing from teams from the Cuyahoga District Competition Regional Competition this year included 14 Mary), held at the Lakeside Courthouse. The Cuyahoga County also hosts a Regional Competition, held in mid-to-late February. afternoon second trial, advance to the Regional afternoon trial and the other side at a later-
each team argues one side in a first trial early-
time and providing them an opportunity to bring out the best in the student participants and rules on trial issues and objections, and two Scoring Judges, who focus on the student attorney and witness performances.

In this year’s Cuyahoga District Competition (which can include teams from surrounding counties), 49 teams participated in trials held at both the Justice Center and the Lakeside Courthouse. In past years, the full District Competition, involving approximately 34 teams, has been able to be held using only the Justice Center, but this year the CMBA (and particularly competition coordinators Jessica Paine and Mary Groth) extended the invitation to all local participating teams to participate in a single Cuyahoga County-based competition, necessitating the use of both courthouses. It was a mighty effort, and a grand success. Those teams fortunate (and talented) enough to win both trials at the District Competition, where each team argues one side in a first trial early-
by providing them with an engaged trial atmosphere, by thoroughly reading over all of the case materials prior to each level of the Competition, and by explaining the reasons for procedure and evidence rulings during the trial. It pays off. It is truly rewarding after a mock trial when the students, teachers, and legal advisors thank you for giving them your time and providing them an opportunity to "have their day in court."

Judging at the Cuyahoga District and Regional Competitions gives one an insight into just how talented and well-prepared our local teams are. Often, three, four, and sometimes more teams from Cuyahoga County advance to the three-
day State Tournament, held in Columbus in early March, culminating in a final Championship Trial at the Ohio Statehouse in Columbus on Saturday morning. In the last three years, a team from Orange High School went all the way to the Saturday morning Championship Trial. This year, one of those teams, Orange’s "Team Polaris," won the whole thing, and another Cuyahoga team — St. Edward High School’s Team Andre — was one of the top six State Finalists. The Orange Polaris team advanced to the National High School Mock Trial Tournament, which was held this year in Boise, Idaho. At the final trial in Columbus, Orange went up against an amazing team from Dayton Early College Academy (DECA), a magnet school within the Dayton city school system. What was most impressive about seeing DECA advance to the Championship trial is that this was its first year participating in the tournament.

Participating as a mock trial judge at each level allows one to see some very fine teams. Judging at the Cuyahoga Competitions usually offers a view to some of the best. Judging at the State Championship Tournament as I have for five years now shows the best of the best. As a volunteer, it also presents an opportunity to meet again with those who have judged at the State Tournament for many years — including a number of Common Pleas Court and Municipal Court judges from throughout the state — and to meet folks new to judging at the State Tournament. This year, I and three other volunteers from the Cuyahoga Competitions judged at the state level: Cuyahoga County Common Pleas Presiding and Administrative Judge John Russo, and attorneys Richard Stuhan and Mark Porter. We were also joined by special facilitator (and Shaw High School Mock Trial alum) Ivin Tinsley.

By this time, you can tell I am a fan of the Ohio Mock Trial Competition and enjoy telling others about how much fun it can be to serve as a judge at all levels in the Competition. You don’t need to be a longtime litigation attorney to take part. While the role of Presiding Judge may call on familiarity with courtroom procedure and evidence, all you need to know to be a great Scoring Judge is appreciation of a good argument and recognizing a convincing presentation.

Participation as a CMBA member in the Ohio Mock Trial Competition is a great way to help students, our leaders of tomorrow, appreciate and understand their constitutional rights and learn about how those rights are advanced through our judicial system. Plus, it’s a lot of fun. I hope I’ve convinced at least a few to join in on next year’s District and Regional Competitions — and who knows, maybe see you in Columbus too.

James W. Satola currently serves as Chair of the 3Rs Oversight Committee. He has been a CMBA member since 1989. James can be reached at jsatola@roadrunner.com or (216) 321-6926.
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Wow! Thanks to you and our amazing legal community — and the larger community — the Cleveland Metropolitan Bar Foundation (CMBF) had a tremendous year. Through the sweat and financial equity of many, the Foundation rose to new heights and the Foundation of our bar was made stronger than ever. Our Rock the Foundation event broke all records in terms of financial support and attendance (and the number of questions as to the meaning of “Rocktail Attire”). The creation of the Richard W. Pogue Award for Excellence in Community Leadership and Engagement to honor the legacy of Dick Pogue’s leadership and commitment to our community was a high point, as was Dick’s formal presentation of the inaugural Pogue Award to Chris Connor at Rock 11. Those two community heroes capture the essence of the CMBF’s theme of Giving Back. Our Halloween Run (Cavs Spirit Edition) was a great community event and we saw record levels of engagement and participation, as the Run has become a mainstay of the Cleveland running scene (and spirited costumes scene). Special thanks to the Cavs for being such a great partner. In general, our community partnering moved to a whole new level. We are increasingly able to spread the gospel of the amazing programs supported by the CMBF, which impact the larger community in profound ways. Support for the CMBF and these programs is steadily growing in the larger community.

For the long-term viability and vitality of our programs, the Foundation’s Endowment is crucial. This past year, in the wake of our recent Endowment Campaign, the endowment’s investments grew significantly, as a record amount of Fellows pledges were paid, and as support continued to grow. Special thanks to all you Fellows for providing a crucial element of stability and growth for the future. The ranks of Fellows now stands at 530, with more than 10% of our membership having this honor and providing this crucial support. As the endowment grows and campaign pledges and endowment dollars accrue, we are also beginning to see the power of our growing endowment and how it increasingly is paying off. The dollars generated by the Endowment alone generated $10,000 greater program support over the prior year.

As the CMBF’s endowment investments grew to a record high and our events generated record levels of support, our grants to fund the programs of the CMBA hit a record high. Our grants this year for the coming year are $164,000 — significantly higher than any past year and an increase of $19,000 (13%) over last year. In addition, based on the success of Rock, we were able to provide an additional supplemental unbudgeted grant of $20,000 to the CMBA for the current fiscal year related to programming. We also provided for the reallocation of grant dollars to other underfunded JFA programs in the amount of $7,300. Your dollars are being well spent and are having a big impact.

All of the above success was attributable to the efforts and support of many, but I must thank our exceptional Board of Trustees for their great engagement and commitment to the CMBF. I am proud to have worked with such an outstanding group, namely: Rosanne Aumiller, Mark E. Avsec, Barton A. Bixenstine, Mitchell G. Blair, Kevin Donahue,
Thomas L. Feher, Anne Owings Ford, M. Colette Gibbons, Eric R. Goodman, Shelly K. Hillyer, Ronald V. Johnson, Jr., Erica Jones, Kerin Lyn Kaminski, Honorable Diane J. Karpinski, Catherine O'Malley Kearney, John F. Kostelnik, Dennis R. Lansdowne, John W. Lebold, Jonathan Leiken, Richard D. Manoloff, Jacqueline McLemore, John T. Mulligan, Bethanie R. Murray, David M. Paris, Susan L. Racey, Alexander B. Reich, David W. Rowan, Matthew A. Secrist, Stephanie D. Trudeau, and Deborah W. Yue. Special thanks to my wingman and next CMBF President Drew Parobek; Treasurer Rosemary Sweeney; Vice President of Special Events Pat Krebs; and Vice President of Endowment Ginger Mlakar, for leading our Endowment Committee and keeping us focused on continued growth of the Endowment, which is crucial for the long term. And thanks as always to the remarkable staff of the CMBA for their tireless and often thankless work to advance our mission. (Special thanks to Mary Groth and Jessica Paine for such great work on programs and kudos to Mary for her appointment to the board of the National Conference of Bar Foundations.)

In summary, thanks to you and your colleagues, the CMBF is stronger than ever, as are the remarkable programs of the CMBA. Thank you for all your support and for making the Cleveland legal community one of the greatest in the country. P.S. — Congratulations to new CMBA President (and former CMBF President) Rick Manoloff, champion of our “Big Bar.”

CMBF President Hugh McKay grew up in East Cleveland, attended Brown University (BA ’78) and the University of Pennsylvania (JD ’81). He is the former President of the CMBA, founder of The 3Rs program, and is Partner-in-Charge of the Cleveland office of Porter Wright where he practices complex commercial litigation. He has been a CMBA member since 1982. He can be reached at (216) 443-2580 or hmckay@porterwright.com.
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Portability’s Pliability and Why Married Couples and Surviving Spouses Are Dumping Their Old A-B Trust Plans

By Patrick J. Saccogna

The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the “2010 Act”) enacted the important concept of portability, which affects the estate planning of virtually all married couples.

This article highlights the profound changes that portability has had on estate planning for married couples, and explains why married couples and surviving spouses are dumping their old A-B Trust plans.

