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MARCH 2018
SPOTLIGHT ON: PAUL W. SMITH
BONEZZI SWITZER POLITO & HUPP CO. LPA

Paul has served as a chair of the Louis Stokes Scholars Committee since 2015 and a mentor in the program since it started in 2012. Through his passion for the program, rapport with the Scholars and steady leadership, he has contributed so much to the growth and success of this program and is instrumental in helping shape its future.

Paul’s engagement is “all in”. He promotes it to prospective applicants in high school, is involved in reviewing applications, participates in the interview and selection process, is a featured presenter at the orientation for Scholars and Mentors, and his annual lunch & learn program on professionalism and etiquette is always a favorite. He has created curriculum for the program, including signature projects on Terry v. Ohio and the opioid crisis. Last summer, he guided the Scholars on a new group project that allowed them to study the opioid crisis and that culminated in the Scholars’ coordinating and hosting the CMBA’s August Hot Talk program.

In his practice, Paul focuses on defending medical malpractice and product liability actions. He has a JD from Cleveland-Marshall College of Law, an MBA from CWRU’s Weatherhead School of Management and a BS in Science from the University of Rochester. He shares his educational and career journey with the Scholars, encouraging them to set goals and work hard to achieve them. Thank you, Paul, for your commitment and inspiration.

“I am very happy to have known Congressman Stokes and to be involved with the program since its inception; I am continuously pleased and encouraged by the great things our Scholars are doing and their accomplishments.”
ON DAYS WHICH WILL LIVE IN INFAMY

Darrell A. Clay

On December 8, 1941, Franklin Roosevelt used the phrase “a day which will live in infamy” in reference to the attack on Pearl Harbor the day before, in which 2,403 Americans were killed. In the subsequent 70-plus years, there have been too many other days where you can always recall where you were and what you were doing when you heard the awful news.

For me, some of these days are:

March 30, 1981
President Ronald Reagan is shot by John Hinckley Jr. I’ve just turned 13, and I’m sitting at my desk in my seventh grade graphics class. We hear the announcement over the school’s public address system. So many questions about the world explode into the head of this new teenager.

January 28, 1986
The Space Shuttle Challenger explodes after lift-off. I’m in my last six months of high school in Clearwater, Florida, and I’m meeting up with some friends for lunch. While Kennedy Space Center’s launch pad was located on the opposite coast, it wasn’t unusual for us to see the Space Shuttle climbing into orbit after launch. How can this be, I think. Space flight seems so routine.

April 20, 1999
Columbine. I’ve just finished up another long trial day in Judge Peter Economus’ courtroom in Youngstown, and am back at the hotel to change before our dinner strategy session. I turn on the television and hear the awful news of the killing of 12 students and one teacher in Colorado, with many other injured. What has happened to the innocence of simply going to school and learning?

September 11, 2001
I’m walking into the break room in my law firm’s former offices at Terminal Tower, and I see the second tower being struck. At the time, I’m taking flying lessons and it immediately occurs to me that while one tower being hit by an airplane might be accidental, there’s no way that can be true for a second, especially given the blue skies and clear weather in New York that terrible morning. I leave the office soon after, pick up my son from child care, and spend the rest of the afternoon with him. In my mind, I muse: How much change is the world about to experience? It was far more than I ever imagined.

February 27, 2012
Chardon High School. I’m at my desk, and I start seeing social media reports of a school shooting just east of Cleveland. Yet another senseless act of violence. More innocent lives lost, this time way too close to home. Can’t we do something about violence in our schools, I wonder. We have to find a way to stop this.

And now, the latest ...

February 14, 2018
Marjory Stoneman Douglas High School. Reports that seven (ultimately, 17) people are dead in a high school shooting on Florida’s east coast. My jaw drops. No possible way this is happening again!!!, I scream in my mind.

Having just reached the ripe old age of 50, I’m not naïve enough to think that my life won’t be marked by more days which will live in infamy. I’ll hope until my last dying breath there won’t be more, but I know in my heart of hearts there will be.

Today, my fervent wish is that this latest infamous day gives rise to real, lasting solutions. Not mere platitudes. Not meaningless social media memes that cite dubious statistics, offer half-baked analogies, or fail to recognize the complexity of the society in which we live. If we are to avoid another Columbine, Chardon, or Stoneman Douglas, we must focus like lasers and address the ease of access to weapons, the pervasiveness of violence in our culture, the lack of sustainable mental health treatment, the desocialization of the family unit, and other issues too numerous to mention.

At the CMBA, we want to be part of the conversations and initiatives necessary to achieve lasting reforms that address these issues. To that end, on Tuesday, April 10 at noon, we will hear from Jill Snitcher McQuain and Carl Smallwood about the Columbus Trust — a group of community leaders who are developing a plan to address potential civil unrest in Columbus. We have invited community leaders from throughout Cleveland to attend and help assess whether Cleveland would benefit from having a similar plan in place.

Then, at noon on Tuesday, May 8, our monthly Hot Talk will focus on ongoing efforts to combat violence. We’ll be hearing from, among others, Michael Walker, Executive Director of the Partnership for a Safer Cleveland. He’ll highlight “Impact 25,” an initiative design to reduce violence in Cleveland youth, create safer neighborhoods, and reduce fear in the community.

Please come and be a part of these very important discussions.

Darrell A. Clay is the tenth President of the CMBA. He is a litigation partner at Walter Haverfield LLP, with a practice focusing on complex civil litigation, white collar criminal defense, and aviation matters. He has been a CMBA member since arriving in Cleveland in April 1997. E-mail your CMBA-related questions or concerns to him at dclay@walterhav.com. Follow him on Twitter at @DClayCMBA.
Save the Date!

2018 Golf Outing
June 25th
Westwood Country Club

Women Honoring Women
Celebrating thirty years of Women in the Law
Featuring a keynote presentation by
Yvette McGee Brown

THURSDAY, APRIL 26, 2018
4:30 – 7:30 P.M.
CMBA CONFERENCE CENTER

For registration and sponsorship details, visit CleMetroBar.org.

GREET THE JUDGES & GCs / A MEMBERS ONLY EVENT

THURSDAY, MAY 17 / 5 – 7 P.M.
CMBA CONFERENCE CENTER

Spend the evening networking with honored members of the judiciary, local in-house counsel and your CMBA colleagues.

• Free to members and invited guests
• Appetizers included / cash bar
• We will also celebrate the newest Ohio attorneys sworn in by the Supreme Court in May.

Register today! Call (216) 696-3525 or visit CleMetroBar.org/Greet.
Join us at our celebration for the installation of 2018–2019 CMBA President Marlon A. Primes of the United States Attorney’s Office and incoming Bar Association and Bar Foundation officers and trustees. We will observe the theme “back to the future” to celebrate where we’ve been and where we’re heading. We will also honor members who have achieved legend status, including this year’s award recipients and the 2018 class of 50- and 65-year practitioners.
Our pipeline is working! So far it’s produced one lawyer, seven law school students, and eight hopefuls applying for law school admission — all from Cleveland and East Cleveland public schools.

We call our Louis Stokes Scholars Program a diversity pipeline because it captures students with an interest in legal careers, often sparked by their experience in 3Rs and Mock Trials, and carries them from high school through college and law school.

In its sixth year, the program has tapped 64 Scholars, 96% first-generation college goers. They are attending or graduating from 17 universities, as close as Cleveland State and Case Western Reserve to as far away as Hawaii-Pacific.

You are about to meet Brandon Brown, our first Stokes Scholar to complete law school, pass the bar, and land a job. Brandon’s the first, but more are moving through the pipeline.

Our Stokes Scholars program continues to grow and, as summer approaches, we need more lawyers and judges, firms and companies to work the pipeline. Learn here how you can be of service.

Our wish list
We need more volunteers and contributions for Stokes Scholars this summer. There’s still time to get involved and make a difference. Here’s how you can help:

- Host an intern at your law firm or corporate law office.
- Be a mentor to a Scholar.
- Organize a Lunch & Learn event or field trip.
- Offer to be a speaker at a Lunch & Learn.
- Donate to Louis Stokes Scholars Fund of the Foundation, a gift used entirely for stipends and enrichment activities to directly benefit Scholars.

★ $1,800 funds a summer internship at courts or legal nonprofits
★ $300 funds a group learning experience

If you or your organization would like to help a Cleveland student on the path to becoming a lawyer, contact Mary Groth, director of member and donor engagement, at mgroth@clemetrobar.org.

Mitch Blair is vice chairman of Calfee Halter & Griswold LLP and former chair of the Litigation Group. He tries complex disputes, with special emphasis on securities litigation, including class action defense. He is president of the Cleveland Metropolitan Bar Foundation and has been a CMBA member since 1982. He can be reached at mblair@calfee.com or (216) 622-8361.

Brandon: Stokes Scholars gave me exposure and mentorship I could never gain in a classroom. My village will forever be part of my professional support system.
Michael Jordan

Firm/Company: Jordan Resolutions, LLC
Title: Principal
CMBA Join Date: 1989
Undergrad: Ohio Wesleyan University
Law School: George Washington University

WHY DID YOU BECOME A LAWYER?
I had a pre-law class in college and found it intellectually challenging. A career that would present a constant series of new problems to solve really appealed to me, and the idea that I could assist others in achieving their goals through the legal system was intriguing.

IF YOU WEREN'T PRACTICING LAW, WHAT WOULD YOUR PROFESSION BE?
I think it would have been some combination of acting and writing. Community theater was a big part of my life for many years (yes, the trial lawyer as a frustrated actor!), and writing stories and poetry has been a pastime of mine since childhood.

WHAT WOULD REALLY SURPRISE PEOPLE ABOUT YOU?
Most likely my eclectic range of interests: adventure travel (climbing Mt. Fuji was quite an experience!), fine dining, studying the Spanish language and my collection of more than 4,000 comic books.

WHAT DO YOU DO FOR FUN?
I enjoy traveling, writing and attending theater performances locally or in New York. I write almost daily, typically travel abroad twice per year, and my wife is an accomplished soft pastel artist whose business takes us to NYC on a regular basis.

WHAT ARE YOUR GOALS?
I recently published my debut legal thriller, The Company of Demons, which reimagines the eerie return of one of our area’s most infamous serial killers—the Torso Murderer—to Cleveland. I’m really looking forward to all of the book signings and other events that will accompany its release. I’ve been fascinated by the Torso Murderer for quite a while, after first hearing about it during a deposition years ago. I’m also in the middle of writing my second novel, a thriller set during the closing stages of WWII, and intend to finish that project later this year.

Francine B. Goldberg
(aka “Frankie”)

Firm/Company: Cuyahoga County Domestic Relations Court
Title: Judge
CMBA Join Date: 2011
Undergrad: Ohio State University
Law School: Cleveland-Marshall College of Law

FAVORITE CLEVELAND HOT SPOT:
Velvet Tango Room for cocktails — it’s Cleveland in the 1920s.

TELL US WHY YOU LOVE CLEVELAND.
I love the grit, determination and energy of our city. It’s a great place to raise a family. I was at the Cavs parade celebrating our NBA Championship—witnessing pride, joy and happiness in our town. Too many great things to list, but here’s a few: Cleveland Metroparks, Tremont, Ohio City, Cleveland Marathon, Terminal Tower, Wade Oval Wednesdays, The Cleveland Museum of Art, The Cleveland Orchestra, Fourth of July Parade in West Park, the rejuvenated Flats, and of course, the Old Courthouse!

WHY DID YOU BECOME A LAWYER?
I was motivated by a desire to protect the integrity and well-being of our families. As an Assistant Cuyahoga County Prosecutor for 24 years and now as a Domestic Relations Judge, I have been able to fulfill this obligation in a significant and meaningful manner.

Being a Judge in Domestic Relations Court is not a job for me, but a mission. I have invested in family issues my entire career, and now I strive to assist in creating long-term solutions for families in crisis. Making a difference for a family or a child is incredibly impactful. I am dedicated to making our Court more family friendly and accessible.

