Navigating the Landscape of International Contracts in India

THIS ISSUE
International Law
Labor & Employment
Workers’ Compensation

26  Apportioning Liability to the Immune Empty Chair
28  The New Tax Law and the Settlement of Sexual Harassment Claims
30  Give a Little, Get a Lot: How Volunteering Benefits Attorneys Launching Careers and During Job Transitions
EMPLOYMENT LAW IS ONE OF THE TOP AREAS OF REFERRALS PROVIDED BY THE CMBA’S LAWYER SERVICE

Join today and get connected with these referrals.

11,000+ referrals for the fiscal year with 1,100 being referrals for employment related issues
MAY 2018

CONTENT

YOU’VE GOT MAIL ... AND THE RIGHT TO USE IT!

WORKERS’ COMPENSATION
MEDICARE SET-ASIDE
FACTS AND FICTION

ASSESSING THE FINE (FINGER) PRINT
By Emily Knight

WORKERS’ COMPENSATION
MEDICARE SET-ASIDE
FACTS AND FICTION
By Eric A. Rich

NAVIGATING THE
LANDSCAPE OF INTERNATIONAL
CONTRACTS IN INDIA
By Renuka Raman

APPORTIONING LIABILITY TO THE IMMUNE
EMPTY CHAIR
By Colleen C. Murnane

THE NEW TAX LAW AND THE
SETTLEMENT OF SEXUAL HARASSMENT CLAIMS
By Shawn Romer

YOU’VE GOT MAIL ... AND THE RIGHT TO USE IT!
By Brooks W. Boron

WALK THE WALK
By Brian J. Halliday

SHIFTING PRESUMPTIONS OF CREDIBILITY IN SEXUAL HARASSMENT CASES IN THE #METOO ERA
By Ann-Marie Ahern

JACK MORAN

FROM THE CMBA PRESIDENT
On Honoring Our Own
Darrell A. Clay

FROM THE EXECUTIVE DIRECTOR
#31 Ways in 31 Days
Rebecca Ruppert McMahon

BAR FOUNDATION
Mock Trials Build Confidence in Teens to Conquer Difficulty
Mitch Blair

YOUR CLE METRO BAR
Professor W. Bradley Wendel Visits, 2017–18 3Rs Year, Hot Talks, Medical/Legal Summit

JUDGES CORNER
Juvenile Drug Court
Alive and Well
Magistrate Carolyn Kaye Ranke

VIEWPOINT
YOU’VE GOT MAIL ... AND THE RIGHT TO USE IT!
By Brooks W. Boron

WALK THE WALK
By Brian J. Halliday

SHIFTING PRESUMPTIONS OF CREDIBILITY IN SEXUAL HARASSMENT CASES IN THE #METOO ERA
By Ann-Marie Ahern

DEPARTMENTS

04 VOLUNTEER SPOTLIGHT
09 THE SCOOP
10 SECTION/COMMITTEE SPOTLIGHT
18 CLE
35 NEW MEMBERS
38 CLASSIFIEDS
41 CMBA CALENDARS
43 BRIEFCASE

Auto Appraisal Group .................................. 33
Clark Shaefer Hackett .................................. 21
Ciuni and Panichi ....................................... 07
Franz Ward LLP ........................................ 13
Hennes Communications ............................. 39
Jackson Lewis PC ..................................... 06
The Legal Aid Society of Cleveland ................ 31
Margaret W. Wong & Associates LLC ............. 34
Mediation Inc .......................................... 36
Micro Systems Management ......................... 37
Nicola, Gudbranson and Cooper, LLC .......... 29
Oswald Companies .................................... 42
Private Mediation Services .......................... 32
The Robenalt Law Firm, Inc. ......................... 43
Robert Brown ......................................... 33
Skoda Minotti ......................................... 27
Weston Hurd LLP .................................... 31
Alex Campbell joined the Reach Out: Legal Assistance for Nonprofits steering committee soon after relocating from Chicago to Cleveland in 2016, and has been an active volunteer and speaker ever since. A Cleveland native who spent more than a decade away from his hometown before returning, Alex’s practice at Buckingham, Doolittle & Burroughs is focused on representing public charities, private and community foundations, and social enterprises. He also serves the firm’s for-profit clients on a range of business transactional matters.

During his time in Chicago, Alex contributed to The Law Project (an organization similar in many ways to Reach Out), where he wrote articles and gave seminars for nonprofits on issues ranging from crowdfunding to bankruptcy. Upon returning to Cleveland, one of Alex’s first moves was to seek out ways to continue to give back to the community by connecting nonprofits with information and pro bono services, and Reach Out was a natural fit.

Besides helping to coordinate the free legal information given to eligible nonprofits at Reach Out’s quarterly brief advice clinics, Alex has been a prolific speaker for Reach Out and other groups such as the Ohio Society of CPAs, the Northeast Ohio Faith-Based Collaborative, and the Foundation Center of Cleveland. On May 10, Alex joined fellow volunteer Nate Haskell to present “Make Your Own Rain: Fundraising and Crowdfunding for Nonprofits,” helping organizations navigate the ins and outs of fundraising in the age of social media. Besides his work with Reach Out, Alex is also a Partner in Justice with the Legal Aid Society of Cleveland, a volunteer attorney with BVU: The Center for Nonprofit Excellence, and a member of the Public Interest Law Initiative Alumni Network.

When asked why he devotes his time to helping nonprofits, Alex said: “I truly enjoy working with and providing counsel to clients who strive to better the communities in which they live and work — and nonprofits epitomize this commitment.”

Thank you, Alex, for your great contributions to the nonprofits that are benefitting our community!
ON HONORING OUR OWN

Darrell A. Clay

On April 16, 2018, we held our annual Bench-Bar Memorial Service. There was a large turnout, including dozens of judges from federal, state, and local courts. I’d like to share with you the remarks I delivered at the outset of the program:

Members of the judiciary;
Fellow CMBA members;
Honored guests;

Today, as we do each year, we gather in solemn remembrance of beloved friends, family, and colleagues who have left us. Once again, our hearts grow heavy with goodbyes.

It’s been said that death is the great equalizer. It spares no one. It takes without regard to age, gender, race, or religion. There are no exemptions. It is the shared fate that ultimately befalls all of us.

But as painful as it can be to say goodbye, it’s truly fitting that we gather to commemorate the contributions, service, and legacy of this great collective of lawyers and judges — 37 in all — who by all accounts had an impact on virtually every aspect of life in northeast Ohio.

Some of them pursued the law from early in life, while others came to it as a second career. Each survived the rigors of law school — and the dreaded bar examination — to take their place as advocates, counselors, and jurists living among us.

Many were trailblazers in the truest sense of the word, breaking barriers, winning cases, leading organizations, effecting change. From the first African-American female member of Cleveland city council, to two judges of the Cleveland Housing Court, to an educator turned head of the guardian ad litem program in Cuyahoga County, and other accomplishments too numerous to mention here, I think it’s fair to say that all had a life well and truly lived.

The program this year is particularly poignant for me, for two reasons. First, among those we honor today are three past bar association presidents:

Leo Collins served as President of the Lake County Bar Association from 1997 to 1998. During his presidency, Leo played a critical role in helping the Lake County Court of Common Pleas establish a fourth general jurisdiction seat. He was both a well-known and a well-loved fixture of the Lake County legal community.

We are also honoring Fred Weisman, who was a pioneer in the field of medical malpractice in the early 1960s. Beyond his law practice, Fred devoted his significant time and leadership to the Cuyahoga County Bar Association, including as President of the Cuyahoga County Bar from 1971 to 1972.