WHAT IS PORTABILITY?
The 2010 Act, as extended by the American Taxpayer Relief Act of 2012 (the “2012 Act”), amended Section 2010(c) of the Internal Revenue Code (the “Code”) to allow a surviving spouse to port the deceased spouse’s unused exclusion amount (“DSUE amount”) to the surviving spouse if the executor of the deceased spouse’s estate makes a portability election on a timely filed federal estate tax return that calculates the DSUE amount.

As a result of a valid portability election, the surviving spouse can use the DSUE amount of the deceased spouse by making lifetime gifts (beginning immediately after the deceased spouse’s death) or by utilizing the DSUE amount at the surviving spouse’s death.

Example 1 (Basic Portability)
John and Mary are married. Neither has used any of his or her basic exclusion amount of $5.45 million. John dies in 2016, leaving all his assets to Mary. John’s executor makes a portability election that ports his entire $5.45 million DSUE amount to Mary. She can then shelter up to $10.90 million worth of assets from federal gift and estate taxes. (Portability does not apply for federal generation-skipping transfer (GST) tax purposes.) These results are true, even if John and Mary do not employ any fancy “A-B Trust” (also known as “Credit Shelter Trust” or “Bypass Trust”) planning.

LOWER TRANSFER TAX RATES AND HIGHER INCOME TAX RATES
The 2012 Act not only made portability permanent, but also provided for a unified estate and gift tax exemption that is indexed for inflation (i.e., $5.45 million per person [or $10.90 million for married couples] in 2016), and a maximum estate and gift tax rate of 40%.

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The 2012 Act also increased the maximum long-term capital gains tax rate from 15% to 20%, and the maximum income tax rate on ordinary income from 35% to 39.6%. The Patient Protection and Affordable Care Act added a surtax of 3.8% on the net investment income of certain high income taxpayers. Thus, the maximum long-term capital gains tax rate is now 23.8%, and the maximum tax rate on ordinary income is 43.4%. This combination of lower transfer tax rates and higher income tax rates has caused income tax planning to take on much greater importance in the estate planning for married couples and surviving spouses.

**The Portability Plan Says “I Love You” and “No A-B Trusts”**

A major advantage of a portability plan is its simplicity: a married couple can replace their complicated old A-B Trust plan with simple “I Love You” Wills leaving all their assets outright to each other and still eliminating federal estate taxes at both spouses’ deaths. There are other important reasons for a married couple to use a simple portability plan instead of a traditional A-B Trust plan, including (i) not having to use retirement plan assets to fund the B Trust (and thus preserving the tax benefits of naming the surviving spouse as primary beneficiary), (ii) not having to split their assets, and (iii) providing the surviving spouse complete control over the couple’s assets after the deceased spouse’s death.

The portability plan also affords the couple with a “double basis step-up,” or one income tax basis step-up at each spouse’s death. Conversely, a traditional A-B Trust plan does not achieve an income tax basis step-up at the surviving spouse’s death. The portability plan’s second basis step-up could save the couple’s children hundreds of thousands of dollars in federal and state capital gains taxes compared to an old A-B Trust plan.

Portability produces a second basis step-up at the surviving spouse’s death under Section 1014 of the Code, because all of the couple’s remaining assets are included in the surviving spouse’s gross estate. With a traditional A-B Trust plan, however, the appreciated assets remaining in the B Trust will not be included in the survivor’s gross estate and thus will not receive an income tax basis step-up at the survivor’s death.

**Example 2 (Portability Plan)**

John purchased ABC stock in 1995 for $200,000. His initial income tax basis is thus $200,000. He bequeaths the stock outright to his wife, Mary, at his death in 2005, when the stock was worth $500,000. Under Section 1014 of the Code, the stock would receive an income tax basis “step up” (the first step-up): Mary’s new income tax basis in the stock would equal the stock’s fair market value at John’s death, or $500,000. Mary dies in 2016, when the stock is worth $900,000, and she bequeaths the stock to her son, Max. The stock would thus receive another income tax basis step-up (the second step-up): Max’s new income tax basis in the stock would equal the stock’s fair market value at Mary’s death, or $900,000. If Max were to immediately sell the stock, his capital gain would be zero, (i.e., $900,000 amount realized less $900,000 tax basis), and thus his capital gains tax would be zero.

**Example 3 (Old A-B Trust Plan)**

If instead John leaves the ABC stock to the B Trust for Mary’s benefit under his old A-B Trust plan, then the stock would still receive an income tax basis step-up (the first and only step-up) at his death: the B Trust’s new income tax basis in the stock would equal the stock’s fair market value at John’s death, or $500,000. But this time, when Mary dies in 2016 and the B Trust distributes the
A-B Trust plan, "B Trust Prison" is a reality well below $10.90 million and the deceased in cases where a married couple’s assets are both deaths of and estate taxes both minimize or even zero out objectives of each of these options are to more of these approaches. The key tax plan, and hybrid plans employing two or of appointment provisions. This way, the surviving spouse can achieve a “jail break” and a basis step-up on the appreciated B Trust assets at the survivor’s death.

Example 4 (B Trust Prison)
John and Mary implement a traditional A-B Trust plan in 2008, when the value of their combined assets was $3,000,000. John dies in 2016 with a gross estate valued at $2,000,000. Mary’s separate assets are worth $1,700,000. Under this plan, all of John’s assets pass to the B Trust for Mary’s sole benefit. (The A Trust remains unfunded, because there are no assets left to fund it.) Under Section 1014 of the Code, the B Trust’s new income tax basis in John’s assets equals the assets’ fair market value at his death, or $2,000,000. No principal distributions are made and Mary does not undertake any additional planning. At Mary’s later death, if the remaining B Trust assets are worth $2,800,000 and son Max sells them, he would realize an $800,000 capital gain (i.e., $2,800,000 less $2,000,000).

The surviving spouse in situations like Example 4 should try to get out of B Trust Prison by asking the Trustee to distribute the B Trust’s appreciated assets to him or her. Alternatively, the Trustee might decant the B Trust to permit principal distributions to the surviving spouse or to “soup up” the B Trust with contingent general power of appointment provisions. This way, the surviving spouse can achieve a “jail break” and a basis step-up on the appreciated B Trust assets at the survivor’s death.

BUT WHAT IF A MARRIED COUPLE STILL WANTS TO USE TRUSTS?
Notwithstanding portability’s simplicity, many married couples still prefer to use trusts (instead of simple “I Love You” Wills) in their estate planning. Reasons for this include asset protection, investment management, limitations on distributions, concern over future federal estate taxes, GST tax planning, state death tax planning, the surviving spouse’s potential remarriage, and blended family concerns.

Fortunately, a number of trust-based planning alternatives permit married couples to achieve a portability “double basis step-up,” including a portability plan that utilizes a single QTIP-eligible Spousal Trust, a “soupied” A-B Trust plan that achieves a second income tax basis step-up via a contingent testamentary general power of appointment, a traditional disclaimer plan, and hybrid plans employing two or more of these approaches. The key tax objectives of each of these options are to minimize or even zero out both federal estate taxes and capital gains taxes at the deaths of both spouses.

IF IT’S TOO LATE FOR PORTABILITY, GET OUT OF “B TRUST PRISON”
In cases where a married couple’s assets are well below $10.90 million and the deceased spouse dies without having updated an old A-B Trust plan, “B Trust Prison” is a reality for the surviving spouse. This is because the old B Trust is no longer necessary to avoid federal estate taxes and will prevent a second income tax basis step up at the survivor’s death.
Each month, these pages will be dedicated to highlighting just some of the activities and programs of your Cleveland Metro Bar.

UPCOMING EVENTS & SPONSORSHIP OPPORTUNITIES

Sponsorship opportunities exist for many of these upcoming and high-profile events. If your firm/office is interested in gaining visibility through support of these events, please contact the CMBA at (216) 696-3525.

- **June 27**  CMBA Annual Golf Outing (Westwood Country Club)
- **September 9**  70th Annual Public Servants Merit Awards Luncheon (The Westin Cleveland Downtown)
- **September 23**  Small & Solo Expo (Independence)
- **September 30**  Greener Way to Work Luncheon
- **October 29**  15th Annual Halloween Run for Justice (Burke Lakefront Airport)

LEGAL DIRECTORY INCENTIVE & SAVINGS

Renew your CMBA membership before July 31 and get a free electronic version of its new 2016–17 Legal Directory.

**Save $5 on your printed edition now through July 31 too!** Members save $20 compared to non-members. Directories will be available in September. Act early and save when you order with your renewal invoice, order form on page 24 or CleMetroBar.org/Directory.

**YOUR LISTING & PHOTO**

We emailed all members their listing information to confirm it for the directory, and updates are due by June 30. Add your photo to the directory by sending us a photo to membership@clemetrobar.org. Individual photo sessions may be arranged with Wetzler’s Studios. Please call (216) 771-1554 for more information.
LIMITED TIME SUMMER SAVINGS ON CLE

Lock in your CLE savings with the CMBA’s CLE Passport and get 12 hours of CLE for $180. That’s 50% off regular rates! Order your CLE Passport today! This great offer expires July 31st.