To acknowledge successful outcomes, I created the “Wall of Happiness,” which displays photographs of families who have amicably resolved their cases.

WHAT’S YOUR FAVORITE BOOK?
All I Really Need To Know I Learned in Kindergarten, by Robert Fulghum. The title says it all.

IF YOU COULD GO TO DINNER WITH A FAMOUS PERSON, WHO WOULD IT BE?
LeBron James. I would thank him for his philanthropic efforts to assist children in need and this should serve as an inspiration to all of us. His endowment of college scholarships for inner city children will enhance the quality of life for thousands of our families. I believe these efforts will be his greatest legacy.

TELL US ABOUT YOUR FAMILY.
My wife Karen and I have two daughters, Meadow (11) and Rosemarie (9), and a son, Dylan (5). We recently bought and moved into the house on my family’s farm in Chardon, OH. My parents still run the farm, and everyone is looking forward to making maple syrup this month.

WHAT’S YOUR FAVORITE BOOk?
The Human Comedy, by William Saroyan

Velvet Tango Room for cocktails — it’s Cleveland in the 1920s.

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Volunteer Lawyers for the Arts

Chair
Steven W. Day
Café, Holter & Griswold LLP
sday@cafe.com

Vice Chair
Michael S. Russell
The Legal Aid Society of Cleveland
mrussell239@yahoo.com

Regular Meeting Time
2nd Wednesday of the month, noon at the CMBA

What is your goal?
The VLA aims to make it easier for artists to live and work in the Cleveland area. We believe that artists and arts organizations contribute to the area’s economic growth and overall standard of living by providing a more engaging and vibrant community. Artists are just like any other business owners who face a range of legal questions from negotiating leases to contractual disputes. Artists may use the VLA as a resource to help navigate these issues so they can focus on their work and building their businesses.

What can members expect?
The VLA gives attorneys a chance to be a part of the local arts community. Many of our volunteer lawyers have an artistic background, including music, visual arts, acting and dance. Working with the VLA allows them to engage with that artistic part of their lives. Not only do VLA members provide pro bono legal services to local artists and arts organizations, we also provide educational seminars to artists and lawyers on various legal topics, teach classes and hold roundtables at schools like the Cleveland Institute of Art, the Cleveland Institute of Music and Cleveland State University, and host social events at local arts and entertainment venues.

Past & Upcoming Events
Over the past couple of years, we have focused on participating in more public educational events for artists. We have started hosting roundtable discussions at local arts colleges, where students can ask VLA lawyers questions about legal issues that often arise in their fields. We have also participated in panel discussions for musicians at local music venues, such as the Happy Dog and the Beachland Ballroom, where we have discussed legal and business issues facing musicians, such as professional rights organizations and royalties for online streaming services.

Health Law Section

Co-Chairs
Laura McBride
The MetroHealth System
lmcbride@metrohealth.org

J. Ryan Williams
Brouse McDowell
rwilliams@brouse.com

Regular Meeting
First Wednesday of the month, teleconference at 12 noon

What can members expect?
We have a great group of members, some of whom have been involved in the Section for years and serve as a ready-made support network. We also recently shifted into a new format focusing on two larger CLE presentations each year:

What is your goal?
With the incredible healthcare facilities and research institutions in Northeast Ohio, we hope to connect health law practitioners with peers in a variety of settings to share experience and expertise, and further support the establishment of Northeast Ohio as a healthcare center of excellence.

Past & Upcoming Events
This past fall, we had a half-day seminar with panels on a variety of issues. The seminar was held at MetroHealth and we hope to continue bringing these seminars to interesting healthcare locations around the County in the years to come. This spring we will again be supporting the Medical-Legal Summit, which is hosted by the CMBA, along with The Academy of Medicine Education Foundation, and The Academy of Medicine of Cleveland & Northern Ohio (AMCNO).

Diversity & Inclusion

Chair
Gregory G. Guice
Reminger Co, LPA
gguice@reminger.com

Regular meeting
Second Tuesday of the month at 4 p.m.

What is your goal?
Our goal is to increase diversity and inclusion within the legal community, including making Cleveland a hub of diversity-related activities.

Past & Upcoming Events
We partnered with Midwest BLSA to coordinate and host a Diversity Career Fair in September 2017 that was open to all law students in the Midwest as well as employers from Northeast Ohio and beyond. The event was well attended and concluded with a networking reception in the Flats. Interviews for Minority Clerkship applicants were held in February. Applications for Stokes Scholars and Summer Legal Academy are now available. We are planning a seminar this spring and will again host a diversity career fair this fall.

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
I yield my column this month to Rosalyn Sia Baker-Barnes, 2017–18 President of the Palm Beach County Bar Association, who sent the following message to the 3,000+ members of her bar on February 14, 2018.

“Today we are once again faced with the aftermath of a terrible tragedy. We extend our heartfelt sympathy to all affected by the senseless acts of violence at Marjory Stoneman Douglas High School. As lawyers, advocates and counselors, we also recognize that sympathy and condolences are not enough, and to prevent tragedies like this in the future, we must do more. We have the opportunity and ability to effect change in our society. We encourage our members to engage and assist, to be a part of the process and to help devise solutions to these difficult problems. It is our hope that through these actions, we all will play a role in making our society safer for our children, for our families and for our communities.”

Ms. Baker-Barnes is a shareholder with the West Palm Beach law firm Searcy Denney Scarola Barnhart & Shipley, where she devotes her practice to personal injury, medical negligence and product liability cases. She earned both her law degree and her undergraduate degree from Florida State University. She has been recognized as a “Best Lawyer in America” by U.S. News & World Report and as a Florida Super Lawyer.

Marjory Stoneman Douglas High School is located in Parkland, Florida, less than three miles south of the Palm Beach County line.
Anatomy of Justice: A Symposium on Criminal Justice in Cuyahoga County
March 27, 2018
The CmBA will present an interactive, multi-media program featuring two separate panels of Judges, lawyers and experts to critically analyze the process by which the Criminal Justice System administers the consequences for criminal behavior through sentencing and incarceration in Cuyahoga County and Ohio. Our panel of practitioners in the Criminal Justice field will discuss real life issues that they confront on a regular basis.

Excerpts from the highly acclaimed Netflix documentary “13th” by Ava Duvernay will provide historical factual context to drive the lively discussion by the panels and the audience.

CREDITS 2.5 hours CLE
REGISTRATION 4 p.m.
PROGRAM 4:30 – 7:30 p.m
LOCATION CM College of Law, Moot Court Room

PANELISTS
- Hon. James Gwin, U.S. District Court
- Charles R. See, Executive Director, Community Re-Entry, Lutheran Metropolitan Ministry
- Cullen G. Sweeney, Cuyahoga County Public Defender Office
- Gary C. Mohr, Director, Ohio Department of Rehabilitation and Correction
- Hon. Kathleen A. Sutula, Cuyahoga County Court of Common Pleas
- Hon. Janet R. Burnside, Cuyahoga County Court of Common Pleas
- Hon. Robert C. McClelland, Cuyahoga County Court of Common Pleas

TOPICS
- Mass incarceration — the facts, the causes and the costs are staggering.
- What are the causes of this mass incarceration situation?
- What are the social costs to society, to families and to the integrity of the Criminal Justice System?
- Are the goals of criminal sentencing being achieved- to punish crime, to deter future crime, to protect society, and to rehabilitate criminals?
- What are the pros and cons of mandatory sentences vs. discretionary sentences?
- What factors should guide judges for imposing sentences and how should the factors be weighted?
- What are the alternatives to address mass incarceration?
- What are the pros and cons of privatization of the criminal justice system?
- Is the criminal justice system dealing with juvenile crime effectively?
- Do the suggested reforms for sentencing and incarceration withstand critical analysis?

Health Care Law Update & Medical/Legal Summit 2018

Health Care Law Update
Friday, April 13
CREDITS 4.25 CLE
REGISTRATION 11:15 a.m.
PROGRAM 11:15 a.m. – 4:15 p.m.

State & Federal Update
- Bradley D. Reed, Frantz Ward LLP
- Michael G. VanBuren, Calfee Halter & Griswold LLP

Behavioral Health Re-design/Ohio Medicaid and Confidentiality
- J. Ryan Williams, Brouse McDowell, Moderator
- Peggy L. Beat, CareSource, Moderator
- Terry Jones, Director of Behavioral Health, Ohio CareSource

The State of Medical Marijuana in Ohio
- Anne F. Strassfeld, Ulmer & Berne LLP
- Stephanie Dutchess Trudea, Ulmer & Berne LLP

Immigration Update: Nuts and Bolts for Healthcare Attorneys
- Isabelle Bibet-Kalinyak, McDonald Hopkins, LLC
David Wolfe Leopold, Ulmer & Berne LLP
The Change and Challenges of Medical Records
Vicky Vance, Tucker Ellis LLP; Moderator
Emily Huggins Jones, Thompson Hine LLP
Adjourn to Medical/Legal Summit

Medical/Legal Summit
Presented by the CMBA’s Criminal Law Section

Friday, April 13
CREDITS 1.50 CLE
REGISTRATION 4 p.m.
PROGRAM 4:30 – 6 p.m.
NETWORKING RECEPTION 6 p.m.

Welcome & Introductions
Darrell A. Clay, CMBA President;
Fred M. Jorgensen, MD, AMCNO President;
Justin Cernansky, Associate General Counsel,
University Hospitals

Overcoming the Stigma of Addiction
Christopher Kennedy Lawford

Saturday Session
Saturday, April 14
CREDITS 4.00 CLE hours
REGISTRATION 8 a.m.
PROGRAM 8 a.m. – 1 p.m.

Welcome & Introductions
Opioid Issues
Co-Chairs: Isabelle Bibet-Kalinyak and Kristen Englund, MD
Speakers: Allisyn Leppla, Executive Director for the Northeast Ohio Hospital Opioid Consortium, Center for Health Affairs
W. Bradford Longbrake, Hanna, Campbell & Powell, LLP (invited)
Justin E. Herdman, U.S. Attorney, Northern District of Ohio

Interaction between Hospitals, Law Enforcement and Mental Health Facilities
Co-Chairs: Drew R. Barnholz and Fred M. Jorgensen, MD
David Easton, Chief of Police, Cleveland Clinic
Shannon F. Jerse, General Counsel, St. Vincent Charity Medical Center

18th Annual Northern Ohio Labor & Employment Conference
Presented by the CMBA’s Labor and Employment Section

Thursday & Friday, April 19 & 20
Two full days – Details TBA

TOPICS
Panel presentation related to the “Me Too” Movement and Potential Issues for Employers
Deciphering Emerging FLSA Issues
Don’t Do That! Employment Law Lessons from America’s Worst Employers.
Strategic Considerations When Drafting and Litigating Employment Restrictive Covenant Agreements
The Impact of the 2008 ADA Amendments on the Definition of “Substantial Limitation” Under the
Ohio Civil Rights Act
NLRB Updates and Considerations
And much more!
Visit CleMetroBar.org for the full program details – and watch your inbox for your mailed brochure!

What You Need to Know Now: LGBT Legal Update
Tuesday, April 24
CREDITS 3.00 CLE hours
REGISTRATION 8:30 a.m.
PROGRAM 9 a.m. – 12:15 p.m.