And in 2017, our bar family also lost Tom Dettelbach, a tremendous example of an attorney who time and again answered the call to serve the greater community and those in need. In addition to serving as president of the Cuyahoga County Bar Association from 1981 to 1982, Tom went on to serve as President and Guardian of the Cuyahoga County Bar Foundation for many years. I’m told that he once kissed a pig in front of hundreds in the Galleria food court to raise money for Harvest for Hunger. I’m glad no one asked this bar president to reprise that stunt!

I should also note that a few months before losing their father, Tom, brothers Steve and Eric Dettelbach also said goodbye to their mother, Marcia Dettelbach, who was an accomplished school teacher turned lawyer. Among other achievements during her legal career, in the early 1980s, Marcia helped launch the guardian ad litem program that continues today in the Cuyahoga County Juvenile Court.

I’ve attended this program regularly, and I can’t recall another year in which we marked the passing of so many bar association leaders. There’s an incredible time commitment that comes with serving as a bar president. Thank you to the families of these past presidents for your sacrifices, large and small, so they could serve our profession so honorably.

Second, I mark the passing of one of my own law partners, James Mackey. Jim and I worked together for the better part of two decades. He was kind, witty, compassionate, dedicated to his clients, and above all else delighted in spending time with his family.

Jim epitomized what it means to be a true friend. His death was a blow to all of us at Walter | Haverfield. We may recover from Jim’s loss, but we will never be the same without him.

Thank you to the many judges and bar leaders who join us today for this extraordinary program, one that is truly unique in the world of bar associations. Thanks also to CMBA Executive Director Rebecca Ruppert McMahon and all of the CMBA staff and Northern District of Ohio Court personnel for their efforts in organizing today’s event. Finally, special thanks are due to my good friend and fellow Civil Air Patrol volunteer, Pastor Eric van Scyoc, for providing our closing remarks.

God bless and Godspeed to you all.

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. Email your CMBA-related questions or concerns to him at dclay@walterhav.com. Follow him on Twitter at @DClayCMBA.
Using an employee’s biometric data — such as fingerprints and facial recognition — as a means of security is quickly gaining popularity among employers. However, as more states begin to regulate the collection and handling of this ultra-personal data, employers may find themselves exposed to liability. Given the evolving and uncertain regulatory landscape surrounding biometric data, this article will explore how Ohio employers can utilize cutting-edge security measures while still protecting themselves from future litigation.

What Is Biometric Data and Why Collect It

Biometric identifiers are the distinctive, measurable characteristics used to recognize or describe an individual. This includes fingerprints, voiceprints, and iris or retina scans. Biometric data is the information derived from the identifiers, usually reduced to algorithms or mathematical equations. Biometric identifiers are what the employer actually collects — e.g. the fingerprint. But biometric data is the information the employer digitally stores and uses. Employers favor biometric data for security purposes because of its increased reliability and efficiency. Employers are also increasingly incorporating biometrics into their day-to-day operations to protect against potential FLSA wage and hour claims. By using a “biometric” timeclock, for instance, employers can significantly reduce the amount of buddy punching and other manipulative practices. But unlike knowledge-based, personal information (credit card numbers, passwords, etc.), biometric data cannot be replaced if compromised. The privacy implications are significant, but the law in this area is largely uncharted. As a result, employers wanting to explore this new frontier should do so carefully.

The Current Regulatory Landscape

Illinois, Texas, and Washington are the only states that have enacted statutes regulating biometric data. Currently, no federal law regulating biometric data exists. Illinois’ Biometric Information Privacy Act (BIPA) offers the most protection, but all three statutes create a complex regulatory scheme that imposes additional burdens on the employer.

Scope of the Statutes

The BIPA and Texas statutes cover any information based on an individual’s biometric identifier and is used to identify an individual, including hand and face geometry. But Washington’s statute expressly excludes hand and face geometry. This is likely in response to recent class-action suits alleging social media companies violated BIPA by using facial recognition programs without the users’ permission. Also, the Texas and Washington statutes apply to data collected for commercial purposes, and in Texas, this includes security purposes. The BIPA does not have this limitation and applies to any purpose an employer might have for collecting the data.

Collecting, Storing, Sharing, and Destroying Data

Before collecting biometric identifiers, employers must provide notice and obtain consent. In Illinois, notice and consent must be written, explain the purpose for collection, and identify the retention period. Typically, employers must destroy the data once the purpose has expired or three years after the employee leaves the company. In Washington, notice and consent do not have to be written but must be “readily available” to employees, and employers may only store the data as long as reasonably necessary. Texas only requires notice be given and consent obtained, and employers must destroy the data within a “reasonable time” but not later than one year after it is no longer needed. All three statutes require the employer to protect the data in at least the same manner it protects other sensitive and confidential information. And all three statutes generally prohibit selling and/or profiting from the data, although some enumerated exceptions exist.

Penalties

The state attorney general enforces the Texas and Washington’s statutes. But the BIPA is much more generous to employees. The BIPA creates a private right of action entitling a plaintiff to statutory damages and attorney’s fees. For negligent violations, plaintiffs may receive the greater of $1,000 or actual damages for each violation. For intentional or reckless violations, plaintiffs may receive the greater of $5,000 or actual damages for each violation.

Ohio

Ohio has enacted a data breach notification stat-
ute. But this statute only applies to personal information and does not capture biometric data—at least in its current form. Although Ohio is not the only state that has yet to address this issue, some states are beginning to assess regulations. In fact, Alaska, Connecticut, and New Hampshire all have proposed legislation similar to the BIPA. There is no indication as to whether Ohio will propose biometric data legislation in the near future, but as more states enact legislation it behooves employers to begin thinking about compliance now.

Federal and International Laws
Even without a regulatory scheme, Ohio employers may still face liability for improperly collecting or using biometric data under federal law. Section 5 of the FTC Act grants the FTC broad authority to protect consumers from unfair and deceptive trade practices in or affecting commerce. Under Section 5, the FTC may take enforcement action against commercial organizations that engage in unfair or deceptive trade practices involving biometric information. For example, if a company promises a certain level of security but fails to keep this promise, the FTC may take action regardless of whether the company violated an Ohio statute. Employers should also keep in mind EU’s General Data Protection Regulation (GDPR) that takes effect May 25, 2018. The GDPR broadly prohibits processing biometric data of any EU citizen unless it fits into one of the explicitly enumerated bases such as consent, the performance of specific contracts, or processing for certain specific circumstances.

The First Wave of Litigation
In recent years, Illinois companies have begun to experience an influx of class-action litigation under the BIPA. In this litigation, two types of fact patterns have emerged: (1) improper use of facial recognition technology (e.g. social media); and (2) improper collection and use of fingerprints, primarily in the employment context. Specifically, plaintiffs are alleging that their employer failed to provide proper notice and/or obtain consent before collecting their fingerprints. The potential liability for employers in these types of cases can be significant.

In 2016, L.A. Tan settled with a class of plaintiffs for $1.5 million, agreeing to pay $600,000 in attorneys’ fees. And in 2017, a class of plaintiffs sued Roundy’s Supermarket—operator of Mariano’s and subsidiary of Kroger’s—for $10 million in damages. Employers have challenged some of these class actions, particularly on the issue of standing. Yet, the courts’ willingness to accept this challenge has been mixed.

Article III Standing
Plaintiffs seeking redress against employers are not alleging any theft or misuse of their biometric data. Instead, these suits rely on allegations of improper collection — a technical violation. In several instances, courts have dismissed cases relying on technical violations on the grounds that cognizable injury-in-fact does not exist. See McCollough v. Smarte Carte, Inc., 2016 WL 4077108 (Aug. 1, 2016). But in Monroy v. Shutterfly, Inc., 2017 WL 4099846 (Sept. 15, 2017), the court determined that the mere invasion of privacy associated with the defendant’s collection of biometric information without the plaintiffs’ knowledge or consent was a sufficient injury-in-fact to give rise to standing. In McCollough, the plaintiffs voluntarily provided their employer with the data. But in Monroy, the employer obtained the data unbeknownst to the employees. The court in Monroy, relied on this distinction in reaching its conclusion. The BIPA also requires a cognizable harm, loss, or injury, but this area of law remains unchartered.