The CMBA CLE Passport is available to members only so we invite you to take advantage of this incredible deal when you renew. The CLE Passport can be used on CMBA sponsored CLE through June 2017 (exclusions apply, see CleMetroBar.org/CLE for full details).

ESSAY COMPETITION WINNERS

Congratulations to the winners of the 2016 CMBA Ethics and Professionalism Essay Competition, presented by AmericanLawRadio.com and Malik Law:

1st Place – Seth Osnowitz (Case Law, ’17)
2nd Place – Seth Garfinikel (Case Law, ’17)
Honorable Mentions – Ankita Channarasappa (Case Law, ’17); Sarah Katz (Case Law, ’17)

Their essays were selected out of 49 submissions. The winning essay will be published in an upcoming edition of the Bar Journal.

CMBA SPOTLIGHTS

There is great buzz at the CMBA and so much happening. In case you missed some of it, here are some things highlighted in this issue worthy of your attention.

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No-Contest Clauses in Ohio

BY LISA BABISH FORBES

Since at least 1869, when the Supreme Court of Ohio decided Bradford v. Bradford, no-contest, or in terrorem, clauses in wills have been considered valid and binding in Ohio. No-contest clauses deny or limit the inheritance of a named beneficiary if that person makes any attempt to change or set aside a will or any part of a will. The Bradford decision, handed down 140 years ago, did not answer all questions about how no-contest clauses operate: What type of action by a beneficiary triggers a no-contest clause? Do Ohio courts follow the modern trend by including a probable cause or good faith exception to the enforceability of a no-contest clause? Should they? Whether the attorney considering a no-contest clause is a planner or a litigator, answers to these questions can help guide strategy.

Background

In Bradford, after recognizing that it is the duty of the courts to carry out the intention of the testator unless that intention be contrary to the policy of the law, the Supreme Court held:

A condition in a will whereby the testator excludes any one of his heirs who ‘goes to law to break his will from any part or share of his estate, is valid and binding; and effect will be given to it, as well in respect to bequests of personality, as to devises of real estate.

Bradford v. Bradford, 19 Ohio St. 546, 547-548 (1869).

The no-contest clause at issue in Bradford read: “[i]f any of my heirs is dissatisfied and goes to law to break this will, then my will is and I direct that they shall have no part of my estate and I debar them from any part of my estate whatever.” Id. at 546.

Upholding the validity of the no-contest clause, the Court reasoned:

‘No considerations of public policy require that an heir should contest the doubtful questions of fact or of law upon which the validity of a devise or a bequest may depend. The determination of such questions ordinarily affects only the interests of the parties to the controversy. As was said by the court in the case of Cooke v. Turner...’ There is no duty on the part of an heir, whether of perfect or imperfect obligation, to contest his ancestor’s sanity. It matters not to the state whether the land is enjoyed by the heir or devisee.’ Id. at 547-548.

Certain Actions Do Not Trigger No-Contest Clauses

Over the years courts across Ohio have recognized that not all legal action by a beneficiary will trigger a no-contest clause. Of course, the specific wording of the no-contest clause will be significant to any analysis. And, only an unsuccessful challenge to a will containing a no-contest clause implicates the clause. See Bazo v. Siegel, 58 Ohio St. 2d 353 (1979).

The Supreme Court of Ohio recognized almost 100 years after Bradford that, where beneficiaries have not sought to set aside, break, or make invalid any provision of the will, they have not triggered the no-contest clause. Kirkbride v. Hickok, 155 Ohio St. 293, 302 (1951).


Objecting to the sale of probate assets or seeking to remove the fiduciary, likewise, should not trigger a no-contest clause. Modie, 2002-Ohio-5765 at ¶ 29.

A proceeding for the construction of the will or for guidance on whether an executor has authority to undertake certain acts is not an action to challenge the validity of the will. In re Estate of Stevens, 2012-Ohio-4754, 981 N.E.2d 905, ¶ 21 (2nd Dist.) (“every request by a beneficiary for involvement of the probate court does not constitute a challenge to a will”); Kasapis v. High Point Furniture co., Inc., 9th Dist. Summit Nos. 22758, 22762, 2006-Ohio-255; See also Kirkbride, 155 Ohio St. 293; Banta v. Ohio Masonic Home, 6th Dist. Lucas No. L-76-323, 1977 Ohio App. LEXIS 9861 (Dec. 2, 1977) (where an action does not seek to have the will set aside or to change its provisions, it does not trigger a no-contest clause).

The probate court has the authority to review the conduct of the fiduciary and administration of the estate. Kasapis, 2006-Ohio-255 at ¶ 31; Modie, 2002-Ohio-5765 at ¶ 29. If questioning the conduct of the fiduciary could invoke a no-contest clause, the fiduciary would be beyond the reach of the probate court. See id.

The way a beneficiary presents her position to the court may also impact whether the no-contest clause is invoked. For example, in Moskowitz v. Federman, the Ninth District Court of Appeals concluded that the no-contest clause was not triggered even though the decedent’s siblings had denied, in court papers, the validity of a trust created by the will. Moskowitz v. Federman, 72 Ohio App. 149, 51 N.E.2d 48 (9th Dist.1943). The no-contest clause provided, “In the event that any beneficiary named herein, or any one of my next of kin, shall begin or maintain any proceeding to challenge or deny any of the provisions of this will, the legacy herein made to him or her shall lapse.” Id. at 155.

First one sibling brought an action seeking construction of an item in the will, to determine if it was sufficiently definite as to beneficiaries to create a valid trust. That sibling also brought a separate action to contest the validity of the will. She later reached an agreement with trustees and ultimately did not challenge the will. Two other siblings answered the first sibling’s complaints. Initially they did not challenge the will. After the first sibling reached the agreement not to challenge the will, they amended their pleadings to assert that the will did not create a valid trust. The court determined that the will and all its provisions were valid, and that the no-contest clause was not triggered.

The court narrowly held that where heirs and legatees are made defendants to an action to determine the validity of a clause in a will and, as defendants, “urge the invalidity of certain provisions of the will.”
Such pleading and argument creates the issue for determination by the court, and does not “begin or maintain ... proceedings to challenge or deny any of the provisions of ... the will.” Nor does it constitute a contest of the will or any of its provisions within the directions given the trustees.

Moskowitz at 154. The Court summarized its holding, “A request for construction in which issues are joined and argument had should not be interpreted as a violation of the conditions against challenge or contest under these circumstances.” *Id.*

**Good Faith or Probable Cause Exception**

In *Moskowitz*, the Ninth District recognized, “The more modern doctrine seems to be that public policy, probable cause, good faith and a variety of other matters, should be considered in connection with the facts of each particular case examined, and that hard and fast rules cannot be pronounced and made applicable to all cases.” *Moskowitz*, 72 Ohio App. at 163, 51 N.E.2d 48. The Court disagreed with Bradford reasoning: “What would be the effect of permitting a ‘no contest’ clause to prevail in cases of contests made upon the grounds of fraud or undue influence when the insertion of the condition was the work of those exerting the undue influence? Is there a public policy involved?” *Id.*

The “modern trend” is found in the Uniform Probate Code, adopted by some 16 states: “A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.” UPC Sections 2-517/3-905. Another five states have a similar rule, but have not adopted the UPC. T. Challis and H. Zaritsky, State Laws: No-Contest Clauses, ACTEC (2012).

Ohio has not adopted the UPC or a similar rule across the state. In 2002, almost 60 years after deciding *Moskowitz*, the Ninth District Court of Appeals held that “there is no good faith exception to ‘no contest’ clauses.” *Modie*, 2002-Ohio-5765 at ¶ 22. The *Modie* Court concluded that the language in *Moskowitz* “regarding the ‘modern trend’ is simply dicta, which we are not inclined to follow.” *Id.*

But, *Modie* is not the last word on the viability of a good faith or probable cause exception to no-contest clauses. In 2012, the Second Appellate District, in Champaign County, cited *Moskowitz* approvingly. In re *Estate of Stevens*, 2012-Ohio-4754, 981 N.E.2d 905 (2nd Dist.). The Stevens court noted, “In determining whether the in terrorem doctrine applies in a particular case, courts must consider ‘public policy, probable cause, good faith, and a variety of other matters ... in connection with the facts’ of the case.” *Id.* at ¶ 17.

Whether other courts across Ohio agree with *Moskowitz* and *Stevens* or follow *Modie* remains to be seen. Will the modern trend catch on in Ohio? Or, will no-contest clauses be strictly construed? Either way, drafting attorneys may want to consider the possibility of an expansion of the modern trend into Ohio as they advise their clients on the impact of including no-contest clauses in wills.
Attorneys often use their transition from active full-time work as an opportunity to volunteer in pro bono efforts. In the past, attorneys were required to pay the full cost of keeping their license active in order to do pro bono work during retirement. Today, there is good news for attorneys who want to volunteer in the later years of their career; Ohio will soon have a new emeritus attorney registration status. The Ohio Supreme Court announced in March new rules that will allow retired attorneys to engage in limited legal practice to provide pro bono service.