The National Perspectives - Legislative/Regulatory/Electoral Update
Timothy J. Downing, Ulmer & Berne LLP
Sarah Warbelow, Human Rights Campaign

The State of the State: Civil Rights and Ongoing Legislative Efforts in Ohio
Alana Jochum, Equality Ohio and additional panelists TBA

Masterpiece Bakery and First Amendment Rights
John Paul Schnapper-Casteras, Special Counsel for Appellate and Supreme Court Advocacy, NAACP Legal Defense and Educational Fund

Masterpiece Bakery Case – First Amendment Rights panel discussion

2018 Litigation Institute
Wednesday, April 25
CREDITS 3.5 hours CLE, with 1.0 hour professional conduct
Registration
Lunch Presentation – Carole Rendon
Ethics in Litigation Panel
Hot Topics with In-House Counsel
View from the Bench: Judges’ Panel
Adjourn to Networking Happy Hour

Register at CleMetroBar.org/CLE!
For questions or to register over the phone, call (216) 696-2404.
2018 HEALTHCARE COMPLIANCE OUTLOOK FOR BOARDS OF DIRECTORS

BY JAYNE E. JUVAN & KELLI R. NOVAK

With the 2016 election of Donald Trump, some healthcare industry experts predicted a substantially relaxed enforcement environment. Fatigued by burdensome regulation under the Obama Administration, many welcomed change. However, now that Trump's first year has come to a close, it is clear that the fight against healthcare fraud has not completely fallen by the wayside. We may one day look back and conclude that enforcement under the current administration was indeed less aggressive; still, the level of activity in the administration's first year underscores that boards of directors of healthcare organizations must remain vigilant in their compliance efforts to ensure that the organizations they serve do not end up in the government's crosshairs.

THE BOARD'S ROLE IN HEALTHCARE COMPLIANCE

The U.S. Department of Health and Human Services, Office of Inspector General (OIG) consistently advises boards of healthcare organizations of the importance of fulfilling their oversight responsibilities. In Practical Guidance for Health Care Governing Boards on Compliance Oversight, an article co-published by OIG, OIG indicated that boards need to be fully engaged in carrying out this role. Delaware law is considered to be the gold standard in articulating corporate governance standards, as it is the most sophisticated in defining director fiduciary duties — in part, because of the high number of corporations incorporated there. When issuing healthcare guidance, OIG has similarly cited Delaware law in analyzing a board's oversight responsibilities under state law and has expressed a need for boards to understand these state law duties.

Under Delaware law, directors have a fiduciary duty of care and loyalty. The duty of care provides that the board has a responsibility to act with the care an ordinarily prudent person in a like position would exercise under similar circumstances. Pursuant to the duty of loyalty, the director shall perform duties in good faith and in a manner the director reasonably believes to be in, or not opposed to, the corporation's best interests.

Because courts prefer not to second-guess business decisions, boards enjoy “business judgment rule” protection — a judicially-created presumption that, in making a business decision, the directors acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the corporation. In a court action, a plaintiff must demonstrate that the director breached the duty of care or loyalty to rebut the presumption.

In In re Caremark International, Inc. Derivative Litigation, the court indicated that the duty of care encompasses a board's duty to monitor. Pursuant to Caremark, an "utter failure to attempt to assure a reasonable information and reporting system exists" or a conscious failure to monitor such a system after it is implemented would constitute a breach of the duty of care. In Stone v. Ritter, the court tied this analysis to the duty of loyalty, saying that the duty of good faith is a subsidiary element of the duty of loyalty, and it is a breach of the duty of good faith to intentionally fail to act in the face of a known duty to act. The conditions for liability are (i) "utterly failing to implement any reporting or information controls" or (ii) "consciously failing to monitor... thus disabling themselves from being informed."

In Practical Guidance, OIG illustrates its view of the applicability of this analysis to healthcare organizations. Citing Caremark, OIG states, "[a] Board must act in good faith in the exercise of its oversight responsibility for its organization, including making inquiries to ensure: (1) a corporate information and reporting system exists and (2) the reporting system is adequate to assure the Board that appropriate information relating to compliance with applicable laws will come to its attention timely and as a matter of course."

OIG emphasizes that boards should adopt corporate compliance programs to ensure the organization is and remains in compliance with applicable laws and evaluates and responds to illegal activities that occur within it. In structuring these programs, boards may consider documents such as the Federal Sentencing Guidelines, as well as OIG's voluntary compliance program guidance and prior corporate integrity agreements (CIAs). In Practical Guidance, OIG states, “Boards are expected to put forth a meaningful effort to review the adequacy of existing compliance systems and functions,” making it clear that the responsibility for compliance oversight lies firmly with the board itself and recommending that boards adopt corporate programs to ensure compliance.

One of the most important aspects of a well-designed and implemented corporate compliance program is that, in accordance with the Federal Sentencing Guidelines and OIG guidance, such programs may serve as a mitigating factor if misconduct is detected. Properly implemented compliance programs that include an information reporting system and board oversight may also help a board fulfill its fiduciary duties.

In overseeing the compliance function, boards also should ensure they stay abreast of developments in healthcare laws. Requesting regular updates from the organization's compliance officer, privacy and security officer, or experienced staff results in a better-informed board, placing it in a stronger position when interacting with management.

Listed below are key risk areas boards should be apprised of as they navigate the changing operating environment in 2018 and oversee their organizations' compliance efforts.
KEY RISK AREAS

1. Fraud and Abuse
During the Trump Administration, federal government agency enforcement actions have continued, and there are attempts to strengthen efforts with a proposed $70 million funding increase for the Health Care Fraud and Abuse Control Program.

Recent fraud investigations shed new light on motivations contributing to the opioid crisis — a target of the current administration. The Department of Justice reported that 2017 marked the largest takedown in U.S. history, involving over 400 practitioners responsible for $1.3 billion in false billings from prescribing and distributing opioids and other narcotics. At the corporate level, opioid sales practices and incentives are being closely scrutinized.

Companies in specific service lines deemed at high risk for fraud and abuse are also on OIG’s radar. OIG’s 2017 Work Plan targets home-based and community-based services, ambulance transportation, durable medical equipment, and diagnostic radiology and laboratory testing.

2. Corporate Integrity Agreements
With the continued focus on fraud and abuse, it is no surprise that 2017 revealed a rise in CIAs. Last year, OIG entered into 52 CIAs — exceeding the five-year annual average of 43 CIAs. The 52 CIAs demonstrate increasing penetration into the healthcare industry including laboratories, hospices, pharmacies, specialty medical practices, EMS, and home care. Significantly, some CIAs named corporate officers as parties, in addition to the corporate entity itself.

CIAs impose penalties for misconduct that carry significant organizational burdens. Further, a breach of the CIA itself is grounds for additional sanctions — ranging from monetary fines to exclusion from participation in federal healthcare programs.

3. Cybersecurity and Patient Privacy
A May 2017 Executive Order announced cybersecurity as another priority, focusing initially on securing federal networks and enhancing critical infrastructure; however, we anticipate an increase in the breadth of data security regulation — especially in the healthcare industry, recently plagued by data breaches and settlements. In 2017, Anthem paid a record-setting $115 million to settle litigation involving a data breach implicating 80 million customers’ personal information.

In response to cybersecurity threats, the Office of Civil Rights (OCR) began publishing more guidance for entities regulated by the Health Insurance Portability and Accountability Act (HIPAA). In June 2017, OCR issued a cyber-attack “Quick Response Checklist,” including a four-step response plan to a cyber-related security incident involving a covered entity (CE) or business associate (BA).

OCR also publishes monthly “Cyber Awareness Newsletters” on its website. The surge in publically available information creates an expectation that HIPAA-regulated entities be educated and prepared to guard against cybersecurity threats.

Last fall, OCR announced preliminary audit results from HIPAA’s Phase 2 Audit Program. CEs and BAs located in the Midwest were the highest audit subjects in the country, and early ratings indicate CEs’ overall inadequate compliance with HIPAA Privacy, Security, and Breach Notification standards. As of September, BA desk audits were still underway, and we expect on-site audits will follow, which will comprehensively evaluate privacy and security practices of CEs and BAs.

4. Contractual Relationships
Corporations engage countless subcontractors and vendors to perform essential business functions. In the healthcare industry, these engagements must be executed and structured properly to ensure compliance.

Recent six- and seven-figure settlements demonstrate the importance of BA agreements among HIPAA-regulated entities. This includes both executing written agreements and vetting and updating existing agreements to ensure continued compliance. BA agreements are particularly ripe for compliance enforcement in light of OCR’s ongoing auditing processes.

Given that a corporation is prohibited from contracting with individuals or entities excluded from federal healthcare programs, its due diligence process and documentation is also subject to scrutiny. Because a party’s circumstances can change in an instant and jeopardize a once-appropriate business relationship, a corporation should establish screening processes to regularly monitor their vendors’ participation status in federal healthcare programs.

5. Workplace Issues
Healthcare organizations continue to face high employee turnover rates, especially in the skilled workforce. Those who depart may be disgruntled and pose compliance risk. Recent False Claims Act judgments and settlements — up to $331 million — underscore that anyone can become a whistleblower and create exposure to significant monetary and reputational damages. Therefore, building a “culture of compliance” within every level of an organization is of the utmost importance.

Conclusion
Boards of healthcare organizations should closely examine governing laws and ensure that their organizations’ corporate and HIPAA compliance programs and other policies and procedures are regularly updated. Periodically participating in training and education on these issues, ensuring that corporate compliance is a recurring agenda item, and making sure that regulatory developments and material compliance incidents are promptly brought to their attention will go a long way in combatting risks.

Jerome F. Weiss, Mediator

empathy (ˈem-pa-thē) noun 1. Understanding another’s feelings; sensitivity to emotions; walking around in someone else’s skin, à la Atticus Finch.

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For secrets are edged tools
And must be kept from children
And fools”
– John Dryden, 1631–1700

I know, I know. Ohio lawyers should no longer call them “secrets.” Per our Rules of Professional Conduct, what clients tell us are “confidences.” And “confidences,” Rule 1.6 warns, are pretty much anything we learn from clients.

Lawyers who learn that the client intends to commit serious misconduct have three alternatives — may disclose, must disclose, or must not disclose.

To reach the right answer, a good starting point is a handy-dandy chart published by Chicago-based Attorneys Liability Assurance Society (ALAS). ALAS member firms can view the chart on its members-only website. The chart is publically available, however, in Morgan and Rotunda, “Selected Standards On Professional Responsibility” (Foundation Press) 2017.

Seven scenarios are presented, with answers under the ABA Model Rules, state ethics rules, and the District of Columbia.

Four scenarios deal with a client’s expressed intention to commit misconduct; three scenarios deal with the lawyer’s obligation, if any, to rectify client misconduct.

1. Client’s intention to commit any crime
The answer in Ohio is “May” disclose, provided “the lawyer reasonably believes [disclosure is] necessary... (2) to prevent the commission of a crime by the client or other person.” Rule 1.6 (b)(2). If your client tells you he will bring your retainer tomorrow, after his brother holds up the Linndale National Bank, you are not prohibited from calling the police, at least in Ohio. Interestingly, the states are roughly evenly split — 24 “Mays,” 25 “Must Nots,” and 2 “Musts” (Florida and Virginia). The ABA Model Rule is a “Must Not.” So much for uniform ethics rules.

2. Client’s or other’s intention to commit a crime or other act likely to result in death or substantial bodily harm
Again, Ohio leaves it up to you. We are a “May” state. Many states are split on the subject, making disclosure a “Must” if the intended act is a crime, but a “May” if not a crime. A good prosecutor pondering an “other act likely to result in death or substantial bodily harm” could probably come up with a crime. No state prohibits disclosure (“Must Not”), and Ohio tracks the Model Rule language, as do 19 other states.

3. Client’s intention to commit a criminal fraud
Another “May” for Ohio lawyers. “Criminal fraud” falls comfortably within the “any crime” language of 1.6 (b)(2), cited in Scenario 1. Ohio’s “May” joins the overwhelming majority (39); two jurisdictions opt for “Must” and seven opt for “Must Not.”

4. Client’s intention to commit a noncriminal fraud
Ohio says this type of fraud retains its attorney-client privileged status. We are a “Must Not” state. Rule 1.6 (a) says no disclosure absent client informed consent, or “impliedly authorized” disclosure, or disclosure necessary to comply with Rule 3.3 (candor to tribunal) or Rule 4.1 (truthfulness in statements to others). A client’s intention to commit noncriminal fraud enjoys the safe harbor of “information related to the representation ... including information protected by the attorney-client privilege.” Ohio is in the minority on this one (20 “Must Nots”), while 27 jurisdictions are “Mays,” three are “Musts,” and Tennessee, in the tradition of Davy Crockett, follows its own path; its lawyers “Must Withdraw.”