What Ohio Employers Can Do Now to Avoid Liability Later
The absence of biometric data statutory schemes is not an excuse for employers to ignore their biometric data practices. As more employers incorporate this data into their day-to-day operations, it is almost certain more states will begin to regulate. Therefore, employers seeking to avoid future liability but also integrate this new technology should begin updating their data security policies and procedures now. Although the regulatory landscape remains unclear, there are a few things employers can implement now to avoid headaches later.

Employers thinking about using biometric data (or already using it) should consider what the biometric data is used for. Using it for non-commercial, security purposes is likely to pose less of a risk compared to using it in consumer transactions. Also, employers should only collect biometric identifiers after providing written notice and obtaining informed consent. This notice and consent should detail the purpose of collecting, how the data will be used, the company’s retention policy, and whether any outside vendors will have access to it. Since almost all biometric data litigation in the employment context right now hinges on notice and consent, it is vital employers sufficiently address this step.

Employers must also protect this highly sensitive data at least in the same manner as other sensitive and confidential information. This means encryption, limited access, and retention and disposal policies. Lastly, employers should consider adopting safeguards for the sale, lease, or sharing of this data. And if this data is shared, disclose it to the employee prior to collection. Remember, creating these policies is not enough. Employers must actively carry out these procedures or face action by the FTC.

Despite the recent uptick in class-action litigation, biometric data is not going anywhere. Instead, it is likely that more and more employers will incorporate this cutting-edge technology into the workplace. As of now, this area of law remains largely untouched. But a prudent employer will begin addressing its biometric data privacy policies and procedures now to avoid potential exposure to class action litigation later.

Emily Knight is a member of the Tucker Ellis Trial Department. She has been a CMBA member since 2017. She can be reached at (216) 696-4893 or emily.knight@tuckerellis.com.

**Expertise**

Here, it’s about more than just numbers.

216.831.7171

Ciuni & Panichi

CPAs and Business Advisors

cp-advisors.com
2018 Golf Outing Registration
Monday, June 25, 2018 • Registration: 10 a.m. • Tee time: 12 p.m.
Westwood Country Club – 22625 Detroit Road, Rocky River, Ohio 44116

Name __________________________________________________ Company ________________________________________________
Phone __________________________________________________ Email ____________________________________________________

- Individual Tickets ($200 each) #_______
- Foursome ($800 each) #_______
- I need a pairing
- I do not need a pairing

Golfers:
1. ______________________________________________
2. ______________________________________________
3. ______________________________________________
4. ______________________________________________

- Lunch-only guests ($25) # _______
- Reception-only guests ($50) # _______
- Bar Bundle for four: $175 (includes putting contest, 8 raffle tickets and 2 mulligans for each foursome member)
- Bar Bundle for one: $50 (includes putting contest, 8 raffle tickets and 2 mulligans)

Payment Total: _________

- Check enclosed (payable to the CMBA)
- Visa
- Mastercard
- American Express
- Discover

Credit Card # ___________________________________________ Exp Date ___________________________
Signature ______________________________________________________________________________________________________

Register early — limited space available. The event will take place rain or shine.

This year’s outing will include lunch, 18 holes of golf and a post-round reception — making the event an experience not to be missed.

Sponsorship opportunities available. Call (216) 696-3525 for info.

Complete this form and return to Sarah Charlton, CMBA, 1375 East 9th Street, Floor 2, Cleveland, Ohio 44114-1785
scharlton@clemetrobar.org • fax (216) 696-2413
Matthew D. Gurbach
Firm/Company: Benesch Friedlander Coplan & Aronoff LLP
Title: Partner
CMBA Join Date: 2011
College: Youngstown State University
Law School: Case Western Reserve University School of Law

IF YOU WERE NOT PRACTICING LAW, WHAT WOULD YOUR PROFESSION BE?
I enjoy being a lawyer. I would enjoy being an art historian more. The multi-disciplinary aspect of that profession, bringing together history, politics, language, and religion is very appealing.

FAVORITE CLEVELAND HOTSPOT?
Progressive Field. There is nothing better than watching the Cleveland Indians play on a warm, summer evening. Aside from the team, the ballpark itself is inviting and fun. My three daughters are growing up going to games and I hope that they remember these times as fondly as I do. And, I hope that they remember the infield fly rule. Whomever they date many, many, many years from now must know that my girls know the game better than them.

EAST SIDE OR WEST SIDE?
East Side. After living in Northeastern Ohio for most of my life, I was shocked to learn recently that life existed West of the Cuyahoga River. All of these years I thought that only a collection of barely-inhabited frontier outposts and an airport could be found beyond the great crooked river. Who knew?!

WHAT ADVICE WOULD YOU GIVE TO A LAW STUDENT?
Keep in touch with your law school classmates. They will provide you with an outstanding referral network as you advance in your career. Additionally, and most importantly, do not take commercial paper simply because it is on the bar exam. Big mistake. You can learn that during your bar review sessions.

TELL US ABOUT YOUR FIRST EVER JOB?
My first job was as a cook/dishwasher at the Ground Round in Mentor, Ohio. I think that the hours, working conditions, and overall environment broke just about every child labor law ever written. However, those years taught me about hard work, to appreciate the good people in the foodservice industry and how to make a mean hamburger on the grill.

The Scoop
CMBA Member Q&A

Matthew D. Gurbach
Firm/Company: Benesch Friedlander Coplan & Aronoff LLP
Title: Partner
CMBA Join Date: 2011
College: Youngstown State University
Law School: Case Western Reserve University School of Law

IF YOU WERE NOT PRACTICING LAW, WHAT WOULD YOUR PROFESSION BE?
I enjoy being a lawyer. I would enjoy being an art historian more. The multi-disciplinary aspect of that profession, bringing together history, politics, language, and religion is very appealing.

FAVORITE CLEVELAND HOTSPOT?
Progressive Field. There is nothing better than watching the Cleveland Indians play on a warm, summer evening. Aside from the team, the ballpark itself is inviting and fun. My three daughters are growing up going to games and I hope that they remember these times as fondly as I do. And, I hope that they remember the infield fly rule. Whomever they date many, many, many years from now must know that my girls know the game better than them.

EAST SIDE OR WEST SIDE?
East Side. After living in Northeastern Ohio for most of my life, I was shocked to learn recently that life existed West of the Cuyahoga River. All of these years I thought that only a collection of barely-inhabited frontier outposts and an airport could be found beyond the great crooked river. Who knew?!

WHAT ADVICE WOULD YOU GIVE TO A LAW STUDENT?
Keep in touch with your law school classmates. They will provide you with an outstanding referral network as you advance in your career. Additionally, and most importantly, do not take commercial paper simply because it is on the bar exam. Big mistake. You can learn that during your bar review sessions.

TELL US ABOUT YOUR FIRST EVER JOB?
My first job was as a cook/dishwasher at the Ground Round in Mentor, Ohio. I think that the hours, working conditions, and overall environment broke just about every child labor law ever written. However, those years taught me about hard work, to appreciate the good people in the foodservice industry and how to make a mean hamburger on the grill.

Ashley Ribando
Company: Cleveland Metropolitan Bar Association
Title: Manager of Marketing & Communications
Start Date: March 2018
College: Louisiana State University

A RECENT MILESTONE FOR YOU?
I just moved to Cleveland from Florida. So far I LOVE everything about #CLE except for the late Spring surprise snowfalls. I’m still adjusting!