The new registration status is the result of changes to Rule VI of the Rules for the Government of the Bar of Ohio. The changes were in response to the recommendations made by the Supreme Court Task Force on Access to Justice, which was charged with identifying gaps in and obstacles to accessing the civil justice system in Ohio. These changes will take effect on September 15, 2016.

The emeritus pro bono status will be available to an attorney admitted to practice law in Ohio and is associated with a law school clinic, legal aid, approved legal services organization, public defender’s office, or other legal services organization. The attorney will be required to have supervision from an active-status attorney and routine legal services will not require supervision. The emeritus attorney will not be allowed to receive compensation beyond reimbursement for expenses from the pro bono organization.

Access to justice remains a problem across the United States. Roughly 80% of people with low incomes are not having their civil legal needs met. Many lawyers are doing their part by providing pro bono services; the attorney emeritus status in Ohio will help to encourage more pro bono work throughout the state. Ohio joins several jurisdictions across the United States in making this change.

What type of work can late-career and retired attorneys do?

The Legal Aid Society of Cleveland, through its ACT 2 initiative of Legal Aid’s Volunteer Lawyers Program and in collaboration with the CMBA, provides attorneys with a variety of opportunities to get involved.

Volunteers work closely with Legal Aid staff attorneys in their pro bono efforts. Legal Aid’s Volunteer Lawyers Program supports ACT 2 volunteers with malpractice insurance, office space and resources, training, and mentors.
Roles for ACT 2 volunteers at Legal Aid include:

- In-house work at Legal Aid in a substantive practice group or in the Community Engagement practice group;
- In-house work at Legal Aid within the Volunteer Lawyers Program, leading a project or program; and
- Traditional pro bono work, such as participation in brief advice clinics, assisted pro se clinics, or accepting a pro bono case.

Within any of these opportunities, ACT 2 volunteers will also have the option to mentor law students and newer attorneys. Volunteers and law students or newer attorneys will be matched based on mutual interest in a project or area of law. In this way, ACT 2 attorneys can pass on their skills and experiences to the next generation of lawyers.

Attorneys who participate currently in Legal Aid’s ACT 2 program all have a commitment to public service and to advocacy for low-income persons and are making a positive impact on our communities. For example, an ACT 2 volunteer at Legal Aid recently ensured housing for a person being displaced by the Ohio Department of Transportation’s new Opportunity Corridor project, a $331 million, 3.5 mile road linking I-490 and University Circle. The new road and surrounding development could bring jobs back to the neighborhoods and improve access to jobs, education and cultural activities for residents.

However, 64 homes and 25 businesses remain in the path of construction. The state has the right, by eminent domain, to access the land for development, but residents needed help to protect their rights.

Cleveland’s Department of Aging approached Legal Aid for help. Homeowners, many of whom are older adults, who live along the construction route, needed legal advice.

As a Legal Aid ACT 2 volunteer, Paul Binder has been the point person at Legal Aid to help homeowners. He has reviewed a number of cases and has advised several residents whose property is slated to be taken for the Opportunity Corridor.

Mr. Binder brings 36 years of experience as a federal prosecutor to his volunteer work with Legal Aid. He recently retired from his practice of prosecuting anti-trust, fraud, and violent crime cases with the U.S. Department of Justice. In retirement, he wanted to continue using his skills as an attorney and joined Legal Aid as an in-house volunteer under Legal Aid’s ACT 2 program. “It’s a terrific opportunity to give back,” says Mr. Binder.

“There is a wealth of experience and expertise in the community of potential ACT 2 attorneys. We are so fortunate to have so many talented attorneys willing to share that talent,” says Ann Porath, managing attorney of Legal Aid’s Volunteer Lawyers Program. Porath adds, “to maximize that experience and expertise is a key to addressing access to justice issues and strengthening our communities.”

ACT 2 is a great opportunity for attorneys to continue or to begin giving their time and expertise to “do good.” With flexible hours and a wide array of projects available, it is easy to find the right experience for you with ACT 2. To learn more and to sign-up for ACT 2 with Legal Aid, visit www.lasclev.org/ACT2.

Frank DeSantis is a partner at Thompson Hine. He leads the advisory committee for Legal Aid’s ACT 2 program, and is also an active pro bono volunteer. He is president emeritus of Legal Aid’s Board of Directors, and a past president of the Cleveland Metropolitan Bar Foundation. He has been a CMBA member since 1983. He can be reached at (216) 566-5514 or Frank.Desantis@ThompsonHine.com.
Cleveland’s Bike Share Program Will Offer a Wealth of Opportunities

As a member of the CMBA’s Green Initiative Committee, I’m always trying to think of ways for local lawyers and law firms to positively impact the environment, while reducing energy use and costs. Last year, I had the opportunity to share with you my experiences in riding a bike to work. That got me thinking, what about all the people who don’t have a bicycle? After all, according to a survey conducted by Breakaway Research Group for PeopleForBikes, only 52% of Americans reported having a functioning bike available to them.1 Fortunately for the 48%, bike share programs are on the rise and Cleveland is set to get in on the action! You should too as the programs offer numerous ways for your firm to increase productivity, save money and improve morale.

In 2013, the City of Cleveland and RTA funded a formal study to determine the feasibility of bike sharing in Cleveland. According to the advocacy group Bike Cleveland, “the study recommended a 700 bike, 70 station system with a ‘dual hub’ configuration encompassing downtown and University Circle in phase 1, with expansion into the surrounding neighborhoods in phase 2.” The neighborhood expansion would include Detroit-Shoreway, Midtown, Ohio City and Tremont.2

In 2015, the Northeast Ohio Areawide Coordinating Agency (NOACA) awarded Cleveland’s Bike Share program $357,000, and Bike Cleveland was able to raise the $89,000 local match to fund the project. As of today, Bike Cleveland expects that 500 bikes will be in place at 50 stations this summer — hopefully in time for the RNC at the end of July.

In the meantime, on September 10, 2014, Zagster, a Cambridge, Massachusetts-based bike sharing company launched a pilot network of 34 bikes at six stations throughout Ohio City and at the Superior Viaduct. The program, which was aimed at promoting economic growth, linking neighborhoods, encouraging physical activity, cutting down on car dependence and offering a convenient and fun way to make urban trips, was completely funded by the private sector, and was a quick success.3 In fact, Zagster added several new locations within six weeks, and currently offers locations in Ohio City, downtown, University Circle and at Legacy Village.4 It’s unclear whether Zagster and the City’s program will be able to coexist once the larger bike share program is implemented this summer, but one way or another, bike shares will be available to Clevelanders.

So, what does all of this mean for you and your firm? It provides opportunities to be green, to save money, to increase activity, production and morale, and to possibly even reduce costs. For instance, consider an attorney with an office on Euclid in the theatre district. A trip to the Justice Center is roughly a mile, or a 20 minute walk at 3 mph. On a bike, you could make the same trip in just six minutes at 10 mph. That’s a time savings of 28 minutes round trip. The time saved is a win for attorneys and clients as the above scenario, an employee in the theater district isn’t likely to walk to the warehouse district to eat lunch, and vice versa. With a bike, however, it’s an entirely different story. Bike shares could open a world of possibilities for your employees by allowing them to travel farther and be more productive during their breaks. This could translate to increased morale, a healthier workforce, additional marketing opportunities and economic growth.

For those who are skeptical, consider the old cliché, “It’s just like riding a bike.” As the saying implies, we all know how. With bike shares coming to Cleveland, I challenge you to embrace the opportunities presented, and I hope to see all of you riding by the CMBA’s Greener Way to Work Week — September 26 – 30. Those who don’t capitalize on this opportunity will forever be one pedal behind.

David Brown is a partner at Weltman, Weinberg & Reis Co., LPA who is based in the Cleveland office and handles commercial collection matters. He is a member of the CMBA Green Initiative Committee. He has been a CMBA member since 2007. David can be reached at (216) 685-1062 and dbrown@weltman.com.

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Millennial Estate Planning

Capitalizing on Generation Next

BY BETHANY A. STICKRADT

Millennials have arrived! In the United States, there are over 83 million Millennials and we account for over one third of the growing workforce, making us larger than the Baby Boomers! With such a surge in recent years, many are left wondering — who is a Millennial and why should I pay attention to them? More importantly, how do I attract them as clients and why do they need estate plans?

As a Millennial, I question how to attract and educate my peers on the value of an estate plan.

Who is a Millennial?
Millennials were born between 1980 and 2000 and are described as the “boomerang” generation, Gen Y, and the “Peter Pan” generation. According to Pew Research Center, we are the most educated generation in history. Due to a struggling job market, many Millennials decided to continue our education when, post-graduation, jobs were not available. Coupled with the increasing costs of education, we are (on average) saddled with over $21,000 in student loan debt. For Millennials in the legal profession, the American Bar Association reports our mean student loan debt is more than $122,000!