Now we turn to rectification.

5. Client’s prior commission of a financial crime or fraud using the lawyer’s services
Your client used your services to create a Ponzi scheme that makes Bernie Madoff look like an angel. This is a “May” for Ohio lawyers. Ohio Rule 1.6 (b)(3) authorizes disclosure “to the extent the lawyer reasonably believes necessary... (3) to mitigate substantial injury to the financial interests or property of another that has resulted from a client’s illegal or fraudulent act using the lawyer’s services. Ohio agrees with the ABA and 34 states on this one, except that here (and elsewhere in our Rules) Ohio broadens the Model Rule “crime or fraud” language to “illegal or fraudulent act.”

6. Client’s prior or contemporaneous commission of perjury or other fraud on a tribunal
Your client invites you to his 50th
birthday party and regales the attendees with stories about the great job you did defending him three years ago in a price-fixing case. Later, after more drinks, he takes you aside and tells you that he lied on the stand about never having secret conversations with his competitors. Forty-six states, including Ohio, are classified as “Must Disclose.” Ohio, however, — along with the Model Rules and many other “Must Disclose” states — would not require disclosure on these facts. Our Candor Toward The Tribunal provision, Rule 3.3 (c), contains a time limit on mandatory disclosure of client perjury. Comment [13] to 3.3 (c) explains that Ohio’s time limit was prompted by Disciplinary Counsel v Heffernan, 58 Ohio St. 3d 260, 569 N.E. 2d 1027 (1991). The Ohio Supreme Court suspended Heffernan for six months for not disclosing to a lower court his client’s perjury “once respondent learned of the fraud” after the fact. Per 3.3 (c), if the last appeal has been decided or time for such an appeal has expired, you are off the reporting hook. But no immunity against sleepless nights.

7. Client’s ongoing criminal or fraudulent act
This one is messy. Ohio is a “Must Disclose,” as are 43 others. You get to “Must” by reading 1.6 (b)(2)’s “to prevent the commission of a crime by the client or other person” in parallel with 4.1 (b)’s obligation “to disclose a material fact when disclosure is necessary to avoid assisting client’s illegal or fraudulent act.” Then add 1.2 (d)’s permission to reveal privileged information to comply with 3.3’s candor toward tribunal obligation.

Complicated stuff. Think about calling the CMBA Ethics Hotline before navigating this minefield.

Brian Toohey, a retired Jones Day partner, is in solo practice, representing law firms and lawyers. Brian also edits “Ohio Legal Ethics Law Under the Rules of Professional Conduct” (Copyright 2017 Jones Day), authored by Marc Swartzbaugh and Professor Art Greenbaum, which is available at http://hdl.handle.net/1811/61287. He has been a CMBA member since 1980. Brian can be reached at (216) 496-4363 or bftoohey@gmail.com.
VALUATION OF INTANGIBLE ASSETS IN HEALTHCARE TRANSACTIONS

BY TAMM M. BOLDER

M&A activity in the healthcare industry is expected to remain robust over the next year, fueled in part by increased venture funding. In a business combination, the intangible value of the acquired entity must be allocated to the specific intangible assets acquired for financial reporting purposes. Intangible assets are specifically identified if they are capable of being separated from the entity or relate to a contractual obligation. All other intangible assets may be combined with goodwill. In a transaction, it is common for the majority of the value to be allocated to intangible assets versus tangible assets.

The increase in M&A activity in the healthcare industry has resulted in increased regulatory scrutiny of the transactions. As a result, it is important for client advisors to help clients navigate the various issues to maintain compliance. In particular, payments for assets acquired in a healthcare transaction need to be carefully analyzed to ensure that no value is attributed to the volume or value of referrals. Having an understanding of the types of intangible assets that may be encountered in healthcare transactions and the methods for determining their value can help avoid costly mistakes.

Valuation Methodologies
The three generally accepted approaches for valuing businesses and intangibles assets is presented below:

Income Approach: Under the Income Approach, value is measured as the present worth of anticipated future net cash flows generated by a business. In a multi-period model, net cash flows attributable to a business are forecast for an appropriate period and then discounted to present value using an appropriate discount rate. In a single-period model, net cash flow or earnings for a normalized period are capitalized to reach a determination of present value.

Market Approach: Under the Market Approach, prices are observed at which assets comparable to a subject asset are bought and sold. Adjustments are made to the data to account for operational and other relevant differences between the subject asset and the comparable assets. Value indications are calculated by applying the transaction information to the subject asset data.

Cost Approach: The Cost Approach is based on the assumption that a prudent investor would pay no more for an asset than the amount at which it could be replaced or reproduced. The Cost Approach considers reproduction or replacement cost as an indicator of value, less depreciation for physical deterioration and functional or economic obsolescence.

Intangibles
There are many types of intangible assets within the healthcare industry. The types of identifiable intangible assets generally fall into one of four categories: Marketing-related, Customer-related, Contract-based and Technology-based. The types of intangible assets that may be encountered in healthcare transactions and the methodologies for valuing them are presented below.

Trade Name
Trade names and trademarks are important assets in most entities. They are intended to help differentiate from competitors and are often a key driver in the attractiveness of an acquisition. Healthcare entities may transfer trade names in acquisitions. Trade names are generally valued using the relief from royalty method, which is a methodology under the Income Approach. Under the relief from royalty method, value is determined based on the present worth of anticipated cost savings that accrue to the asset’s owner who would otherwise have to pay a royalty or license fee on revenues earned through use of the asset. Under the relief from royalty method, expected cost savings calculated based on a market royalty rate are forecast over an appropriate period and discounted to present value utilizing a risk adjusted rate of return. Market royalty rates are derived by analyzing comparable arms length royalty or license agreements and making adjustments for asset specific factors. These factors may include:
- Level of brand awareness
- Ability to re-brand
- Age of the trade name
- Degree of customer loyalty
- Certificate of need

Certain states provide Certificates of Need (CON) to healthcare entities, which provide them with a legal right to provide specific services. CONs are generally granted for a defined geographic area and may be limited based on local market conditions. In some states, entities cannot operate without a CON. CONs are common in transactions related to hospitals, imaging centers, nursing homes and outpatient facilities. The replacement cost method under the Cost Approach is often used to value CONs. The replacement cost method involves quantifying the costs required to obtain a CON. Typical costs include labor, application preparation costs and filling fees, and professional fees. A drawback to using the replacement cost method is that it does not explicitly consider the likelihood of successful granting of the CON.

Alternatively, CONs may be valued using the with and without method under the Income Approach. Under the with and without method, the difference in financial performance between the entity with the CON and the entity without the CON is quantified and discounted to a present value.

In states where a moratorium exists and there is no ability to reproduce or apply for a new CON, it may be appropriate to value the CON utilizing an excess earnings method under the Income Approach. Under the excess earnings method, the net cash flows attributable to the CON are calculated net of fair returns on and of all other contributing assets to isolate the economic benefit of the CON. The earnings associated with the CON are then discounted to a present value using a rate of return adjusted for risk.

Similar to CONs, entities that already possess a state license and Medicare certification provide a valuable benefit to an acquirer. It may require a significant financial
burden and a considerable amount of time to obtain a state license and wait for a Medicare provider number. These regulatory rights are often valued utilizing a replacement cost method under the Cost Approach or a with and without method under the Income Approach.

Non-Compete Agreement
Potential acquirers consider covenants not to compete valuable since owners and employees of target companies may be able to influence customer relationships. With a non-compete in place, the acquirer is able to mitigate the risk that a previous owner or employee may compete and cause revenue loss. Non-compete agreements are generally valued using a with or without method under the Income Approach. In the analysis, the incremental cash flows derived with the non-compete in place are compared to a hypothetical scenario without the non-compete. The “with” scenario reflects the company’s projected operating results over the term of the non-compete. The “without” scenario presents the expected cash flows assuming competition from the covered individuals. The analysis will require discussions with management regarding the likelihood of competition from the covered individuals and the potential impact to the business if competition occurred.

Electronic Medical Records
An electronic medical records system (EMR) is a sizable investment for a medical practice. A multi-physician practice can expect to incur $200,000 or more for an EMR system not including the investment of time for implementation and training. EMR systems are typically valued using the replacement cost method under the Cost Approach. EMR systems include both a hardware and software component. The cost of the hardware component is determined based on costs for computer workstations, installation and set-up costs. The process for determining the value of the software cost may differ depending on if the software is owned or leased. If leased, the costs associated with recreating the software would include assignment fees charged by the vendor and costs related to training and implementation. If the software is owned by the practice, in addition to the cost of the software and training and implementation costs, there may also be transfer fees to transfer the software to the buyer.

While clinical information and data within patient records cannot be sold, the custodial rights to the electronic patient files may represent a separate and identifiable asset. The value of the custodial rights is generally based on a Cost Approach utilizing a replacement cost method and represents the cost avoided by having the custodial rights. To determine value, the cost to assemble, maintain and store each active electronic medical record is quantified based on labor costs and file scanning times.

Assembled Workforce
Most healthcare transactions include an assembled and trained workforce as a part of the acquisition. This allows the buyer to avoid expenditures related to recruiting and training qualified employees. The replacement cost method under the Cost Approach is the most commonly used method for valuing an assembled workforce. Under this method, workforce value is a function of costs avoided through obtaining a pre-existing and fully efficient team rather than incurring the costs to assemble the workforce. To properly value the workforce-in-place, management will need to provide data related to position descriptions. Assumptions related to hiring and training costs and estimated time to reach full productivity can be provided by management and/or market research. Since the assembled workforce is not considered a separately identifiable asset, it is generally included as a component of goodwill.

In sum, the increase in M&A activity in the healthcare industry has amplified the need to have advisors who are able to help clients navigate the complex issues that may arise in healthcare transactions. It will be important for advisors to understand the various types of intangible assets and the nuances of how they are valued for healthcare transaction negotiations, and to help clients withstand regulatory scrutiny.

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Each month, these pages will be dedicated to highlighting just some of the activities and programs of your Cleveland Metro Bar.

**WOMEN HONORING WOMEN**

Save the date for April 26, when the Women in Law Section celebrates 30 years of advocating for women in the profession. Yvette McGee Brown, Partner at Jones Day and former Ohio Supreme Court Justice, joins with Melissa Nandi of Rockwell Automation and Lee Fisher, Dean of C|M Law, for a dynamic panel discussion on the future of women in the law. Immediately following their panel, we’ll recognize the members of the 1987 Commission on Women in Law, which led to the formation of the Women in Law Section, with remarks by The Honorable Patricia A. Gaughan. Mix and mingle with your fellow guests at the networking reception to close out the event.

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FEBRUARY’S HOT TALKS: OHIO HB 160

The CMBA thanks our speakers, moderator, and guests at February’s Hot Talks event on Ohio HB 160: The Ohio Fairness Act. Under the masterful moderation of Tucker Ellis attorney Chad Eggspuehler, Alana Jochum (Executive Director of Equality Ohio) and Prof. David Forte (Cleveland-Marshall College of Law) led a thought-provoking yet civil conversation on a topic that draws strong reactions from many, and that spurred further discourse well after the program concluded. Ohio HB 160 is pending with the Ohio General Assembly and, if passed, would make it illegal to discriminate against people based on sexual orientation and gender identity in the areas of employment, housing, and public accommodations. The video presentation of this event is available on the CMBA Facebook page, along with videos of past Hot Talks.

Our Hot Talks Series occurs on the Second Tuesday of every month! They are free and open to the public, so bring a friend (or ten!). No RSVP needed. Learn more about Hot Talks on our website.