FAVORITE CLEVELAND HOTSPOT?
There are so many places I haven’t been but I’m keeping a list and looking forward to trying them all.

CAN YOU PLAY AN INSTRUMENT?
I’ve been playing the French Horn for 25 years — everything from classical to Broadway! Looking forward to connecting with other musicians and performing groups in Cleveland. Does anyone need a horn player?

WHAT NEIGHBORHOOD DO YOU LIVE, AND WHAT DO YOU LIKE ABOUT IT?
I live in the Warehouse District, and I absolutely LOVE IT! It’s within walking distance of just about everything with great views of the city. Also, Insomnia Cookie’s late night offerings are still a fun novelty.

ONE FUN FACT ABOUT YOU?
I am fascinated with unicorns and I’ve even met one — her name is Snowflake.

Becky Kerstetter
Firm/Company: Squire Patton Boggs (US) LLP
Title: OSBA Certified Paralegal and President of the Cleveland Association of Paralegals
CMBA Join Date: 2005
College: Kent State University

YOUR MOST EMBARRASSING PROFESSIONAL MOMENT!
I was unlucky enough to contract the dreaded norovirus and began abruptly and unexpectedly marathon vomiting in my office trash can. I managed to run over and close the door; but once a coworker came knocking suddenly half of the floor were gathered outside gawking at my unfortunate circumstances. Needless to say, I was mortified!

EAST SIDE OR WEST SIDE?
Sorry to all my east siders, but the west side is the best side!

TELL US ABOUT YOUR FAMILY?
My husband and I currently have a three and a half year old and every day is an adventure! Nothing compares to seeing the world through the eyes of a child. Our home is always full of adventure, fun and laughter. And ... we are absolutely thrilled to be adding another in November!

ONE FUN FACT ABOUT YOU?
I began working in the legal industry when I was just 16 years old for a large downtown law firm. The experience I had and those I worked with inspired me to pursue a legal career.
Labor and Employment

Chair
Lauren Tompkins,
Giffen & Kaminski, LLC
ltompkins@thinkgl.com

Regular Meeting
Third Wednesday of the Month
at noon at the CMBA Conference Center.

What is your goal?
To provide a collegial environment
for monthly continuing education
meetings, an annual conference, and
networking among the Northeast
Ohio labor and employment bar.

What can members expect?
Monthly meetings featuring dynamic
speakers from the Section and an
annual two-day conference.

Upcoming Events
May 30th Lunch and Learn
Presentation “Meet Our Newest
Bundle of Joy, the FMLA Leave Tax
Update” presented by Melissa Dials
and Jeffrey Smith from Fisher Phillips.

Recent Event
Our recently concluded two-day
conference held April 19th and 20th,
featuring 12.5 hours of CLE
on a wide-range of labor and
employment topics.

Workers’ Compensation

Chair
Bonnie Kristan, Chair
Litler Mendelson
bkristan@litler.com

Regular Meeting
Second Wednesday from noon to
1 p.m. in the Auditorium on the
second floor of the state office
building (615 W. Superior Ave)

What is your goal?
To educate members on advanced
workers’ compensation topics, offer
advance workers’ compensation
CLE’s necessary for workers’
compensation certification and
provide a forum for discussion about
legal issues pertinent to workers’
compensation.

What can members expect?
Inexpensive CLE on advanced
workers’ compensation topics
and the opportunity to interact
professionally and socially with other
practitioners.

Upcoming Events
On May 9, 2018, Attorney Geoffrey
Shapiro will speak at our monthly
CLE meeting regarding the issue of
Federal Workers’ Compensation.

Recent Event
On 4/2/18, our section co-sponsored
a happy hour social event with the
Social Security & Disability section.

International and Immigration Law

Chair
Lawrence S. Crowther
Wegman, Hessler & Vanderburg
Lscrowther@wegmanlaw.com

Regular Meeting
Subject to other plans, luncheon
meetings are scheduled for the 1st
Tuesday of each month.

What is your goal?
Presentation of current developments
in connection with international
business law as well as U.S.
immigration law issues, and education
of attorneys and others in essential
legal considerations of providing
services relating to non-U.S. activities.

What can members expect?
Informative luncheon meetings,
networking and CLE credit.

Upcoming Events
Luncheon presentations (and other
events) for 2018 and 2019 to be
determined. Let us know if you have
a topic that you would like to present
or see presented.

Recent event to highlight?
“Legal Considerations for Chinese
Business Relationships,” April 10, 2018
Section Meeting.
#31Waysin31Days

Rebecca Ruppert McMahon

So you might have heard our 11th Annual Meeting and Membership Expo are coming up on June 1 at the newly-renovated Cleveland Downtown Marriott. Our theme this year — Back to the Future — will focus on a celebration of how our legal community's past accomplishments have built a foundation for future success, excellence and innovation.

Our look both backward and forward will feature:
• Darrell Clay reflecting on highlights from his year as CMBA President and the many accomplishments of our collective Bar;
• Marlon Primes setting a course for the year to come as we continue driving forward in pursuit of the CMBA’s 2026 future state;
• the installation of our incoming Bar Foundation President, Stephanie Dutches Trudeau, as well as our new Association and Foundation officers and trustees;
• recognition of the newest class of 50- and 65-Year Honorees, as well as the recipients of this year’s President’s, Justice For All and Professionalism Awards; and
• the graduation of our inaugural Leadership Academy.

Immediately before the luncheon begins (noon sharp!), our annual Membership Expo will give you the chance to better connect with Section, Committee and Program leaders, as well as some of our community partners. Here’s your chance, in one easy swoop, to learn about opportunities for engagement, volunteering and business development. Doors open at 11 a.m.

Among others making an appearance at the Membership Expo will be:
• The Bar Foundation – check out the Fellows Program and get entered into a drawing for a free registration to the Halloween Run or free tickets to Rock the Foundation 13.
• Volunteer Now! – how about giving a little time to our Reach Out: Legal Assistance for Nonprofits Program, Volunteer Lawyers for the Arts, or Pro Se Divorce clinics?
• We Love Our Schools – The 3Rs, Mock Trial, and the Legal Clinics at the CMSD are looking for volunteers!
• Membership Committee – renew your membership onsite and skip the invoice process completely.
• Lawyer Referral Service – looking for new client leads? Have we got a service for you.
• Meet Us at the Conference Center – did you know Members who meet us at the Bar received FREE access to a member office and two conference rooms, plus preferred rates on all other rooms?

The Annual Meeting and Membership Expo represent the grand finale to our month-long celebration of what is best about our Bar: our members! Throughout May, we are saying thank you for all that you have done to help us make this year such a success. From member spotlights, raffles, and other giveaways, we will be showing you #31Waysin31Days. That’s 31 Ways the CMBA can say THANK YOU in 31 days of May. No strings attached. No fine print to read. We simply want you to know that we’ve had a great Bar year because of you.

So, what are these thank yous? Here’s a sampling:
• Members of the Day: Back by popular demand, every day we will recognize a member or two who have gone above and beyond in their service to our Bar. Did you see Frank DeSantis, Jack Kluznik and Judge Emanuella Groves? They were our first MODs but certainly not the last. Check out Facebook or CleMetroBar.org/WeLoveOurMembers for a complete listing.
• Surprise visits: Members of Team CMBA will be making a few surprise office visits throughout the month to share our thanks with donuts, coffee, balloons and more. You never know where we might show up!
• MAYDAY: Register for any one of our May or June CLE programs by May 31, 2018 and receive 25% off your registration using the code “MAYDAY.”
• Maybe an occasional workday diversion is more your speed? Spend a few minutes during the month of June surfing our social media outlets — Facebook, Twitter and LinkedIn — and find spontaneous specials and giveaways that are members-only.
• And our favorite new Member Appreciation initiative: Project Selfie Our Staff! Break out your smart phones — or ask to borrow one — to capture a selfie with any of your favorite TEAM CMBA staff members. Every time you post an SOS on social media, you will be entered into a drawing for Free Membership for a year! The winner will be revealed on the jumbo screen at our Annual Meeting on June 1.