Millennials are a product of our environment, having witnessed two stock market crashes, the burst of the dot-com bubble, and 2008’s global financial crisis, most of which came at a time when we were entering the workforce or beginning our education. Regardless of our high debt, we are generally more optimistic about our financial future and security than others. According to the Wall Street Journal, Millennials save at an average rate of negative 2%. In comparison, Generation X saves at a rate of 3–6%, and Baby Boomers at 13%. Millennials are more conservative in our investments, picking more socially conscious methods of return. The generation has been criticized — with naysayers alleging our investments are based in immaturity, but in actuality they are based on the global experiences we have observed.

Millennials are forging a new path to adulthood, one that looks remarkably different than our predecessors’. For example, Millennials are taking longer to get married. A U.S. Census Bureau report states that for the ages of 18 – 34, the number of individuals who have never been married increased from 41.5% in the 1980s to 65.9% in 2013. Millennials are independent and do not see institutions like marriage as necessary.

Since Millennials stay single longer, life’s biggest decisions are delayed. Often referred to as “Generation Rent,” Millennials are delaying home ownership. The U.S. Census Bureau released data showing Millennial home ownership decreasing since the mid-2000s. Even though a majority of us are not currently homeowners, a Goldman Sachs study shows that 93% of Millennials plan on purchasing in the future. Clearly, Millennials are paying attention to the future.

After you know what Millennials are, you need to educate us on (1) the need to work with estate planners and (2) that our net worth is more than our high debt load.

Estate Planning Concerns for Millennials
Should you suggest to younger individuals the need to start planning they may respond: “I’m too young for Estate Planning,” or “Why? What do I even have?” Millennials think the only “estate” we have is saddled with debt and spending money to protect our sparse assets is unnecessary. Millennials feel immortal; we know death will happen someday but it is a distant thought. We have not thought about life’s what ifs: injury, incapacitation, death. It is the Estate Planner’s job to explain to Millennials why they need to start planning now.

Millennials have a variety of assets to consider when planning. For instance, many
Millennials put money into retirement assets or life insurance plans. The three most common Millennial retirement based accounts are: 401(k) or 403(b) plans, bank account (checking, savings, CD), and Roth or Traditional IRAs. All of these come with planning strategies that the attorney should suggest to their client, the most important being maximizing gain from the investment, considering tax implications, and probate avoidance.

When educating Millennial clients on the importance of planning, it is imperative to discuss their online footprint. Millennials are more apt to utilize digital and virtual currencies like bitcoin and we have accounts through Venmo, PayPal, Apple, or a myriad of other mobile payment providers. All of these digital assets should be addressed in the estate plan.

Millennials need to understand that an estate plan is more about preparing for the worse case scenario, than protecting assets and creating a legacy. Outside of our assets, the most important concern for Millennials is having a plan should we be unable to make decisions for ourselves. Educating us on the value of appointing surrogate decision makers will go a long way in selling Millennials on planning. As with all preceding generations, we appreciate making decisions for ourselves. We put a higher value on social awareness and aligning our actions with our beliefs and our plans must reflect this.

What does the Millennial estate plan look like?
There are many options open to Millennials when it comes to developing estate plans. The path we will take is determined by our individual needs, though most Millennials require a simple estate plan. You will find that most of the estate planning strategies you are currently using for other generations will work with Millennials.

The first step in working with us is getting to know us. Once you accomplish this, you will be able to determine what will play out in the estate plan. For example, the Millennial may have a sibling with special needs, a parent on public benefits, or perhaps children and pets. The proper estate plan will incorporate all the Millennial’s needs, regardless of whether or not we know we have them.

The four basic documents that all Millennials need include: a Last Will and Testament, Financial Power of Attorney, Health Care Power of Attorney, and Living Will. Both the Last Will and the Financial Power of Attorney will need individualization for the Millennial client. The documents should address online activity, such as social media accounts, digital currency, and online banking. It may also include specific provisions if they are a business or homeowner. If the Millennial client has children or is expecting, it is wise to progress from the simple plan to one addressing parenting needs. This will include nominating a guardian in a Last Will, establishing a trust for the child's benefit, and education on funding the trust.

Establish a Growth Plan
One thing is certain, Millennials will continue to change over time and our estate plans will need to follow suit. By developing a relationship...
with the Millennial client, attorneys have the opportunity to help the client through complex life challenges and act as a knowledgeable advisor. With fewer Millennials heeding the advice of financial advisors, the estate planner could be the first step in developing a network of professional assistance.

Take for example a typical single Millennial in their late twenties. The basic estate planning techniques required are simple and most likely include the four basic documents. The estate planner will educate the client on what steps he or she will need to take if they purchase a home, get married, or have a child.

Generally, Millennials understand that we will most likely not see large inheritances from our forebears. Even though the Baby Boomers will pass on thirty trillion dollars, we know it is not practical to expect that money to be there when we need it. Developing a growth plan will allow the attorney to maintain a relationship with the client and turn the basic estate plan into a more complex one down the road.

Marketing to Millennials, Fostering Engagement

Infiltrating the Millennial market is essential to capitalizing on this generation. According to a Harris Poll, 90% of individuals aged 35 and under do not have a Last Will and Testament. Whether they think estate planning is too expensive or unnecessary, the number of Millennials leaving themselves vulnerable to estate blunders is high.

Studies show that Millennials value four qualities when working with professionals: transparency, reputation, accessibility, and cost. Millennials want to see their attorney is conveying a genuine message. They also want to know that should they have questions or concerns, their attorney (and firm) are accessible.

Attorneys looking to market to Millennials should evaluate their online presence. Known as “digital natives,” Millennials are more likely to first turn to the internet for advice — rather than picking up the phone to call an attorney. Wise estate planners will utilize tools on the web to interact with these clients. You should consider the different platforms available for free public outreach — including blogging, social media, and brief educational videos.

One of the biggest obstacles for estate planners is demonstrating to Millennials that your services highly exceed outcomes from do-it-yourself online resources available at a lower cost. Unbundling the estate plan package is wise when working with Millennials — if we do not need it, do not sell it to us ... and we will check!

Millennials are more likely to seek a second opinion and conduct their own research than to blindly follow advice. Even though Millennials are optimistic about their financial futures, Pew research has shown that they are more skeptical when trusting advice from others. Taking these potential clients seriously when meeting with them and understanding that they are more sophisticated than their age will help estate planners make strong first impressions with this generation.

The most important takeaway a Millennial can get after leaving their attorney’s office is satisfaction — “I am familiar with my documents, I have a plan, and I understand the plan.”

Bethany A. Stickradt is an associate attorney with AlerStallings. Bethany received her JD from Cleveland Marshall College of Law. She has presented on various topics involving Millennials, including their incorporation into the workplace. She has been a CMBA member since 2014. She can be reached at (614) 798-9800 or at bethany@alerstallings.com.
Transgender issues have been a hot topic recently, particularly with the announcement by Target that customers may use the restroom corresponding with their gender identity. However, considering the paucity of law on the topic, how can one advise clients as to the best practices for responding to the myriad of questions raised by this issue?

While “gender dysphoria” (previously “gender identity disorder”) is a recognized medical condition, the ADA does not protect transgender status not related to an underlying physical impairment. 29 C.F.R. §1630.3(d)(1). Furthermore, gender identity is not a protected class under the Fourteenth Amendment.

Rather, transgender claims are most frequently raised under Title VII of the Civil Rights Act of 1964, which prohibits an employer from discriminating against any individual “because of... sex.” However, “sex” is not defined within this statute, which has spurred much litigation over its meaning. While this article largely addresses workplace discrimination, the courts interpret other federal laws that prohibit discrimination based on “sex” by reference to Title VII. As such, this analysis also applies to areas such as education (Title IX) and Fair Housing.

An analysis of transgender issues under Title VII begins with Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989), which was not about transgender individuals at all, but addressed “traditional” gender discrimination. Hopkins was told that she had a better chance of making partner if she “walk[ed] more femininely, talk[ed] more femininely, dress[ed] more femininely and did things like “wear makeup, have her hair styled and wear jewelry.” Id. at 1782. As a result, she filed suit under Title VII for gender discrimination, claiming that her promotion to partner was delayed because she was not “feminine” enough.

In affirming judgment for Hopkins, the U.S. Supreme Court confirmed that gender discrimination includes discrimination for failing to conform to the stereotypical idea of how a person of a particular gender should behave. Id. at 1791. As a transgender individual may not fit into the stereotypical idea of how one of his or her biological sex should appear or behave, Price Waterhouse allowed for the law to develop in the area of transgender discrimination.

Since Price Waterhouse, the Sixth Circuit has made clear that a transgender plaintiff may bring a claim based on a Price Waterhouse theory of failure to conform to a gender identity stereotype, though it has rejected the idea that transgender status itself is protected under Title VII.