CleMetroBar.org/HotTalks

2018 MEDICAL/LEGAL SUMMIT & HEALTH CARE LAW UPDATE

The CMBA’s Health Care Law Section and the Academy of Medicine of Cleveland and Northern Ohio look forward to seeing you at their annual CLE spectacular on April 13 and 14. With more than 200 attorneys and physicians in attendance, you’ll earn 9.25 hours of CLE credit and hear from the area’s leading experts in Health Care Law. We’re thrilled to welcome attorney and mental health advocate Christopher Kennedy Lawford for a special address on Friday afternoon. See full details at CleMetroBar.org/CLE.
The Tax Cuts and Jobs Act of 2017 (the Act), or more accurately “An Act to provide for reconciliation pursuant to Titles II and V of the concurrent resolution on the budget for fiscal year 2018,” will significantly impact both for-profit and tax-exempt hospitals and health systems. Tax-exempt hospitals breathed a sigh of relief in late December 2017 when the final version of the Act did not include a previously proposed provision to eliminate tax-exempt private activity bonds. However, the Act has several noteworthy provisions impacting tax-exempt hospitals, to which hospitals should respond appropriately.

Termination of Advance Refunding Bonds

While the Act did not eliminate private activity bonds – a major financing source for capital improvements of tax-exempt hospitals – it terminated the ability to issue tax-exempt advance refunding bonds after December 31, 2017.

An advance refunding bond issuance is a refunding that occurs more than 90 days before the date the refunded bonds may be called for redemption. Proceeds of advance refunding bonds are typically deposited in an escrow account and used, together with earnings on such money, to pay principal and interest on the original bond issuance. Advance refunding bonds allow hospitals to refinance debt at lower interest rates or eliminate burdensome covenants. Over the past few years, many hospitals and bond issuers have taken advantage of historically low interest rates and realized significant savings by issuing advance refunding outstanding bonds to pay off higher interest debt.

Following the elimination of tax-exempt advance refunding bonds, the interest earned on any advance refunding bond issued after 2017 will be taxable to the holders, which, in turn, means that purchasers will demand a greater return to compensate them for their tax liability. This eliminates a financial tool that has previously allowed many hospitals to reduce debt service costs and free up money that can be deployed otherwise. The elimination of tax-exempt advance refundings, coupled with potential decreased demand from banks and insurance companies as a result of the lower corporate income tax (as tax rates decrease for buyers of tax-exempt debt, they have less incentive to purchase the bonds) will alter the landscape of the tax-exempt bond market going forward.

Gross-Ups in Existing Bank Placement Bonds

The decrease in the corporate tax rate provided in the Act may also trigger certain “gross-up” provisions in existing tax-exempt bond issuances that were purchased directly by banks. As a condition to purchasing the bonds, many banks required a provision where if the corporate federal income tax rate decreased, the bank could increase the interest rate on the bonds in order for the bank to continue to maintain its after-tax yield. Some of these “gross-up” provisions are automatic, while others require the bank to take some sort of action to implement the adjustment. In light of these provisions, hospitals may want to review their existing bond documents and evaluate if it would be prudent to refinance that bank debt and also revisit the hospital’s existing non-credit relationship with the bank.

Excise Tax on Highly Compensated Administrative Employees

In a purported effort to create parity between publicly held, for-profit corporations and...
tax-exempt organizations (but not private companies), the Act imposes a 21 percent excise tax – equal to the Act’s corporate tax rate – on the annual compensation of executive “covered employees” above $1 million. The excise tax provision is effective January 1, 2018, and applies to pre-existing compensation arrangements as well as those arrangements commencing January 1. In this context, a “covered employee” is one of the organization’s five highest-paid employees. Once an employee becomes a covered employee, he or she remains a covered employee even if the compensation decreases above the excise tax threshold or the employment terminates, depending on the amount of any severance payments. This means an organization could have more than five covered employees over time. Compensation subject to the excise tax includes all pre-tax income but does not include after-tax contributions to a 401(k), 403(b), or Roth plan or contributions to a 457(f) non-qualified deferred compensation plan (though amounts taxed upon vesting are included).

Also excluded from compensation are “parachute payments” or payments to a covered employee upon termination in which the aggregate value of the payments is at least three times the employee’s “base amount.” The base amount is a five-year average of the employee’s annual taxable compensation prior to the year of the termination. The parachute payments are subject to a separate parachute payment excise tax on severance payment amounts above the covered employee’s base amount threshold.

Hospitals should be cognizant of the requirement to include covered employees’ aggregate compensation from sources across the enterprise, including income from related organizations and supporting and supported organizations (with each organization responsible for a proportional share of the excise tax). Even if a covered employee’s annual compensation from any one organization in the system is less than $1 million, the excise tax applies if the aggregate is over $1 million, and each organization is partially responsible for the excise tax.

Again, there is some limited good news for hospitals here in that the Act distinguishes between compensation to covered employees for the performance of licensed professional services and compensation for administrative services. In the instance of a hospital executive who also provides professional services, the compensation attributable to the performance of those professional services is carved out from compensation for purposes of the excise tax calculation. However, any compensation above $1 million for a highly compensated executive who is a medical professional but does not provide professional medical services to or on behalf of the organization is subject to the excise tax regardless of the executive’s professional credentials.

**Unrelated Business Income Tax**

The Act impacts the manner in which hospitals treat unrelated business income tax (UBIT) in two ways. First, the Act treats the value of certain fringe benefits commonly offered by tax-exempt hospitals as UBIT, which means the value of those benefits is subject to tax at the corporate rate, effective January 1, 2018. Hospitals commonly provide transportation, parking, and on-site fitness facility benefits to their employees. While the stated intent of this change is to create parity in the deductibility of such benefits between for-profit and non-profit employers, this will significantly impact the manner in which, and whether, hospitals continue to provide these benefits to their employees.
(For example, a hospital may decide to increase employees’ gross compensation to cover the cost of parking fees or off-campus fitness facilities or may eliminate the benefits entirely.)

Second, the Act requires tax-exempt hospitals to “silo” gains and losses for different hospital activities or lines of business when calculating UBIT. Prior to the Act, tax-exempt hospitals were able to offset gains from one activity with losses from another activity. Going forward, though, these hospitals will be unable to do so.

However, for-profit entities continue to be permitted to offset gains with losses from other activities. This allows hospitals to consider whether to restructure their various business lines in accordance with other Act provisions relating to the net operating losses.

Compliance with 501(r)
In addition to the explicit compliance challenges that the excise tax and UBIT provisions of the Act pose, the Act also serves as an indirect reminder for tax-exempt hospitals not to lose focus on their Internal Revenue Code Section 501(r) compliance efforts.

The Act eliminated the Affordable Care Act’s individual mandate to carry health insurance effective January 1, 2019. The Congressional Budget Office predicts that the repeal of the individual mandate will increase the number of uninsured individuals to 13 million over nine years. This likely means that hospitals will see an increase in patients qualifying for financial assistance for hospital bills.

As more patients look to tax-exempt hospitals’ financial assistance policies, the IRS may increase its enforcement activities relating to compliance with Section 501(r)’s requirements. Section 501(r) requires tax-exempt hospitals to maintain written financial assistance and emergency medical care policies, to limit amounts charged for emergency and other necessary care to patients qualifying for assistance under the hospitals’ financial assistance policy, to make reasonable efforts to determine a patient’s eligibility for assistance before engaging in certain collection efforts, and to conduct a Community Health Needs Assessment and adopt an attendant implementation strategy at least once every three years. (The ACA also imposed an excise tax for failure to complete the Community Health Needs Assessment requirements.)

Accordingly, tax-exempt hospitals should continue to monitor compliance with Section 501(r) requirements and implementation of financial assistance policies and procedures and the Community Health Needs Assessment process. If more patients need to avail themselves of financial assistance plans, the IRS may step up audit activity to ensure that the necessary policies are in place and are being utilized; auditing compliance with these requirements is low-hanging fruit for the IRS.

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Tucker Ellis Applauds the CMBA for their Ongoing Support of Diversity & Inclusion and the Health Care Community.

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n a profession that demands diversity and inclusion, the racial demographics of the legal profession are vastly disproportionate to the make-up of our society. Today, there is no debate that increasing diversity only serves to benefit the profession, yet we still see low numbers of diverse lawyers, specifically Black lawyers. Are Blacks being blackballed in the legal profession ... or more fitting, “black-barred?” Despite being 13% of the United States (U.S.) population and steady increases in diverse law student enrollment, the American Bar Association (ABA) reports that only 3% of all lawyers are Black. Many factors contribute to this staggering statistic, including one glaring beast — The Bar Exam.

For the legal community, the bar exam is the quintessential “necessary evil.” Memories of taking the bar exam are burned deep in the minds of lawyers everywhere, never wanting to deal with it again. Unfortunately, more than one fourth of all bar takers fail the bar exam. A 1975 Yale Law School article revealed that in Ohio, 75% to 85% of whites passed the bar exam. A 1975 Yale Law School article revealed that in Ohio, 75% to 85% of whites passed the bar exam. A 1975 Yale Law School article revealed that in Ohio, 75% to 85% of whites passed the bar exam. A 1975 Yale Law School article revealed that in Ohio, 75% to 85% of whites passed the bar exam. A 1975 Yale Law School article revealed that in Ohio, 75% to 85% of whites passed the bar exam. A 1975 Yale Law School article revealed that in Ohio, 75% to 85% of whites passed the bar exam. A 1975 Yale Law School article revealed that in Ohio, 75% to 85% of whites passed the bar exam. A 1975 Yale Law School article revealed that in Ohio, 75% to 85% of whites passed the bar exam. A 1975 Yale Law School article revealed that in Ohio, 75% to 85% of whites passed the bar exam. A 1975 Yale Law School article revealed that in Ohio, 75% to 85% of whites passed the bar exam. A 1975 Yale Law School article revealed that in Ohio, 75% to 85% of whites passed the bar exam. A 1975 Yale Law School article revealed that in Ohio, 75% to 85% of whites passed the bar exam. A 1975 Yale Law School article revealed that in Ohio, 75% to 85% of whites passed the bar in Ohio — 17% of first-time takers. These statistics dangerously mislead Black bar exam candidates with grossly disproportionate passage rates. While, it may be true that typically 75% to 85% of all Ohio bar exam candidates are successful, that is not the case among Black candidates. It is the conspicuous secret of the legal profession that Black candidates are not performing as well on Ohio bar exams or anywhere else in the country. Surprisingly, there is an alarming lack of data on the subject.

By their own admission, the Ohio Supreme Court does not maintain information related to the race of bar examinees. In fact, in many jurisdictions there is very little data regarding Black bar passage rates mostly because states are not requesting racial information on bar exam applications to avoid accusations of discrimination. This practice begs the question, however, how can the profession address an issue when it does not know the scope or severity of the problem? Despite limited current data, the legal community is certainly aware and able to track the disparity in bar passage rates for Black bar exam candidates.

1970s
Studies have been conducted on the issue sporadically, inferring that since its inception Blacks have faced an uphill battle to conquer the bar exam. A 1975 Yale Law School article revealed that in Ohio, 75% to 85% of whites passed the bar, while only 27% to 43% of Blacks passed; in Alabama, only 20% of Blacks passed as opposed to 70% of whites; in the District of Columbia only 10% of Blacks passed; and in Georgia, not one of the 40 Black students who sat for the bar exam passed. These statistics were attributed to “defects in law school admissions processes, the failure to understand and cope with special problems encountered by Black law students, and the design and administration of bar examinations.”

1980s
In 1989, the Orlando Sentinel published an article stating Blacks consistently failing the bar exam at substantial higher rates than whites is and has been a “critical concern” for the legal profession since the 1970s. Stephen Klein, a consultant who worked with the California bar on minority performance, stated “There is no simple solution because Blacks come to law school without the same educational background as whites.” He did, however, cite several supplemental bar preparation programs in different states that yielded increased rates:

In Illinois, volunteer attorneys created a program that focused on study tactics and exam strategies rather than substantive knowledge. The program also offered advice on managing bar exam stress. A New York program cited the cause of minority failure to be psychological more than academic inability. The six-week program not only concentrated on test-taking strategies and exam writing, but also provided individualized counseling. New Jersey bar examiners went as far as to begin tracking the data, and making changes to the exam and testing procedures in an effort to make the exam more fair.