And that’s just the beginning. Lots more is coming your way throughout May. Keep checking Facebook, Twitter, LinkedIn, your email, and our website (CleMetroBar.org/WeLoveOurMembers) to see the latest of our #31Waysin31Days.

So you see, April showers bring May flowers, but May also brings Membership Appreciation at the CMBA. Let us show you our thanks again and again — and keep coming back to Meet us at the Bar!
Workers’ Compensation Medicare Set-Aside Facts and Fiction

BY ERIC A. RICH

In 1980 Congress passed The Medicare Secondary Payer Act ("MSP") to ensure that Medicare did not pay for services which were the responsibility of other parties, such as workers’ compensation or liability insurers. Subsequent provisions in the SCHIP Extension Act of 2007 (42 U.S.C. §1395y) extended Medicare’s oversight regarding settlements occurring after July 1, 2009 by establishing new reporting requirements.

Most workers’ compensation attorneys are now familiar with MSP issues, but even those in the practice area find the process frustrating and even confusing at times. Following are some common misconceptions regarding the Medicare Set-Aside (MSA) process, and some information that will hopefully make dealing with MSA issues a little easier.

Fact: Nothing in the MSP mandates or even discusses the need for an MSA. However, as a result of the MSP, Medicare will not pay for medical expenses which are properly payable under a workers’ compensation claim. Medicare also has a right of recovery against the injured worker, the employer, and the attorneys for both parties if Medicare’s interests in the settlement are not adequately protected. 42 C.F.R. §411.24(g).

One way to try to avoid a finding by Medicare that the parties have “cost-shifted” is by creating an MSA. An MSA is a separate fund, created as part of the settlement, to pay for medical bills related to the allowed conditions in a claim.

Fact: An MSA that covers all future medical expenses for work-injury related conditions satisfies Medicare’s interest in the settlement.

Fact: In addition to payments for future medical expenses, Medicare maintains an interest in all amounts it has already paid. Accordingly, the first step in settling any workers’ compensation claim where the injured worker might be Medicare eligible is to confirm whether Medicare has already made any "conditional payments" for conditions allowed in the claim.

The Center for Medicare and Medicaid Services (CMS) is the private corporation contracted to protect Medicare’s interests in workers’ compensation and personal injury claims. You can contact the CMS Co-ordination of Benefits and Recovery Center to obtain conditional payment amounts; request a waiver of recovery; or to appeal a determination.

Fact: An MSA is only necessary for current Medicare beneficiaries or large dollar settlements.

Fact: This misconception arises from the “review thresholds” established by CMS. In addition to pursuing recovery, CMS also approves proposed MSAs. CMS does not have the resources to review every MSA. Accordingly, it imposed review thresholds based upon an injured worker’s Medicare enrollment status and the amount of the settlement. Those guidelines are set forth in Section 8.1of CMS’ Workers’ Compensation Medicare Set-Aside Arrangement Reference Guide. Under the guidelines, CMS will only review MSA proposals that meet the following criteria:

• The injured worker is a Medicare beneficiary and the total settlement amount is greater than $25,000.00;
• The injured worker has a reasonable expectation of Medicare enrollment within 30 months of the settlement date and the total settlement amount is greater than $250,000.

According to CMS, an injured worker has a reasonable expectation of becoming Medicare eligible within 30 months if he or she has either: applied for Social Security Disability Benefits; been denied Social Security Disability Benefits but anticipates appealing that decision; is in the process of appealing and/or re-filing for Social Security Disability benefits; or is 62 years and 6 months old. However, CMS has made it very clear that "(a)ny claimant who receives a WC settlement, judgment, or award that includes an amount for future medical expenses must take Medicare’s interest with respect to future medicos into account. Medicare’s interests need to be protected in any workers’ compensation settlement, including those outside the review thresholds.” See WCMSA Reference Guide, Section 3.0

Fiction: An MSA guarantees that Medicare will not assert that its interests were not properly protected.

Fact: Even with an MSA, Medicare may still determine that its interests were not protected, unless the settlement fits within the guidelines that allow it to be submitted to CMS for approval and CMS has approved the proposed MSA. As noted above, Medicare has an interest in the proceeds from any settlement that makes an allocation for future medical expenses, regardless of the size of the settlement. CMS, not the parties to the settlement, makes the final determination as to whether Medicare’s interests were reasonably protected.

Particularly, when the settlement is for a larger amount, or the injured worker will become Medicare eligible in the near future, you might want to consider having an MSA evaluation performed by a third-party vendor, to increase the likelihood that, in the event CMS challenges the settlement, the parties can point to a rational basis for the amount set aside. While there is no guarantee that CMS will accept the MSA vendor’s proposed set-aside amount, CMS is much more likely to accept a detailed evaluation by a third party than an amount arbitrarily chosen by attorneys. Furthermore, MSA vendors are familiar with the pricing structures used by CMS and are more likely to arrive at an amount that CMS will find acceptable.

Some MSA evaluators offer “threshold MSAs” (for claims which will be submitted to CMS for review) and “non-threshold MSAs” (for claims which do not meet the review thresholds). Non-threshold MSAs are generally less expensive than threshold MSAs, and are performed more quickly.
Fiction: Absent CMS approval there is no way to fully eliminate future exposure to yourself and your client from an action by CMS.

Fact: As noted above, the only way to ensure that the MSA allocation will not be questioned in the future is to submit the MSA (if it meets the review thresholds) to CMS for review. The downside is that a review by CMS takes an average of 70 days to complete, and might end up being considerably more expensive than the parties expected, particularly in claims where prescription medications are involved.

However, you can protect yourself and your client by obtaining a guaranteed MSA evaluation. At least one company now offers a product which, for a cost, provides a lifetime guarantee to defend any action by CMS and to indemnify the parties against any additional amounts CMS might require.

In 2011, The Ohio Supreme Court's Board of Commissioners on Grievances and Discipline issued an advisory opinion which held that it is improper for an attorney (as opposed to a third-party, as discussed above) to agree to indemnify the opposing party for MSP liability in a settlement. Board of Commissioners on Grievances and Discipline Opinion 2011–1, February 11, 2011. The Commissioners also held that it is improper for an attorney to ask opposing counsel for such indemnification.

Fiction: If the settlement meets the CMS review thresholds, the parties must submit the settlement to CMS for review.

Fact: Submission of an MSA to CMS for approval is voluntary, regardless of the settlement amount or the Medicare status of the injured worker. However, submission of an MSA to CMS for approval creates a “safe-harbor” to ensure that CMS will not come back in the future and refuse to make payment for services or pursue its right of recovery.

Fiction: Once the parties have addressed Medicare’s interests, there are no other potential conditional payment issues.

Fact: Where the injured worker has been a Medicaid beneficiary it is also important to make sure that no conditional payments have been made by Medicaid. Both Medicare and Medicaid are entitled to reimbursement for payments made for the treatment of work-related injuries.

Medicaid conditional payment issues are dealt with by the individual states. In Ohio, R.C. §5160.37 provides that no settlement in which Medicaid has a right of recovery shall be made final without first providing the Ohio Department of Medicaid with written notice. If the Department is not given an appropriate written notice, the Medicaid recipient and the recipient’s attorney are liable to reimburse the Department for medical payments made for work-injury related conditions.