The most prominent case extending Price Waterhouse to transgender law was Smith v. Salem, 378 F.3d 566 (6th Cir. 2004). Smith, who was born a male, worked as a lieutenant in the City of Salem Fire Department. After working there about seven years, Smith was diagnosed with Gender Identity Disorder and began “expressing a more feminine appearance on a full-time basis.” Following comments from coworkers that Smith was not “masculine enough,” Smith advised the supervisor of Smith’s diagnosis and treatment, leading to a decision by the city that Smith would be terminated. Smith learned of the plan and obtained legal counsel. Several days later, Smith was suspended for an alleged violation of city policy. Smith claimed the suspension was retaliatory and filed a Title VII action in federal court alleging that the city’s actions constituted gender discrimination as defined by Price Waterhouse.

When the district court granted the city’s motion to dismiss, Smith appealed. The Sixth Circuit reversed the order dismissing the case, holding that “sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.” Smith at 575.

Despite Price Waterhouse, a valid claim cannot be stated because an employer merely disliked a person based on his or her status as a transgender person, or because an employer disagrees with the concept that one can change his or her gender identity. In Vickers v. Fairfield Medical Center, 453 F.3d 757 (6th Cir. 2006), Vickers was harassed because his co-workers
believed him to be homosexual. The court held that Title VII does not prohibit people who are perceived as or identify as homosexuals from bringing claims, but they must allege that they did not conform to a gender stereotype in an observable way in the workplace. Though the court felt the harassment was "unacceptable and repugnant," it was not prohibited by Title VII.

Examples of what courts have considered "gender stereotyping" include:

- Comments that a male to female transgender individual lacked "command presence," should stop wearing makeup and should appear more masculine. *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005);
- Refusing to refer to a male employee by his new husband's last name, which the employee adopted as his own. This was "gender stereotyping" as taking a spouse's surname is traditionally a female practice. *Koren v. Ohio Bell Telephone Co.*, 894 F.Supp.2d (N.D. Ohio 2012). (While this case addressed sexual orientation, it can be extended to transgender individuals who wish to be referred to by a name traditionally associated with the opposite gender);
- Terminating a male-to-female transgender employee who stated her intention to dress as a woman at work. *EEOC v. RG & GR Harris Funeral Homes, Inc.*, 100 F.Supp.3d 594 (E.D. Mich. 2015).

In contrast, a lesbian employee who claimed to exhibit a "non-gendernormative" style of dress was not able to state a claim under Title VII, as there was no evidence that co-workers or supervisors had ever commented about her style of dress or that her style of dress affected the workplace in any way. *Revely v. Cincinnati State Technical and Community College*, 2014 WL 5607605 (S.D. Ohio 2014).

One often discussed issue is restroom usage. Few courts have directly considered this issue, and it has not been addressed by the Sixth Circuit. Title VII law currently appears to permit decisions on restroom usage to be made based on biological sex. However, OSHA requires employers to be granted access to restrooms based upon their stated gender identity. As such, advising clients on restroom assignments should be made with OSHA requirements in mind. (Title IX law is more divided on the issue, with a push toward allowing usage based on gender identity.)

A quickly following question is whether an employer can request evidence of an employee's transgender status or progress through sexual reassignment surgery before permitting him or her access to gender specific facilities. The courts have not yet addressed this issue. OSHA's best practices prohibit requesting medical or legal evidence of gender identity (as do federal laws governing housing and prisons). The ADA limits any request for medical information to requests that are "job related and consistent with business necessity." Unless gender is a specific requirement for a job, it is doubtful such a request would meet with the ADAs requirements. An employer can potentially consider other alternatives to assess the genuineness of the employee's statement, such as whether the employee appears as the opposite gender outside of work. It may also be permissible to have a transitional period to allow everyone to adjust to the new situation.

The best advice for a client is to work with the transgender individual and determine the best process for proceeding.

There is also the issue of how to address "objecting" coworkers or patrons. While the issue has not been decided by our courts in the context of transgender law, the Sixth Circuit generally prohibits one individual's views to be used to permit discrimination against another individual. For example, employees are not permitted to reject an employer's anti-discrimination policy based on a religious objection to a particular lifestyle. This case law will likely extend similar protections to transgender individuals.

At time of writing, 19 states plus the District of Columbia have anti-discrimination laws that protect transgender people. Ohio currently does not have any statewide law regarding discrimination of transgender people, but this may be changing. HB 289 was introduced on November 15, 2015, and referred to the Community and Family Advancement Committee, and SB 318 was introduced on April 25, 2016. Both of these bills, if passed as introduced, would expand protections to both transgender and homosexual people in a variety of areas.

Both bills prohibit discrimination based on gender identity or sexual orientation for housing, government contracts, funding domestic violence shelters, community school admissions, and other areas. Most notably for purposes of this article, the bills would make it illegal for employers to base payment of wages on gender identity expression or sexual orientation, and employers will not be able to fire, refuse to hire, refuse to promote, or partake in other adverse employment actions based on a person's gender identity expression or sexual orientation. Employers will not be allowed to ask for information about gender identity or sexual orientation on applications. The bills also remove homosexuality and gender identity disorder from the definition of a "physical or mental impairment" under the Ohio Civil Rights Act. As these bills have just recently been introduced, it is difficult to tell what changes will be made to them, if any, before and if they are passed. Further, several Ohio municipalities, including Cleveland, have enacted their own anti-discrimination protections that include transgender individuals, though remedies are often limited.

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Helping Clients Choose the Right Person to Nominate As Guardian for Their Minor Children If the Unthinkable Ever Happens

BY REBECCA YINGST PRICE

Most parents don’t want to imagine what life would be like for their children if they were no longer around. Where will they live? Who will take care of them? Will they have enough money? Parents can fairly easily ensure that their children have the necessary financial resources, but it is much harder to ensure that their children’s physical, emotional and spiritual needs will be met. Difficulty deciding whom to nominate as a child’s guardian is one of the most common reasons that parents put off establishing an estate plan. While it is not possible to replace the relationship that a parent has with their child, with proper planning it is possible to help a client ensure that their child will be placed with a loving, caring adult who will be able to provide a secure and stable environment for them. Procrastination, and failure to nominate anyone to serve as guardian, may leave this decision to chance. Who will apply to be guardian, and whose application will the probate court select?

First, it is important to note, and distinguish between, the two types of guardians for minors in Ohio. First is the guardian of the person whose duties per R.C. 2111.13 include (1) protecting and controlling the ward’s person; (2) providing them with suitable maintenance (from the ward’s estate); (3) providing such maintenance and education for such ward as the ward’s estate justifies; and (4) obeying all the orders and judgments of the probate court touching the guardianship. Guardians of the person are not required to be Ohio residents so clients may nominate anyone they trust. Second, is the guardian of the estate, whose main responsibility per R.C. 2111.14 is to manage the assets of the ward’s estate. They are required to be Ohio residents, thus allowing the probate court to maintain jurisdiction over the ward’s assets. In the remainder of this article, unless otherwise stated, the term “guardian” refers solely to guardian of the minor’s person.

R.C. 2111.50(A)(1) dictates that at all times, the probate court is the superior guardian of wards who are subject to its jurisdiction. This means that the probate court has exclusive jurisdiction over the appointment of a guardian for an orphaned child. It has the duty to appoint someone to act in the best interest of the minor child, and it will make an independent determination of whether the appointment of the person who is nominated by the deceased parent is indeed in the best interest of the minor child. While a nomination of a guardian is NOT binding upon an Ohio probate court, the Court will appoint a nominee except for good cause shown or disqualification. Nominations of a guardian for a minor child may be made in (1) a last will and testament; (2) durable power of attorney; or (3) a separate document executed with the same formalities as a last will and testament (signed, dated, and witnessed by two independent adults). Guardianships of minors last until they reach the age of majority at age 18. If the ward has a physical or mental disability requiring ongoing legal supervision, the guardian must once again apply to the probate court to be appointed guardian once the disabled individual turns 18.

How can we assist our clients in making these tough decisions? First, I advise clients to brainstorm a list of all potential guardians. The list should include all of the people who: (1) they know and trust; (2) know their children well; (3) are actively involved in their children’s lives; (4) interact well with their children; and (5) their children love and trust. The list should include everyone from parents to siblings, aunts and uncles, cousins, and close family friends. Once that list is complete, it needs to be narrowed down to a few top candidates, then organized in order of preference.

Second, parents should make determinations about the suitability of people on their list. It goes without saying that those who have a criminal history, or history of child abuse (even suspected) should be eliminated. Then the process becomes more
difficult. Does the person have the maturity to provide a stable household for their child? Do they have the physical stamina and life expectancy to care for their children until they reach the age of 18? Will they be a good role model for their children (i.e. do they trust their judgment, are they responsible, patient, honest, and dependable)? Do they deal well with adversity, or have they exhibited a pattern of bad behavior, irresponsibility, dishonesty or volatility? If the client does not respect their choices and how they have lived their life, they should probably be crossed off the list.