In Florida, the Supreme Court created a 24-member task force to examine concerns with Black law school graduates gaining admission to the bar. The task force worked with the Florida Bar Foundation and National Bar Association to create new bar review courses and tutorial programs.

1990s
In 1991, the Law School Admissions Council created the National Longitudinal Bar Passage Study. The study was finally published in 1998 as the first set of national valid data. Although based on a sample size, the Council substantiated the significant disparities in bar passage rates among individuals of color. More specifically, the study found that more than 95% of whites passed the bar exam on the first attempt, compared to only 61.4% of Blacks. Factors contributing to these rates include but are not limited to educational background, high student debt, self-esteem, family issues, and law school curriculum. While conversation has continued, no similar study has been completed since.

PRESENT
Today, although bar passage data continues to be limited, it is widely accepted that a disparity exists and is caused by many various factors including psychological stress, financial...
burden, and educational disadvantages that are difficult to overcome in three years of law school. The lack of Black bar exam passers leaves our profession vulnerable.

RESULTS OF POOR BAR PASSAGE
Blacks not performing well on the bar exam inevitably manifests in lack of diversity in the legal community. In a 2015 article, the Washington Post asserted that “Law is the least diverse profession in the nation...” A study in the same year showed that three in five states have no Black elected prosecutors. Additionally, only 3% of lawyers in BigLaw are Black and even fewer are partners — less than 2%.

A more diverse legal community gives rise to a built-in level of cultural competence, innovation, and overall economic growth. Entities that are racially diverse tend to bring in 15 times more revenue than those not racially diverse. They can better connect with clients, provide higher quality service, and attract additional business. We will never realize the potential of a diverse profession until we invest in breaking barriers for diverse law students and attorneys.

RECOMMENDATIONS
Keep Track of Data – The legal profession cannot adequately address an issue when it does not know the scope or severity of that issue. As lawyers, we are all too familiar with the importance of issue spotting and problem solving. It is unacceptable for lawyers to zealously advocate for diversity and inclusion in other professions, yet fail to monitor its own lack of diversity.

Be Transparent, Don’t Ignore the Issue – Despite limited data, the legal community knows that minority bar passage is a concern. Whether it happened to you, your friends, interns, colleagues or mentees, it is notable how many Black candidates turn up short after the bar exam. We cannot combat a problem that we are not forthcoming about. Law students need to be aware this disparity exists in order to fight against it. No longer can we dangle high pass rates in front of our students knowing that these rates do not apply to all students proportionately. No longer can we simply tell students “Do what the bar prep program tells you to do,” ignoring that that is not enough. Rather we must change the culture surrounding the bar.

Develop Programs & Initiatives Designed to Assist Black Law Students to Pass the Bar – For better or worse, the bar exam is here to stay and is a roadblock that diverse students consistently have trouble overcoming. While three years of law school may not be able to void generations of educational disadvantages, psychological concerns, and/or financial hardship, there is certainly more law schools, bar associations, and attorneys can do to ensure the success of Black students.

Supplemental programs have worked in other states and would be a step in right direction. In addition to developing programs, students need to be aware of resources already available, including alternative bar prep programs.

It is crucial to the efficiency and survival of our profession that diversity matters. That includes getting Black students through the bar exam. The issue of disproportionate bar passage rates is one that can no longer be ignored or swept under the rug. I urge law schools, local bar associations, bar officials, attorneys and students alike to work together with organizations like the Norman S. Minor Bar Association and other key groups to address this problem or risk losing some of the brilliant legal minds of tomorrow.

Delante Spencer Thomas serves as Deputy Inspector General for Cuyahoga County and Co-Founder of LMP Solutions, LLC. His practice areas include ethics and compliance, organizational development, as well as employment and housing discrimination. Originally from East Cleveland, Ohio, Mr. Thomas is a 2016 graduate of Cleveland-Marshall College of Law where he concurrently earned his law degree and masters of labor relations and human resources. He has been a CMBA member since 2017. He can be reached at delante.thomas1911@gmail.com.
In Honor and Remembrance of the Lawyers and Judges of Cleveland and Cuyahoga County who passed away between January 1 – December 31, 2017

Monday, April 16th at Noon
CMBA Conference Center Auditorium

A memorial program will be held for the following members of the bench and bar who passed away over the past year. Family, friends, colleagues and all lawyers in the Cleveland and Cuyahoga County area are invited to share in this final tribute to honor these men and women.

Fred J. Ball            David P. Kraus            William Wilbert Owens
Michael Lamont Belcher  Hon. Robert M. Lawther  Samuel Richard Petry II
Hon. Jean Murrell Capers  George W. MacDonald  Hon. Raymond L. Pianka
Joyce E. Carlozzi       James Michael Mackey  Hon. James M. Porter
Zolman Cavitch          Joel A. Makee         Magistrate Elliot Ian Resnick
Leo Robert Collins      Thomas A. McCormack   Mark Alan Smith
Hon. William H. Corrigan  Gary W. Melsher      Robert Lee Steely
Thomas Lee Dettelbach   John T. Meredith     Lawrence Anthony Sutter III
Elisabeth Druyfuss     Richard David Messerman  Hon. Pauline H. Tarver
Larry S. Gordon         Harvey Stuart Morrison  Fred Weisman
Mark D. Klimek

For more information, please contact Krista Munger at (216) 696-3525 ext. 2224 or kmunger@clemetrobar.org. The CMBA has made every effort to compile a complete list of the attorneys and judges in Cuyahoga County who have passed away over the past year. If you are aware of a name that has been omitted from this list, please contact Krista Munger.
DRAFTING JURY INSTRUCTIONS THAT JURIES CAN UNDERSTAND

Kathleen M. Dugan

A recent online article from the ABA about juries indicated that jurors have “difficulty understanding jury instructions,” (https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/jurors_are_practical.html). To combat this problem, the article recommended using “plain language” to simplify and clarify the laws that jurors need to apply. As a result, this column will suggest resources that can help trial practitioners in both state and federal courts draft jury instructions that jurors can more easily comprehend. It will also identify books and online databases which contain sample and model jury instructions that lawyers can use as starting points when preparing their own cases for trial.

Plain Language Resources

There are several outstanding resources for lawyers who are determined to eliminate legalese from their writing. One of the best guides is Michele M. Asprey’s book entitled Plain Language for Lawyers (4th ed., The Federation Press, 2010), which includes chapters on fundamentals, word structure, legal affectations, and legal interpretation. Another excellent resource is The Elements of Legal Style by Bryan Garner (2nd Ed., Oxford University Press, 2002) which covers basics such as punctuation, word choice, grammar, and syntax, as well as more fundamental principles of legal writing and style.

More specifically, the American Law Institute offers 20 specific tips for creating jury instructions, including tailoring instructions to the facts of a case and personalizing the instructions with the names of the parties. (Twenty Tips for Effective Jury Instructions http://files.ali-cle.org/thumbs/datastorage/lacidoirep/articles/PLIT_ PLIT0505-KOCH_thumb.pdf.) In addition, a Practical Law article on Westlaw entitled Drafting Jury Instructions and Verdict Forms offers several good suggestions, including limiting each instruction to a single issue, avoiding double negatives and compound sentences, and eliminating argumentative language. Lawyers can apply these and other guidelines to sample jury instructions that are available by jurisdiction, court, or topic.

Ohio

For Ohio civil and criminal cases, the gold standard for sample jury instructions is Ohio Jury Instructions (OJI) from the Ohio Judicial Conference. OJI is available in print and online through Lexis, Westlaw, and the Ohio State Bar Association’s (OSBA) Casemaker product. While OJI is a great starting point, most lawyers know that it does not cover every situation. As a result, the OSBA created and posted supplemental Ohio jury instructions on Casemaker that cover selected civil and criminal topics. Lawyers who still need more specific or granular jury instructions may want to search case law for decisions which either quote the language of instructions that were used in actual trials or at least identify the elements of claims, defenses, or crimes. Online dockets in similar cases may also contain proposed instructions, and both Lexis and Westlaw offer databases of selected jury instructions that lawyers have submitted to Ohio trial courts.

Other States

Unlike Ohio, many states provide free copies of their model civil and criminal jury instructions on the Internet. Examples include California civil and criminal instructions, Florida standard criminal instructions, and Michigan civil and criminal instructions. The following link provides a more complete list of free state jury instructions: http://clevelandlawlibrary.org/Public/Misc/Sites/Jury_Inst.html#State

In addition, both Lexis and Westlaw offer database access to many states’ model jury instructions. Depending on the breadth of their practices, lawyers can also purchase premium access on both databases to actual filings from many U.S. state courts.

Federal

For federal court practitioners, the two primary sources of jury instructions are Modern Federal Jury Instructions and Federal Jury Practice and Instructions. These manuals are available in print and online from Lexis and Westlaw, respectively. Several federal circuits also publish model civil, criminal, or topical jury instructions for use in their lower federal courts. Key examples from Ohio include the Sixth Circuit’s set of Criminal Pattern Jury Instructions and two proposed instructions from Northern District of Ohio Judge Dan Polster. Links for these and other federal jury instructions are accessible at: http://clevelandlawlibrary.org/Public/Misc/Sites/Jury_Inst.html#Federal.

Special Topics

Legal publishers also offer topic-specific jury instructions for issues such as civil RICO, construction law, or personal injury. For example, the ABA is often on the forefront of specialized jury instructions and has published Model Jury Instructions for many topics, including Business Torts Litigation, Civil Antitrust Cases, Employment Litigation, and Copyright, Trademark, and Trade Dress Litigation.

Kathleen M. Dugan serves as the head Librarian of The Cleveland Law Library. She has been a CMBA member since 2003. She can be reached at (216) 861-5070 or kdugan@clelaw.lib.oh.us.
While Cleveland’s national popularity as a vacation and entrepreneurial destination is re-emerging, it has been a beacon for immigration for many years. For those of us who live, work and thrive in Northeast Ohio, our identity is synonymous with immigration. From Slavic Village, to Asiatown, to Little Italy to the Cleveland Cultural Gardens, the fabric of our neighborhood and City are woven with diversity.

We as a community recognize the value that diversity through immigration brings to our region. For example, immigrants have been a force in battling the significant population loss that this region has suffered since its time as “The Sixth City.” If it were not for international migration, Cuyahoga County would have lost an estimated 50,291 residents overall since the 2010 census. Instead, the County had a net gain of over 19,000 immigrants who came into Cuyahoga County from other countries around the world. That puts Cuyahoga County sixth out of 36 large regional counties in Ohio, Michigan, Indiana, Kentucky, western Pennsylvania and western New York in terms of immigrant population. At this point, 7.1% of residents in Cuyahoga County are from foreign countries, trailing only Franklin County in Ohio for the largest number of immigrant residents. Rich Exner, International migration a population plus for Cuyahoga County; ranks high regionally, (March 31, 2017), The Plain Dealer, Available at: http://www.cleveland.com/datacentral/indexssf/2017/03/international_migration_a_popu.html (Exner Article).

The group of people that is helping to stave off population loss is also helping to bolster the workforce — both by creating jobs, and by filling those jobs that would otherwise remain unfilled. In Greater Cleveland, nearly 64% of immigrants are of working age — between the ages of 25 and 64 — compared to only 52% of the native-born population. Immigrants as a whole also are more likely to be either highly-skilled workers with advanced degrees, or low-skilled workers performing labor-intensive jobs. This lets them assume positions at the high and low ends of the workforce. Janet H. Cho, Cleveland immigrants pay taxes, start businesses, create jobs, New American Economy says, (February 26, 2017), The Plain Dealer, Available at: http://www.cleveland.com/business/indexssf/2017/02/cleveland_immigrants_pay_taxes_start_businesses_create_jobs_new_american_economy_says.html (Cho Article). In fact, one half of the immigrants who came to Cuyahoga County from 2007 to 2011 were college educated, and the number of educated immigrants coming to Cuyahoga County is only increasing. Richey Piiparinen & Jim Russell, Globalizing Cleveland: A Path Forward, Maxine Goodman Levin College of Urban Affairs Urban Publications, May 1, 2014, at 3. Available at: https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?referer=&httpre

viewdir=1&article=2166&context=urban_facpub (Globalizing Cleveland Article). Moreover, 23% of foreign-born residents in Cleveland have a graduate degree, which is more than double the 11% of native-born residents with advanced degrees. See Cho Article.