Helpful Resources

CMS’ Co-ordination of Benefits and Recovery Call Center can be reached at 1-855-798-2627. The Co-ordination of Benefits and Recovery Center also maintains a Medicare Secondary Payer Recovery Portal (MSPRP), a web-based tool which allows attorneys to access and update certain case specific information online. You can access the MSPRP at: https://www.cob.cms.hhs.gov/MSPPR.

In order to identify and determine the amount of any Medicaid conditional payments, contact the Ohio Tort Recovery Unit at (614) 242-1045. You can submit a subrogation recovery information form to the Ohio Tort Recovery Unit online via their website at www.ohiotort.com after submitting an authorization signed by the injured worker.

Conclusion
The MSA process can be extremely frustrating, particularly when the settlement is submitted to CMS for review, or when there are conditional payment issues. If properly handled however, you can make sure that both you and your clients are protected against future CMS actions.

Eric Rich is a litigation and workers’ compensation attorney with Scheuer Mackin & Breslin, LLC, a statewide Ohio law firm committed to advising and representing employers in their workers’ compensation and employment related interests. Eric assists large and small employers in administrative and court proceedings, occupational disease litigation, alleged workplace safety violations and structured settlement negotiations. Eric also advises employers regarding their obligations under the ADA and FMLA. He has been a CMBA member since 2017. He can be reached at (234) 284-2340 or eric@smblaw.net.

We make Labor look like no work at all.
Our Labor and Employment attorneys are accomplished, recognized, and, to top it off, really easy to work with. Which makes the challenges of Labor Law just a little easier to handle.
What a phenomenal opportunity mock trials give Cleveland high school students! They learn to prepare their best legal arguments for courtroom competition with their peers. This year’s hypothetical case for the city competition centers on the opioid crisis and a student accused of illegally selling medication that causes the overdose death of a fellow student.

Coached by volunteer attorneys and law students, and backed by Foundation donors, high school teams take turns prosecuting and defending these criminal charges, honing their legal skills and deepening their understanding of all sides of important issues.

Cleveland Municipal Court awards paid internships, a coveted reward, to the top-scoring student prosecuting attorney, defense attorney, and witness, as well as the top writer in the essay contest. Cleveland teams also have opportunities to compete in district, regional, state, and national competitions.

The Mock Trial Program in Cleveland continues to grow with student interest. In 2017, more than 250 students on 16 teams from 14 high schools competed, with help from more than 50 volunteer lawyers, judges, and law students. Strong participation is expected for this year’s competition in May.

As mock trials and student success multiply, we need more volunteers — legal coaches for students and judicial panelists to score trials — so we can reach even more kids when the next school year starts.

POWERFUL EXPERIENCE
This extracurricular experience has inspired a number of students to go to college and some to become lawyers.

More than 90 percent of our Stokes Scholars participated in mock trials in high school. In fact, Stokes Scholar alums Xavier Thomas-Hughes and Dairian Heard wrote this year’s case on opioids.

What makes mock trials so powerful for Cleveland and East Cleveland students?
“Kids who typically have limited access to resources are empowered with legal knowledge and exposure to a professional career field,” says Shaw High School graduate and Stokes Scholar Jzinae Jackson, who earned her law degree from Cleveland-Marshall College of Law this May.

“The program motivates students to be career driven and work beyond being successful in high school,” she adds.

“I learned to think quick on my feet and to analyze both sides of a case to make the strongest argument. Both these new skills have contributed to my success as a law student.”

IT’S NOT EASY
James Hronek sees the growth of students as the program’s richest reward.

A social studies teacher at Lincoln West School of Science & Health and a longtime trial team coach, he describes the program as “not an easy venture, so it’s very rewarding for teenagers to see it through to the end.

“Once they put in the work, you can see their confidence build. I tell my students the only way to improve and grow is to challenge and push yourself.

“I believe the most important skills students acquire in mock trials are preparation and practice. Our students are critical thinkers, and legal volunteers can teach them strategies, but knowledge alone doesn’t translate to the trial without repetition and role playing.”

Teachers, students, and volunteers all agree the singular experience of mock trials emboldens Cleveland and East Cleveland high school students to strive for higher goals by building in them the skills to do it.

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.
NEW LEGAL DIRECTORY ON SALE NOW!

EARLY BIRD ORDERS SAVE $10!

NEW 2018–19 Legal Directory is now available for pre-orders!
Order now through May 31 and save $10 on the print edition. Your bottom line will thank you!
You can order using the form below or online at CleMetroBar.org/Directory.

CMBA MEMBERS
☐ Print Format for Pick-up _______ # of books @ $24.95 ea = _______ (Regular price $34.95)
☐ Print Format with Shipping _______ # of books @ $33.45 ea = _______ (Regular price $43.95)

NON-MEMBERS
☐ Print Format for Pick-up _______ # of books @ $44.95 ea = _______ (Regular price $54.95)
☐ Print Format with Shipping _______ # of books @ $53.45 ea = _______ (Regular price $63.45)

All prices include appropriate Ohio sales tax.

Grand Total = ___________________
Notice will be sent when books are available.

Name (Please Print) ____________________________________________ Firm or Office ____________________________________________
Address ___________________________________________________ City __________ State ________ Zip ____________
Phone ____________________________ E-Mail _______________________________
☐ Please Bill Me ☐ Check Enclosed (made payable to CMBA) ☐ Visa ☐ Mastercard ☐ Discover ☐ American Express
Credit Card No. ____________________________ Exp.Date _______________________________
Signature (if paying by credit card) ________________________________________________________

COMPLETE THIS FORM AND MAIL TO Cleveland Metropolitan Bar Association, 2018 Legal Directory, P.O. Box 931852, Cleveland, Ohio 44193 Or fax to: (216) 696-2413
Amid the opioid epidemic and drug crisis in our community, exciting things are happening at the Cuyahoga County Juvenile Court. Under the leadership of Judge Denise N. Rini, the Juvenile Drug Court is making a difference in the lives of our youth.

Established in 1998, the Juvenile Teen Drug Court was started by the late Judge Jack Gallagher and is one of the oldest drug programs. It was on the cutting edge of what is now the norm in present-day treatment courts. And while the Drug Court Program is celebrating its 20th anniversary, recent changes over the last two years have proven its resiliency and impact. Numbers have surged over the past 18 months and approximately 180 youth have participated in the program in the last three years. Treatment Courts are growing and exist to assist veterans, victims of Human Trafficking, mentally ill defendants and those addicted to drugs. Success is often attributed to the tireless efforts of the treatment team that works with the participants as well as the accountability that stems from weekly appearances in court.

Juvenile Drug Court is no different here in Cuyahoga County. Our Treatment Team includes case managers as well as a Drug Court Program Manager. John Thomas, who works as a case manager, has been with the Drug Court since its inception in 1998. Additionally, Community partners include Catholic Charities, New Directions, Abraxas and Ohio Mentor to provide wrap-around services for the youth as well as the family.

The Drug Court is a diversion program that requires the youth to admit to the pending charges prior to being accepted. Upon successful completion, the charges are dismissed and sealed. The Court is certified by the Ohio Supreme Court as a specialized docket and offers the opportunity for a youth’s record to remain clear. All cases may be accepted with the exception of aggravated felonies with mandatory time. Often, youth are involved in drug-related cases or domestic violence for family conflict. An assessment must be completed to determine use or abuse of drugs or alcohol. Eligibility factors also include risk to commit other criminal acts and mental health history. An individualized treatment plan is developed that involves drug education or formal treatment depending upon need and family centered therapy may be offered in home. The Program requires weekly attendance in court for the first eight weeks, b-weekly as progress is made, and finally, monthly reporting until graduation. Youth are tested at a minimum of three times per week in order to maintain accountability and youth who struggle with continued drug use or problems in the home remain in a phase for longer periods as the treatment component is increased. The need for residential treatment has risen and approximately 25 youth have participated at New Directions in the last year. As higher risk youth are accepted, treatment needs increase.