Another important consideration is the work schedule of the potential guardian. Do they have a job with regular hours that will allow them to spend time caring for the child, or do they work around the clock and travel frequently for work? If they are appointed as guardian, will the child be left with a paid caregiver more often than the client would allow? The importance of geography cannot be overlooked either. If the potential guardian lives across the country, the child will have to uproot their entire life (after just losing their parents) to start anew. Given the age of the child, is the guardian who lives far away a better choice than someone who lives close by that will allow the child to stay close to their current friends and activities? It is far easier for a younger child to move than an older one. This should be a more frequent point of discussion as the children age.

Another important consideration is whether the potential guardian is married. If not, can they provide the necessary stability and attention for the child? Many single parents do a great job of raising their children, but it can often be much more of a physical, emotional and financial challenge. If they are married, do you like their spouse? Many clients want to nominate a couple to take custody of their children, but I strongly discourage that since 40-50% of all marriages end in divorce (60% of all second marriages). The last thing that parents would want is for their children to be caught up in a divorce battle. If they trust both parties, then they should still nominate them in order of preference, rather than jointly, so their wishes are clear. It is also important to consider whether the potential guardians have children themselves. If so, do their kids get along with them? Can they handle more kids? What do they think of the potential guardian’s kids? Will they be a good influence on their kids? If not, perhaps they should be crossed off the list since their kids will have constant exposure to them.

Lastly, in making this decision one cannot overlook the financial impact of raising a child. If the potential guardian is not financially stable, then taking on the responsibility of raising additional children will put further stress on an already unstable situation. According to the U.S. Department of Agriculture (USDA) it costs a middle income family $245,000 to raise a child from birth to age 18, or $455,000 for an upper income family. Both figures EXCLUDE the cost of higher education. In addition to determining the best potential guardians, parents need to ensure that they leave adequate resources to care for their children. Using the USDA figures, a $1 million life insurance policy would not cover all the expenses for two orphaned children to be raised by a guardian, and to graduate from college without other financial assistance. If the guardian does not have a large enough house or vehicle to accommodate additional children, then any money left to the orphaned children will be further stretched since no guardian should be expected to personally cover the financial burden of raising children of others.

Once the list has been narrowed down, clients should be counseled to talk to the potential guardians about their willingness to take on the responsibility. This should not be a single conversation, but rather one that occurs regularly as the children age and the potential guardian’s life changes. Relationships change over time so legal documents should be updated regularly to reflect those changes. Another important thing for clients to consider is that under R.C. 2111.12, a minor who is over the age of 14 may ask the probate court to appoint a particular person as their guardian. In that case the probate court has the option to: (1) appoint the person nominated by the deceased parents; (2) appoint the person nominated by the minor; or (3) appoint some other person. Parents of older children may want to discuss potential guardians with their child ahead of time to understand their preferences (and so the child can understand theirs) before making a nomination. While older minors may be able to state a preference about whom they will live with, they are not entitled to a superior preference about who would handle their estate. Any parental nomination for a guardian of the estate will have preference over the person nominated by the minor.

While this decision can be daunting and overwhelming for many people, clients who do a good job of documenting their wishes, and who talk to those involved in their estate plan (including their older minor children), will provide the smoothest transition for their children if the unthinkable ever happens.

Rebecca Yingst Price of the Law Office of Rebecca Yingst Price, LLC, focuses her legal career on helping families and individuals with estate planning, estate and trust administration. She believes that there is no substitute for proper legal planning to protect loved ones. Ms. Price has vast experience working with families with young children and disabled children in building estate plans that will allow their parents to rest assured that their children’s long-term future stability has been provided for. She also struggled with the decision of whom to nominate as a potential guardian for her young daughter when setting up her own estate plan, and wants to help others through this tough decision. She has been a CMBA member since 2007. She can be reached at (216) 239-5043 or at price@ohiowills.net.
Appellate Practice 2016

Thursday, June 16

REGISTRATION 11:45 a.m.
PROGRAM & LUNCH 12 – 4:30 p.m.
CREDITS 3.75 CLE hours and advanced specialization credit in appellate law approved

Welcome & Introductions
Joseph P. Dunson, Dunson Law, LLC, Seminar Chair

Federal Practice Overview, Standing Orders and Early Case Resolution
Hon. Solomon Oliver, Jr., U.S. District Court, Northern District of Ohio

Anatomy of a Federal Criminal Prosecution from Indictment to Sentencing
Ian N. Friedman, Friedman & Nemecek, LLC.
Joseph N. Pinjih, U.S. Attorney’s Office

Perspectives from the Clerk’s Office: E-Filing, ADR and Corporate Disclosure
Vicky Mzeli, Chief Deputy, U.S. District Court Clerk’s Office

Early Civil Case Obligations: Initial Disclosure, Meet and Confer and E-Discovery
Amy Ryder Wentz, Littler Mendelson, PC.

Personal Jurisdiction and Venue in the 6th Circuit
Gregory P. Amend, Buckingham, Doolittle & Burroughs, LLC

Conduct in Court and Depositions (.50 hour Professional Conduct)
Diane E. Citrino, Giffen & Kaminski, LLC

The Estate Planning, Probate & Trust Law Section presents
Hot Topics for Estate Planners

Tuesday, June 21

REGISTRATION 8 a.m.
PROGRAM 8:30 – 11:45 a.m. Lunch to follow
CREDITS 3.00 CLE requested

Welcome & Introductions
Cristin R. Snodgrass, KeyBank Family Wealth, Section Chair
Franklin C. Malemud, Reminger Co., LPA, Section Vice Chair

Top Creative Charitable and Tax Strategies You May Not Have Heard Of
Edwin P. Morrow III, Key Private Bank Family Wealth Advisory Services

Toolkit for Broken Trusts
Lisa Babish Forbes, Vorys, Sater, Seymour and Pease LLP
Victor J. Ferguson, Vorys, Sater, Seymour and Pease LLP

Bitcoin: Tax and Estate Planning Considerations
Matthew F. Kadish, Kadish, Hinkel & Weibel

Section Annual Lunch Meeting (free for Section Members and Seminar Participants)

Got Drones? Fly By Night or Here to Stay?

Wednesday, June 22

REGISTRATION 8:30 a.m.
SEMINAR 9 a.m. – 12:15 p.m.
CREDITS 3.00 CLE requested

Stemming the Tide of Discovery Appeals, Smith v. Chen and Beyond
Paul W. Flowers, Paul W. Flowers Co., LPA

Making and Preserving the Record in the Digital Age: Never Assume Your Record Is Complete
Mary Jane Trapp, Thrasher Dinsmore & Dolan

Pryor v. Director, et al, (Case No. 2015-0770): How an Akron Law Student Created a 6-1 Split and Ended Up in Front of the Supreme Court of Ohio
Marcus H. Pryor II, Tucker Ellis LLP

SEMINAR CHAIR Timothy J. Fitzgerald, Koehler Fitzgerald LLC

Fundamentals of Practice in the Northern District of Ohio: Federal Court Training Program

Friday, June 17

REGISTRATION 8:30 a.m.
PROGRAM 9 a.m. – 12:45 p.m.
CREDITS 3.50 CLE and NLT hours

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We are living in interesting times in the area of elder law in the State of Ohio. That statement was never more evident than on March 31, 2016 and April 1, 2016, when the Ohio State Bar Association held the annual Ohio Elder Law Institute in Worthington, Ohio. In what can only be described as the perfect elder law storm, numerous changes within the umbrella of this area of law have converged at once and are on the horizon for 2016. For those 200 elder law practitioners from across the state in attendance at this year’s Elder Law Institute, the presentations varied from topics that included Ohio’s transition to a 1634 state and Qualified Income Trusts, changes in the Rules of Superintendence governing Guardianships, anticipated changes in qualification for the Veterans Administration Pension with Aid and Attendance Benefit, the emergence of the Achieving a Better Life Experience Act (ABLE) accounts, Medicaid estate recovery, and Social Security issues with Special Needs Trusts.

To get the morning of April 1st off and running, the authors of this article dove into the area of probate litigation, and specifically, new case law impacting same. In January 2016, attorney Michael Olver authored an article in the ElderLaw Report, “A Holistic Approach to Estate Litigation,” which noted a spike in probate litigation in recent years stemming from the increasing aging population and complex family dynamics.

This article is intended to highlight several recent decisions from the presentation which every probate and elder law practitioner should consider.

Does an Attorney Retained by a Fiduciary Represent the Fiduciary or the Estate?


The Supreme Court suspended an attorney from the practice of law for six months for violating Prof.Cond.R. 1.7(b) prohibiting a lawyer from continuing representation if a conflict of interest would be created unless the affected client gives informed consent in writing. The executor retained the attorney to represent her in administering an estate and to defend her against objections to the inventory and a removal action. The Supreme Court held that the attorney’s dual representation of the executor individually and as fiduciary of the estate violated Prof.Cond.R. 1.7(b) because the attorney could not simultaneously discharge his duty of undivided loyalty to the estate while undertaking a similar duty to the alleged wrongdoer. “No matter how well intentioned [the attorney] was, he should have recognized that he had created a conflict not only by accepting representation of [the executor] in her individual capacity — after having already agreed to represent her as
fiduciary of the estate — but also by spending a significant amount of time defending against the allegations asserted by the estate’s other beneficiaries.” Had the attorney disclosed the potential conflict and obtained consent from his client he may have avoided suspension.