With great minds come great ideas, and the positive impact of those ideas is apparent in Greater Cleveland’s economy and workforce. Recent studies show that immigrants are 75.1% more likely to be entrepreneurs than native-born Clevelanders. The impact of those entrepreneurs spans across the entire state of Ohio, boosting the economy and creating jobs statewide. Indeed, statistics show that:

- 27,621 immigrant entrepreneurs live in Ohio;
- 122,404 Ohioans are employed by immigrant-owned firms;
- 30.4% of the Fortune 500 companies in Ohio were founded by immigrants or their children;
- Ohio immigrants paid $4.5 billion in state and local taxes;
- Ohio immigrants controlled $11.1 billion in spending power in 2014; and
- Statewide, immigrants owned 109,522 homes, which helps to build the state's housing wealth. See Cho Article.

Although the above numbers may be dizzying, the simple fact is that immigrants work, immigrants create jobs, and immigrants have spending power. So, it is no surprise that implementing measures to create more diverse and inclusive workplaces has become a high priority in the legal community. Having immigrants, or the children of immigrants, at the table and making decisions helps a law firm as a whole better understand the priorities and goals of businesses owned by immigrants.
We, as lawyers and law firms, should and need to reflect the image of immigrants in order to ensure that their values and interests are being captured for the advancement of all.

Although numbers and statistics illuminate the important position that immigrants occupy in our community, they do not show the practical influence and additional benefits of having a diverse workforce in a law firm. To illustrate, we would like to share two instances where attorneys with diverse backgrounds had a unique impact in client service. For example, one of the authors of this article, Klevis Bakiaj, is an immigrant, and a child of immigrants, from Albania. The Albanian community in the Greater Cleveland area is employed in many different industries, and there also has been increasing entrepreneurship in the community. One of the industries where an increasing amount of Albanians in Cleveland are employed and have started businesses is in the transportation industry. Recently, a client of Frantz Ward encountered an issue with a shipper that damaged its goods. Although the usual way to resolve this when an attorney gets involved is to send threatening demand letters and to initiate a suit, Klevis has a broad knowledge of the transportation industry due to friends and family members in the transportation industry. Using Klevis’ experience and contacts, the firm was able to obtain a favorable settlement for its client in a unique way that would not have been readily apparent to others without his particularized knowledge, thereby avoiding the initiation of litigation.

In yet another example, the other author of this article, Mia Ulery, knows from personal experience that diversity matters in the legal field and contributes to providing better client service. As a child of a Chinese immigrant and the great-granddaughter of a Spanish immigrant, Mia’s bi-racial background gives her a unique perspective on the nuances of racial identity and helps her bridge the gaps between many different cultures. While Mia was in law school and working in the school’s legal clinic, a minority-owned, non-profit business client had a publicity opportunity and was looking for someone in the clinic to appear with company representatives. The client ultimately chose Mia for two reasons. The first was that having a bi-racial woman appear with them would help attract more female participants to the client’s business, which was otherwise male dominated. The second and more important reason was that the client was conscious of the negative stereotype wherein a white male attorney sitting next to a black male is often presented in society as depicting a criminal matter, rather than that of a charitable businessman and his attorney. Since the business’s underlying purpose was to provide for underserved communities that have issues with crime, the client was particularly mindful of how such an image could affect its public perception and interest in its activities.

We hope that the above statistics and personal stories demonstrate the importance of diversity in the legal field, and that you do not create a more diverse and inclusive law firm just to make a more equal society. You also do it because the end product will be better. The immigrant community in the Greater Cleveland area represents a large portion of business owners and entrepreneurs that grew up in different environments and has developed unique and creative ways of problem-solving. Not only does this background allow members of the immigrant community to capitalize on their experiences, and create businesses and jobs, it also leads them to seek attorneys with similar values who have unique and creative ways of problem-solving. In prioritizing diversity and inclusion, law firms are positioning themselves to provide better service to their clients by spotting issues before they turn into problems, providing a comprehensive view of a client's needs, and ultimately creating more value for all.

Klevis Bakiaj’s practice is focused on representing clients in a variety of litigation, including six-figure disputes regarding automobile accidents, coverage decisions, defending subrogation and reimbursement claims, and patent litigation. Klevis is a member of the Albanian-American Association of Cleveland. He has been a CMBA member since 2015. Klevis can be reached at (216) 515-1632 or kbakiaj@frantzward.com.

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Despite a healthcare provider’s best efforts, a patient may experience an unexpected medical outcome, even death. It is an elemental human characteristic to want to offer some expression of sympathy or benevolence — even to apologize for the unanticipated turn of events. An apology may go a long way to diffuse a difficult situation, facilitate healing, preserve relationships, and even avoid later litigation. Yet a healthcare provider may be wary that any such statements would be used later as evidence of negligence or liability in a malpractice suit. To encourage conversations and transparency between healthcare providers, patients, and their families after unanticipated outcomes, Ohio and more than 30 other states, have adopted what are often referred to as “apology statutes.” Ohio’s apology statute — R.C. 2317.43 — provides that a healthcare provider’s “statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence” that relate to an unanticipated outcome during medical care are inadmissible as evidence when made to the patient, her family, or her representative. Ohio’s statute does not define “apology,” or any of the other forms of expression, and does not distinguish between a healthcare provider’s statement of sympathy and one acknowledging fault. One appellate court — Wooster Orthopaedics & Sports Medicine, Inc., 193 Ohio App.3d 581, 2011-Ohio-3199, 952 N.E.2d 1216 (9th Dist.) — said that statements of apology do not include statements of fault, while another — Stewart v. Vivian, 2016-Ohio-2892, 64 N.E.3d 606 (12th Dist.) — said that they do. The Supreme Court agreed to resolve this conflict by accepting Stewart for review.

In a 5-2 decision released in September 2017, Justice Kennedy, writing for the majority, found that statements admitting liability or fault made during the course of apologizing or commiserating do indeed fall within the statute’s protections. Stewart v. Vivian, Slip Opinion No. 2016-1013, 2017-Ohio-7526. Stewart was a medical-malpractice and wrongful-death action filed by Dennis Stewart on behalf of the estate of his wife, Michelle. Following a suicide attempt, Michelle was admitted to Mercy Hospital under the care of Dr. Rodney Vivian, who entered orders requiring hospital staff to visually check on Michelle every 15 minutes. During an unmonitored period, Michelle again attempted suicide. Her attempt caused irreversible brain damage and she eventually died. Dr. Vivian spoke to Dennis and Michelle’s sister after the event. Dr. Vivian did not remember the exact conversation, although he later recalled saying he was sorry. Dennis and Michelle’s sister provided differing accounts of the statements made by Dr. Vivian.

According to Dennis, Dr. Vivian said “he didn’t know how it happened; it was a terrible situation, but she had just told him that she still wanted to be dead, that she wanted to kill herself.” Michelle’s sister remembered that Dr. Vivian asked the family what they thought had happened. In response, Dennis said that Michelle “had obviously tried to kill herself.” Dr. Vivian commented, “Yeah, she said she was going to do that. She told me she would keep trying.”

Despite differences between the family’s statements, the trial court nonetheless found that Dr. Vivian’s statements were an “attempt at commiseration” and therefore inadmissible under the apology statute. The case proceeded to trial without the statements and the jury eventually returned a defense verdict. The appellate court affirmed, finding that the Ohio General Assembly’s intent was to protect all statements of apology, including those admitting fault.

On appeal to the Supreme Court, the Court acknowledged that the statute does not
define “apology.” The Court therefore relied on its ordinary dictionary meaning — “an acknowledgment intended as an atonement for some improper or injurious mark or act; an admission to another of a wrong or discourtesy done accompanied by an expression of regret.” Relying on that dictionary meaning, the statute was “susceptible of only one reasonable interpretation” — i.e., “a statement expressing apology is a statement that expresses a feeling of regret for an unanticipated outcome of the patient’s medical care and may include an acknowledgment that the patient’s medical care fell below the standard of care.” The Court’s ruling makes clear that statements of fault come within the evidentiary protections of R.C. 2317.43 and are inadmissible.

Two justices dissented, in part. Chief Justice O’Connor, joined by Justice O’Neill, agreed that statements of fault come within the statute’s protections, but disagreed that the statements made by Dr. Vivian were statements of fault. To the Chief Justice, Dr. Vivian merely summarized statements Michelle made to him and “added a description of his own state of mind.” She concluded that Dr. Vivian’s statements were an expression of shock and surprise that did not have an indicia of apology, commiseration, or regret.

The Chief Justice acknowledged that a healthcare provider need not expressly say “I apologize” or “I sympathize,” but expressed concern about relying on the speaker’s intent and not on the “actual content” of the statements made. She believes that a healthcare provider “could render any statement inadmissible simply by affirming a subjective intent to apologize orconsole.”

While Stewart resolves an important issue regarding the applicability of Ohio’s apology statute to statements of fault, Chief Justice O’Connor’s dissent is likely to become a focus for further litigation as courts grapple with which statements fall under the statute and which do not. In fact, it already did. Dennis’s counsel filed a motion asking the Supreme Court to reconsider the September decision. Counsel did not take issue with the Supreme Court’s conclusion that statements of fault come within the statute’s protections and are inadmissible. They claimed — much like the Chief Justice — that Dr. Vivian’s statements are not statements of fault. Nevertheless, a majority of the Supreme Court disagreed, denying reconsideration in December 2017.

Stewart has important implications in Ohio, but its holding may affect similar statements made by healthcare providers in other states with apology statutes similar to Ohio’s, including Montana, North Dakota, Oklahoma, West Virginia, and Wyoming. Courts in these jurisdictions have not addressed the issue of whether statements of fault are inadmissible and, like the Ohio statute, these terms are not defined. Stewart may now serve as persuasive authority to support the exclusion of statements of fault.