The primary struggle in our program involves marijuana and alcohol use. Even if legalized, teen use of marijuana will remain off limits. Only a small percentage of juveniles are using heroin or other opioids. This statistic is surprising given the outbreak of overdoses by young adults in our community; however, this pattern is consistent with the arc that leads to heroin use. Therefore, the intervention efforts in Drug Court represent an important piece in drug prevention to at risk youth before use escalates to opioids or heroin.

Under Judge Rini, the Program has expanded beyond low-risk kids caught with marijuana. The National Guidelines for Juvenile Treatment Courts report greater success with youth who have moderate to severe use or other significant risk factors. Emphasis is placed on performance at both home and school. At the heart of the program is a system of sanctions and rewards that are designed to affect each kid individually. As a result, valued possessions are taken and cell phones, XBoxes or other gaming systems can be found in chambers while privileges are earned back. As the Magistrate who hears the docket weekly, the arguments made while requesting the return of their property are a lesson in advocacy. They are priceless.

Our court has maintained a participation rate for the families who stay with the program of 93% while the national completion rate is 79%. The frequent refrain at graduation is “I never dreamed that I could stay clean,” a sentiment echoed by parents. With good old fashioned accountability, growth and change occur over time and in increments. Success is just as sweet.

The lure of social media, bullying and trauma remain challenges for our youth. Efforts are being made to start an educational program to develop safe sexual boundaries. Parent involvement remains a key. Better job opportunities are also needed to keep youth on track. Please continue to support our Drug Court.

Kaye Ranke has been an attorney for 28 years, having graduated from Cleveland-Marshall College of Law in 1989. She currently serves as the Custody Magistrate presiding over private custody cases and the Abuse, Neglect and Dependency docket. She also serves as the Drug Court Jurist for Judge Denise N. Rini and the Cuyahoga County Juvenile Court. Kaye is a life member of the Eighth Judicial Conference and is active in pro bono services as well as with many community partnerships. Magistrate Ranke and Judge Rini are working to establish community partnerships to assist youths in our neighborhoods and to promote positive change within the Juvenile Court System. She can be reached at (216) 443-5829 or kranke@cuyahogacounty.us.
CLEVELAND MARRIOTT DOWNTOWN AT KEY CENTER

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

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.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>INDIVIDUAL TICKET ($55)</td>
<td>Sponsorship Opportunities</td>
</tr>
<tr>
<td>REDUCED RATE TICKET ($40)</td>
<td>Visit CleMetroBar.org/AnnualMeeting to download the full sponsorship form which includes additional levels offering more benefits like advertising in the event program, and more. Or call Krista Munger at (216) 696-3525 x 2224 to inquire.</td>
</tr>
<tr>
<td>TABLE SPONSORSHIP ($650)</td>
<td></td>
</tr>
<tr>
<td>Includes Prominent Visual Recognition at Event</td>
<td></td>
</tr>
</tbody>
</table>

I wish to reserve ________ seat(s) or ________ table(s) for the 11th Annual Meeting.

Name (please print) ____________________________________________________________

Firm/Company ________________________________________________________________

Address ___________________________________________________________________

City ___________________________________________ State _____________ Zip __________

Phone ___________________________ E-mail _________________________________________

Special Dietary Needs (Vegetarian, Gluten Free, etc.) ________________________________

☐ Check enclosed made payable to Cleveland Metropolitan Bar Association ☐ Visa ☐ Mastercard ☐ American Express ☐ Discover

Credit Card No. ___________________________ Exp. Date ___________________________

Signature (needed only if using Credit Card) _____________________________________

Mail to P.O. Box 931891, Cleveland, Ohio 44193 or fax to (216) 696-2413
2018 Diversity & Inclusion Conference

Tuesday, May 22
CREDITS 5.00 CLE
REGISTRATION 8 a.m.
PROGRAM 8:30 a.m. – 2 p.m.

COURSE DESCRIPTION
This course is designed to introduce participants to the core skill areas specific to Diversity & Inclusion, Employee Engagement and Change Agent behaviors. Participants will learn how to leverage the broad spectrum of human diversity where appreciating differences serves as the foundation for cultural change in the organization. Participants will be introduced to the Dimensions of Diversity, unconscious bias, workplace inclusion and D&I cultural competencies.

Through a self-assessment process, participants will gain awareness of their thoughts/preferences of Diversity & Inclusion behaviors. Participants will also learn the importance of Diversity and Inclusion Change Agent behaviors in the workplace.

PRESENTER
Renita Jefferson has a 20-year history with the American Greetings Corporation. Renita is the architect for corporate-wide Organizational Development Programs as well as the Director of Diversity & Inclusion and Talent Acquisition.

As Director of Diversity & Inclusion, Renita has aligned the execution of the multi-year Diversity & Inclusion strategy to enable one of American Greetings’ key values — “We care about People and treat them with Respect.” Under her leadership, the Diversity and Inclusion work has evolved from merely a “people process” into an integrated strategy in support of talent development and performance management.

Renita has received numerous awards that recognize her leadership and community service. She is a sought-after keynote speaker with expertise in various areas of Human Resources. She serves on multiple boards and enjoys working as a volunteer throughout the city of Cleveland.

Appreciating Differences (includes one 15 minute break)
Renita L. Jefferson, MBA, GPCC, PCC, Embrace Consulting

A Lawyer’s Guide To Surviving the New Law Apocalypse

Wednesday, May 23
CREDITS 3.00 CLE requested
REGISTRATION 8:30 a.m.
PROGRAM 9:00 a.m. – 12:15 p.m.

PRESENTER
Brett Renzenbrink is a partner at Luper Neidenthal & Logan (in Columbus/Cincy) and author of “4L, What They Don’t Teach You About Law in Law School.”

Brett will be live at the CMBA to cover client recruitment/retention/expansion for lawyers (and anyone that sells professional services) using non-traditional techniques and in an effort to evolve with the 21st Century “New Law” challenges. It’s about empowerment and evolution.

Come learn more about the New Law evolution and how to stake your claim in the market.

Defining and Overcoming the Landscape and Challenges
• Current legal landscape
• What Legal Services Can Be Commoditized?
• What makes legal services harder to sell?

Client Centric Philosophy
• Failure in client development
• How many clients are enough?
• The Rainmaker Window
• Intersection of Authority & Need
• The Value Equilibrium

Effective Strategies and “Dating” Clients
• Five new sources of clients and matters
• No one sells you — you sell you
• Reverse elevator pitches
• Client communications

The CMBA’s Small & Solo Section and Lawyer Referral Service present
Making it Rain: 2018 Small & Solo Update

Wednesday, May 23

CREDITS 3.00 CLE requested
REGISTRATION & LUNCH 12 p.m.
SEMINAR 1 – 4:15 p.m.
Registration & Lunch
Small & Solo Section Meeting & Announcements
Lawyer Referral Service Meeting & Awards
The Nuts and Bolts of Starting a Modest Means Practice
Mind Your Law Office, LLC
Legal Marketing: Ethical and Practical Considerations for the Solo Practitioner and Small Firm (1.0 hour Professional Conduct)
Craig McCrohon, ProJudicata
Business Development Tips and Tricks
Jeffrey A. Lachina, Lachina
Ashleigh Green, Marketing Specialist, Lachina
Tying It All Together: Lessons Learned
Thomas D. Robenalt, The Robenalt Law Firm
Gregory S. Scott, Lowe Eiland Wakefield Co., LPA
Claire I. Wade, Sobel, Wade & Mapley, LLC

The Lay of the Land (Bank): A Practical Guide for Lawyers

Thursday, June 6
CREDITS 3.00 CLE requested
REGISTRATION 8:30 a.m.
PROGRAM 9:00 a.m. – 12:15 p.m.
Registration and Breakfast
Statutory Construct of County Land Banks vs. Municipal Land Banks:
R.C. 1724 and R.C. 5722
Nature of County Land Banks: Case Law and AG Opinions
Differences between Municipal and County Land Banks
County Land Banks, Tax Foreclosure and Community Development
Super Clearance of Title
Practical Benefits and Application
Enhanced Nuisance Abatement Enforcement for Municipalities:
R.C. 715.261
Meet us at the Bar for lunch, networking, and CLE. Check out these one-hour CLEs, sponsored by our Sections.