Fried v. Abraitis, 8th Dist. Cuyahoga No. 103070, 2016-Ohio-934 (March 10, 2016)

The Probate Court removed the executor and appointed an attorney as successor administrator, who in turn, filed a concealment action against the former executor. The successor administrator also filed a motion to disqualify the attorney that represented the former executor in the administration of the estate and filed an answer on his behalf in the concealment action. The Probate Court granted the motion to disqualify based on Prof.Cond.R. 1.9. Specifically, the successor administrator argued that due to the attorney’s involvement in representing the estate, she had a conflict, and could become a necessary witness to the proceedings. The former executor argued that his attorney represented him, not the estate or the decedent, and therefore no conflict existed. The Appellate Court reversed and remanded holding that the successor administrator lacked standing to assert the conflict because the attorney did not represent the estate, she represented the executor, and it was speculation that the attorney would be a witness.

What Reimbursements Can a Family Member/Creditor Claim against an Estate?


The Probate Court appointed son as executor in August 2012. In November 2012, son submitted a claim for reimbursement against the estate for $101,084.20 for his payments of the decedent’s medical bills and farm maintenance. After objections, the Probate Court heard testimony from the son that he had an understanding and agreement with his parents that he would take care of them and after their deaths, he would file a claim against their estates for reimbursement. The Probate Court determined that son had an express contract with the decedent to pay their medical expenses since their primary asset was the farm and they lacked cash; however, it denied son reimbursements for farm maintenance expenses because he claimed them as tax deductions while living at the farm rent free and claimed his mother as a dependent on his income tax returns without a written contract. The Probate Court also denied the son reimbursement for caregiver expenses for the decedent as it was not timely presented within three months.
of opening the estate. The Appellate Court affirmed in part and reversed and remanded in part, holding that the Probate Court must determine whether son had an express contract with the decedent despite nothing in writing.

When Is a Creditor’s Claim against an Estate Deemed Timely Presented?
Wilson v. Lawrence, 8th Dist., No. 102585, 2015-Ohio-4677, 2015 WL 7078582 (Nov. 12, 2015)

The Probate Court granted summary judgment in favor of the executor because plaintiff failed to send his claim letter directly to the executor or his attorney within the statutory period. However, the creditor timely sent his letter to the decedent’s accountant and executive assistant, who testified that they forwarded their letters to the executor and his attorney upon receipt. The Appellate Court reversed and remanded, holding that summary judgment was not appropriate because a genuine issue of material fact existed as to whether the executor had notice of the claim and whether it was timely presented.

What Type of Activities Constitute Undue Influence on a Decedent?

The decedent died at age 91 leaving six children. In 2000, the decedent executed a will naming all six children as equal successor beneficiaries to his wife. On April 29, 2013, the decedent signed a second will changing the alternate executor, and keeping the remainder of his will intact. In June 2013, the decedent’s wife died. On August 6, 2013, the decedent met with his long time attorney and signed a third will leaving $10,000 to four of his children and the remainder to his other two children, Bryan and Frederick. Litigation ensued upon the decedent’s death a year later. At the conclusion of trial, the jury unanimously returned a verdict against Bryan, Frederick, and the decedent’s longtime attorney. Specifically, Bryan and Frederick alienated their siblings from the decedent, who suffered from dementia, by changing the locks on the house, preventing the siblings from proceeding past the doorway, hanging up the phone on them when they called, and draping blankets over the windows to inhibit the decedent from looking outside. One month prior to the decedent’s death, Frederick told one of his siblings, “We’re in. You’re out.”

When Are Attorneys’ Fees and Costs Warranted for the Prevailing Party in a Trust Action?

The Probate Court entered judgment against the trustee for significant breaches of fiduciary duty and awarded damages to trustee’s sister, but summarily declined to award attorneys’ fees to sister. The Probate Court also ordered the sister to pay half of the joint expert fee and costs. The Appellate Court reversed and remanded, holding that even though the sister did not request an evidentiary hearing on attorneys’ fees and costs, she made requests for them at trial, and the Probate Court should have conducted a meaningful review of whether an award was warranted. The evidence demonstrated the trustee engaged in egregious conduct, acted in bad faith, and breached fiduciary duties; and the necessity for a joint expert arose from trustee’s bad acts. Because the Probate Court failed to conduct an evidentiary hearing to determine whether the sister was entitled to attorneys’ fees, expert witness fees, and costs, the Appellate Court remanded.

How Specific Must an Attorney be When Naming Beneficiaries in a Will?

The decedent died leaving nine children. His will named eight of them as residuary beneficiaries. The ninth child filed a declaratory judgment action for will construction to include her in the bequest. The Probate Court granted the executor’s motion to dismiss finding that the testator never named her as a beneficiary in the will. The Appellate Court, however, reversed and remanded for trial holding that dismissal was premature. The Probate Court may consider extrinsic evidence to determine the intent of the testator when the language in the will creates doubt as to its meaning.

Patricia J. Schraff is a principal in the law firm of Schraff & King Co., L.P.A. Ms. Schraff is a Certified Elder Law Attorney (CELA) by the National Elder Law Foundation (NELF) and the Ohio State Bar Association Commission on Specialization for the Supreme Court of Ohio as an elder law specialist. She has been a CMBA member since 1981. She can be reached at (440) 585-1600 or at pschraff@schraffking.com.

John P. Thomas is an associate at Schraff & King Co., L.P.A. He focuses his practice on probate litigation and elder law. He has been a CMBA member since 2005. He can be reached at (440) 585-1600 or at jithomas@schraffking.com.
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<td>Got Drones? CLE – 9 a.m.</td>
<td>YLS Summer Social – 5 p.m.</td>
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**All events are held at the CMBA Conference Center at noon unless otherwise noted. Information is current as of publication date.**

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### July

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Elizabeth Krusinski
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Meghan Schane-Rambert

Hallie Shipley

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New Associations & Promotions

Frantz Ward is pleased to add Alan B. Dailide to its nationally-recognized construction practice.

Ice Miller LLP proudly announces the arrival of a new partner in its Cleveland office. Nancy A. Valentine has joined the Firm’s Business and Bankruptcy & Financial Restructuring groups.

Frantz Ward LLP is pleased to announce the addition of Gregory L. Watkins as associate to the firm’s Corporate/Mergers & Acquisitions Practice Group.

Thacker Robinson Zinz Co., LPA is proud to share that Teresa G. Santin has joined the firm as an Associate, focusing her practice on Business, Real Estate and Trusts & Estates litigation.

Emerson were recently named to the 2016 list of Who’s Who in Black Cleveland, a publication that celebrates and recognizes the extraordinary and significant accomplishments of African Americans in the community.

Elections & Appointments

Michael N. Ungar, chair of Ulmer & Berne’s Litigation Department, has been appointed to the Cleveland Heights City Council.

Ken Kraus, the former Law Director of Strongsville, has been appointed its Mayors Court Magistrate.

Honors

Reminger Co., LPA is pleased to announce that attorney Martin T. Galvin has been honored by the Academy of Medicine of Cleveland & Northern Ohio with the Presidential Citation Award for 2016.

Cuyahoga County Common Pleas Court Judge David T. Matia has been presented with the Recovery Resources Exemplar Award from Recovery Resources.

Reminger Co., LPA is proud to announce the following attorneys who have received special honors from Ohio Super Lawyers: Stephen E. Walters (10 Years), Michelle Sheehan (Top 100 Ohio, Top 50 Female Ohio, Top 50 Cleveland, Top 25 Cleveland), and Thomas Kilbane (Top 100 Ohio).

Ehrman have opened their law firm, Whitmer & Ehrman LLC, at 2344 Canal Road in the Flats.

Akron attorney Theresa Morelli has opened a solo law practice limited to residential property management law for landlords and other housing providers. She will serve Cuyahoga County and other northeast Ohio counties.

Judge Michael P. Donnelly was recently asked to write an article for Litigation: The American Bar Association’s Journal of the Section of Litigation. The article, entitled “End Factually Baseless Pleas Bargains,” appears in the Spring 2016 issue.

Dickie, McCamey & Chilcote’s Cleveland office has a new address: 600 Superior Avenue East, Fifth Third Center Suite 2330, Cleveland, Ohio 44114. Their phone number remains the same: (216) 685-1827.

The new firm, Schneider Smeltz Spieth Bell LLP, brings together two of Cleveland’s oldest, most well-regarded law firms. Separately, the firms are similar in size and culture, with practice strengths that are highly complementary. Together, the new firm will provide clients with thoughtful, practical solutions to the complex problems with a wider range of resources and expertise.

We are pleased to announce that Mary K. Whitmer and James W.

Something To Share?

Send brief member news and notices for the Briefcase to Jackie Baraona at jbaraona@clemetrobar.org. Please send announcements by the 1st of the month prior to publication to guarantee inclusion.
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