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Christina Marino is an associate with Tucker Ellis LLP. She defends healthcare providers and pharmaceutical and device manufacturers in medical malpractice and product liability lawsuits in state and federal courts. She has been a CMBA member since 2014. She can be reached at (216) 696-5249 or christina.marino@tuckerellis.com.
A crowd of 500+ friends of the CMBF, dressed in “party gras” style, enjoyed a Mardi Gras themed night out in support of our community outreach programs. They mingled, drank signature “rocktrails,” sampled New Orleans and Cleveland favorite cuisine, celebrated our Pogue Award winner, and helped us raise more than $200,000! A special shoutout goes to our 53 sponsors! What a night!
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All event proceeds support the CMBA’s Lawyers Giving Back outreach programs that are building bridges in our community.
### March

<table>
<thead>
<tr>
<th>MONDAY</th>
<th>TUESDAY</th>
<th>WEDNESDAY</th>
<th>THURSDAY</th>
<th>FRIDAY</th>
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</thead>
<tbody>
<tr>
<td>19</td>
<td>PLI – 8:30 a.m.</td>
<td>PLI – 8:30 a.m.</td>
<td>Spring Break CLE in Arizona</td>
<td>Spring Break CLE in Arizona</td>
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<tr>
<td></td>
<td>CMBF Board Meeting</td>
<td>Estate Planning, Probate &amp; Trust Law Section Lunch &amp; CLE</td>
<td>Thought Leadership Committee – 8 a.m.</td>
<td>(Also Saturday and Sunday)</td>
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<tr>
<td></td>
<td></td>
<td>Grievance Committee</td>
<td>PLI – 8:30 a.m.</td>
<td>PLI – 8:30 a.m.</td>
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<tr>
<td>20</td>
<td></td>
<td></td>
<td>Court Rules Committee</td>
<td>Ethics/Video Replay – 9 a.m.</td>
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<tr>
<td>21</td>
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<td>Federal Court Video Replay – 1 p.m.</td>
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### April

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<thead>
<tr>
<th>MONDAY</th>
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<th>WEDNESDAY</th>
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<tbody>
<tr>
<td>2</td>
<td>CMBF Executive Committee – 8 a.m.</td>
<td>Grievance Committee Meeting</td>
<td>PLI – 8:30 a.m.</td>
<td>YLS Council Meeting</td>
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<td>CMBF BOT Meeting</td>
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<td>WITL Section Meeting</td>
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<td>Movie Night – 6 p.m.</td>
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<tr>
<td>9</td>
<td>PLI – 8:30 a.m.</td>
<td>PLI – 8:30 a.m.</td>
<td>Ethics Committee</td>
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<td></td>
<td>PLI – 1:15 p.m.</td>
<td>Hot Talks</td>
<td>Pillars Program</td>
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<td>International Law Section Lunch &amp; CLE</td>
<td>Real Estate Law Section Lunch</td>
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<td>ADR Section</td>
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<td>Diversity &amp; Inclusion Committee – 4 p.m.</td>
<td>Workers’ Comp Section</td>
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<td>10</td>
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<td>VLA Committee Meeting</td>
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<td>Medical/Legal Summit</td>
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<td>– 8 a.m.</td>
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<tr>
<td>16</td>
<td>PLI – 8:30 a.m.</td>
<td>PLI – 8:30 a.m.</td>
<td>Labor &amp; Employment Law Conference – 8 a.m.</td>
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<td>2018 Greater Cleveland Bench-Bar Memorial Program</td>
<td>CMBF BOT Meeting</td>
<td>Family Law Section Meeting &amp; CLE</td>
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<td></td>
<td>Grants &amp; Finance Committee Meeting</td>
<td>Estate Planning Section Lunch &amp; CLE</td>
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<td>Grievance Comm. Mtg.</td>
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<tr>
<td>23</td>
<td>PLI – 8:30 a.m.</td>
<td>3Rs Committee Meeting</td>
<td>Thought Leadership Committee – 8 a.m.</td>
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<tr>
<td>24</td>
<td></td>
<td>Membership Committee Meeting</td>
<td>PLI – 8:30 a.m.</td>
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<td>3Rs Committee Meeting</td>
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<td>Leadership Academy – 9 a.m.</td>
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<td>Court Rules Committee</td>
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<td>Women Honoring Women – 4:30 p.m.</td>
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<tr>
<td>25</td>
<td>Litigation Institute – 11:30 a.m.</td>
<td>3Rs Committee Meeting</td>
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<tr>
<td>26</td>
<td>Thought Leadership Committee – 8 a.m.</td>
<td>Memberships Committee Meeting</td>
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<td>27</td>
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<tr>
<td>30</td>
<td>CMBF Exec. Committee Meeting – 8 a.m.</td>
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<td>PLI – 8:30 a.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.
**Employment**

Schraff & King Co., L.P.A. is accepting applications for a Probate and Medicaid paralegal position. Please send resume and cover letter to John Thomas at jthomas@schraffking.com.

**Law Practices Wanted/For Sale**

Established workers’ compensation firm looking to increase client base by taking over an existing book of clients. If interested in discussing this, please call (216) 990-7951.

**Looking to slow down or starting to think about retirement?** Attorney with established probate/estate planning/small business practice looking to expand current practice; (216) 245-8861.

**Office Space/Sharing**

55 Public Square — Office available in nicely decorated suite with receptionist, fax and copier; (216) 771-8084.

820 W. Superior Ave — 2 large offices available in existing suite with 4 other attorneys. Full amenities. Support staff space available. Call (216) 241-3646.


Downtown Cleveland — Rockefeller Bldg. @ W. 6th & Superior. Exceptional Office space, exceptional value. All window space, no interior offices. Contact Ben Cappadora or Therese Manos at (216) 696-3929.

IMG Center — E. 9th and St. Clair — Office space available in suite with several other attorneys. Telephone, receptionist, fax, copier, secretarial available. Referrals possible. Contact Ty Fazio at (216) 589-5622.

Terminal Tower — Law offices available in prime location with reception area, secretarial space, conference room, copier, fax and kitchen. Reasonable rent. Call (216) 241-2022.

**Unique Cleveland Warehouse District**

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**Suburbs — East**

Beachwood — Office space. Inside parking. Small office/windows. Reasonable. Some possible overage. (216) 244-3423

Beachwood — Green Road near Chagrin. Prime office space. Also small to large office suites in Class A building. Receptionist, Westlaw, conference room, office furniture included. Up to 6 offices available. $500 – $750 per office inclusive. Possible legal referrals. (216) 514-6400, ext. 324.

Beachwood — Office for lease, either fully furnished or vacant (216) 856-5600

Beachwood — Office in gorgeous suite on Chagrin. Copier, fax, conference room and other amenities provided. Possible litigation referrals. Contact Craig W. Relman. (216) 514-4981.

Beachwood — LaPlace — corner of Richmond and Cedar Road. Large windowed office with amenities and free underground parking. Reasonable rent. For more information, call or email (216) 292-4666 or limlaw@sbglobal.net.

Bedford — Law offices available with conference room/library, kitchen, receptionist, and mentoring from C|M grad with 40+ years legal experience. (440) 439-5959

Chagrin Falls — Furnished office available with other attorneys in eastside law firm. Chagrin Falls location with parking. $500/month includes office, WiFi, kitchen and conference room. Contact lawfirmchagrinfalls@gmail.com.

Chardon Square — Offices and large conference room in prime storefront location on Main Street opposite Geauga County Courthouse for possible space sharing or partial sublease. Contact Bill Hofstetter at (440) 285-2247.

Mayfield Heights — Beautiful office space available with conference room, receptionist, all necessary law firm amenities, complementary practices. Rent negotiable. (440) 473-5262.

Mentor — Two offices available at Carrabine & Reardon. Expense sharing arrangement is negotiable. Great location! Contact Jim Carrabine at (440) 974-9911.

**Suburbs — South**

Brecksville — Conference room and mailing services available in the Ganley Building for $50 or $150 per month. Possible legal referrals. (440) 526-6411, ask for Laurie.

Seven Hills — Law office for lease — Broadview Road just north of Pleasant Valley Road. Busy intersection. Not far from I-77. 3,000 square feet, move-in ready, immediate occupancy. Reasonable rent. Contact Michael Kulick at (440) 503-9685 or staff@kulickdds.com to schedule a visit.

Seven Hills — Law office for rent — Rockside Road, Seven Hills Corner office in prime location with Internet, copy, fax, scanner, telephone, receptionist. Two conference rooms. $1,000 per month. Call Anthony at (216) 401-7763.

**Suburbs — West**

Avon — New office space with multiple professionals. Great for networking. Desirable location across from Avon Commons on Detroit Road. Many included amenities. Contact Doug; (440) 937-1551.

Avon — Office space — One newly furnished office in attractive two attorney suite with conference room and reception area. Historic building. Excellent location with free parking. Please contact mschroth@schroth-law.com for details.

Fairview Park Office Space — Beautifully remodeled. Many amenities included. As low as $475 per month. Call (440) 895-1234 to schedule a visit.

Lakewood — Furnished office available in nicely decorated suite. $500/month includes office, WiFi, utilities, conference room and free parking. (216) 246-1392.

Lakewood — Office space in a newly updated modern suite available. First floor; Library, Internet, copy, fax, scanner, receptionist. Call: Skip Lazzaro (216) 226-8241.

Westlake — One/Two offices in Gemini Towers across from Crocker Park includes phones, fax, copier, wi-fi, receptionist, conference room. Call (440) 250-1800 to schedule a visit.

**For Rent**

Lake Erie Rental — Upscale 2 bedroom/2 bath house on Lake Erie in Willowick; Beautifully furnished, wifi and air conditioning, fire pit and patio. Rent for getaway weekend or week. (440) 725-1224

**Suburbs — North**

“Executive and Associate Offices with full services, amenities, and referrals. Convenient to courthouses, restaurants, and parking. Call Pam MacAdams. (216) 621-4244.”


“Office for lease, either fully furnished or vacant. Call (216) 856-5600.”

“Office in gorgeous suite on Chagrin. Copier, fax, conference room and other amenities provided. Possible litigation referrals. Call Craig W. Relman. (216) 514-4981.”

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Tucker Ellis LLP is pleased to announce that it has elected the following attorneys to the firm’s partnership: Ann Caresani, Seth Linnick, and Tod Northman.

Frantz Ward is pleased to announce that attorneys Michael J. Frantz, Jr. and Melissa A. Jones have been elected to the partnership.

Tucker Ellis LLP is pleased to announce that it has promoted the following attorneys to counsel: Brandon Cox, Katya Cronin, Chad Eggspuehler, Daniel Finer, Sarah Stover, Brenda Sweet, and Charissa Walker.

Jones Day announced that three lawyers have been named to the Firm’s partnership: Angela R. Gott, Erin Preedy and Andrew C. Thomas.

Ulmer & Berne LLP announced that Amanda Martinsek joined the firm as a partner in its Cleveland office.

Meyers Roman Friedberg & Lewis is pleased to announce Anne C. Fantelli has been promoted to a partner in the firm.

Hennes Communications announced that Thom Fladung has become a minority owner of the firm, assuming the role of managing partner. Bruce Hennes, who founded the firm in 1989, remains majority shareholder and now becomes the firm’s CEO.

Jennifer Himmelein has been named Partner of Cavitch, Familo, & Durkin Co., LPA. Angela Thi Bennett is now Of Counsel, and Adam Henry is the newest Associate, practicing with the Estate Planning Group.

Kimberly E. Stein became Partner at Schneider Smeltz Spieth Bell LLP.

Littler has elevated Meredith C. Shoop to shareholder status.

Meyers, Roman, Friedberg & Lewis is pleased to announce that Seth P. Briskin has been named the firm’s new Managing Partner. In addition, partners Bryan J. Dardis and Jenifere R. Singleton have been elected to leadership positions on the firm’s Management Committee.

Brouse McDowell announces that Alexandra V. Dattilo was elected as partner in the firm.

Tucker Ellis LLP is pleased to welcome John (Chaz) Weber as Counsel in the firm’s finance practice group.

Ranallo & Aveni is pleased to announce the promotion of Joshua T. Morrow to partner.

Bobby Rutter and Justin Rudin have both been selected to the 2018 Super Lawyers Magazine Rising Stars list in the area of Insurance Coverage. Bob Rutter was selected to the 2018 Super Lawyers list in the area of Insurance Coverage and was featured on the Top 50 list in Cleveland and Top 100 list in Ohio.

Kathryn E. Hickner has been elected to the Board of Directors of The McGregor Foundation.

Gallagher Sharp is pleased to announce that Steven D. Strang has been certified as an Insurance Coverage Law Specialist by the Ohio State Bar Association.

Frantz Ward is proud to announce that partner, Colleen C. Murnane, has been elected President of the Board of Directors of Lifebanc.

Walter | Haverfield announces that Max Rieker, has been certified by the Ohio State Bar Association as a labor and employment specialist.

Tucker Ellis LLP has launched its new corporate blog, Lingua Negoti, or “language of business,” co-edited by partners Christopher Hewitt and Jayne Juvan. The blog’s primary goal is to create a common language of business as it relates to these topics.

The law firm of Buckley King is expanding into Louisville, Kentucky.

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.
11th ANNUAL MEETING

CLEVELAND MARRIOTT DOWNTOWN AT KEY CENTER

JUN 01, 2018

Doors open at 11:00 a.m | Lunch at 12:00 (sharp)