May 15
Estate Planning, Probate & Trust Law Section
Don’t Text and Unduly Influence: An Overview of How to Use Electronic Discovery in Probate Litigation

May 16
Family Law Section
De-Escalation of Clients and Lawyers

May 30
Labor & Employment Section
Meet Our Newest Bundle of Joy — The FMLA Leave Tax Update

Quick Bites

All programs are held at noon at the CMBA Conference Center, unless otherwise noted.

Expedited Repurposing of Tax-Forfeited Properties
Funding of County Land Banks
Questions, Answers, Discussion

FACULTY
Gus Frangos, President and General Counsel, Cuyahoga Land Bank
Jim Rokakis, Vice President, Western Reserve Land Conservancy; Director, Thriving Communities Institute

2018 Media & The Law Summit
Thursday, June 14

CREDITS 3.25 CLE
REGISTRATION 1 p.m.
PROGRAM 1:30 – 5:15 p.m.
Welcome & Introductions
Marlon A. Primes, CMBA President and Assistant U.S. Attorney
Robert Stewart, Director, E.W. Scripps School of Journalism, Ohio University
Justin E. Herdman, United States Attorney, Northern District of Ohio

Free Press/Fair Trial: A Legal Overview
Jonathan L. Entin, David L. Brennan Professor Emeritus, Case Western Reserve University School of Law

The Media Perspective: Covering High Profile Trials and Legal Issues in the Internet Age
Wes Lowery, Pulitzer Prize Winner and Reporter, Washington Post
Matt Zapotosky, Department of Justice Reporter, Washington Post
Greg Korte, White House Correspondent, USA Today
Jan Leach, Former Editor, Akron Beacon Journal and Associate Professor of Journalism and Mass Communication, Kent State University, Moderator

Tips from the Trial Masters in High Profile Cases
Bridget Brennan, Criminal Chief, U.S. Attorney’s Office, Northern District of Ohio
Nathaniel Lee, Lee Cossell & Crowley, LLP, Indianapolis, IN
Thomas Hodson, Former Athens Municipal Court Judge and Professor, E.W. Scripps School of Journalism, Ohio University, Moderator

Maintaining Media and Legal Ethics in High Profile Cases (1.0 hour Professional Conduct CLE requested)
Jay Milano, Milano Attorneys at Law and Lecturer, School of Communications, The Ohio State University
Kevin Z. Smith, Director, The Kiplinger Program, The Ohio State University
Robert Stewart, Director, E.W. Scripps School of Journalism, Ohio University, Moderator

Adjourn to Networking Reception
Special thanks to the Ohio University, E.W. Scripps School of Journalism, and the Press Club of Cleveland for their support of our Summit

Save the Date
Professional Conduct Mash-Up
A Mix of The Latest and Greatest Topics
Wednesday, June 5 at 1 p.m.

Register at CleMetroBar.org/CLE!
For questions or to register over the phone, call (216) 696-2404.

MAY 2018
CLEVELAND METROPOLITAN BAR JOURNAL | 19
Explore the role of media in high-profile cases with an ALL-STAR lineup of journalists, attorneys, and media experts. This is must-see CLE!

Special thanks to the Ohio University, E.W. Scripps School of Journalism, and the Press Club of Cleveland for their support of our Summit.
Caution: Merger ahead

Looking for a seasoned guide to help you navigate acquisition and divestiture activity? Clark Schaefer Hackett’s Transaction Advisory team regularly and seamlessly works with attorneys, bankers and private equity firms to achieve successful outcomes for clients.

Our capabilities include:

- Financial & tax due diligence
- Tax structuring
- Carve-out assistance
- State & local tax evaluation
- Forecasts & projections
- Transaction accounting
- Global tax services
- Initial public offering support

Scott McRill, CPA
Shareholder
Transaction Advisory Services
slmcrill@cshco.com
216.526.8125

Keri Boergert, JD
Principal
Tax & Transaction Advisory Services
kboergert@cshco.com
440.213.1423

CSH welcomes Scott McRill and Keri Boergert to our Cleveland Transaction Advisory team.

We here at the CMBA are meeting planners ourselves, so we know how many details go into executing a successful event.

We do our absolute best to make sure every experience is seamless. Our “all inclusive approach” lets you deal with one contact for all set-up, AV, and catering needs. If you are someone who needs space, we have it. Check us out today!

Your meeting. Our team. Success.

AV Included
400-Seat Auditorium
Reception Areas
Varying Room Sizes

Attached Parking
Video Conferencing
Free Wi-Fi
Catering Available

CleMetroBar.org/ConferenceCenter
(216) 539-3711
or mfarrell@clemetrobar.org
Friday, April 13 was a lucky day for the Ethics & Professionalism Committee because Cornell Law Professor W. Bradley Wendel made a special appearance! Professor Wendel was in town as a guest of the University of Akron’s Miller Becker Center for Professional Responsibility. Professor Wendel talked about litigation financing and professional independence including a discussion about Silicon Valley financier Peter Thiel’s funding of Hulk Hogan’s privacy lawsuit against Gawker Media and the support by public interest groups of the government in Uruguay in its defense of anti-tobacco legislation against a challenge by Philip Morris. Thank you to the Director of the Miller Becker Center and former CMBA Ethics & Professionalism Committee Chair, Jack Sahl, for making possible Professor Wendel’s visit to the CMBA.

2017–18 3Rs Year

3Rs volunteers held their final lessons for 2018 in April and May, capping another great year in the Cleveland and East Cleveland high school classrooms. In 2017–18 The 3Rs covered 79 classes at 21 high schools through the help of more than 400 volunteers. In May, 3Rs+ volunteers also coordinated a special field trip for students to attend a half-day session at Cleveland-Marshall College of Law with volunteers from the Black Law Students Association, the ACLU, and the Public Defenders Office speaking about police encounters and careers in the law. Look for our full 3Rs review in the June Bar Journal as we thank everyone for a successful year!
If you weren’t at this year’s Medical/Legal Summit, you missed a stellar keynote presentation by Christopher Kennedy Lawford. Chris shared the depths of his addiction, including his family’s history of substance abuse, compounded by the assassinations of his uncles. Peppered with memories of his family, Marilyn Monroe and Frank Sinatra, Chris delivered insight into the life of an addict that was at times humorous, devastating and, ultimately, uplifting.

Held annually each spring, the Medical/Legal Summit is co-sponsored with the Academy of Medicine of Cleveland and Northern Ohio. Led by Justin Cernansky of University Hospitals and Dr. Fred Jorgensen of the Cleveland Clinic, our planning committee of attorneys and physicians worked tirelessly to deliver outstanding content. Our very own Health Care Law Section kicked us off with their popular Health Care Law update. Many thanks to our sponsors for their generous contributions, supporting our event:

**Partner Level**
- Elk & Elk Co., Ltd.

**Gold Level**
- Buckingham, Doolittle & Burroughs, LLC
- Cleveland Clinic
- McDonald Hopkins LLC
- Moscarino & Treu L.L.P.
- Reminger Co., LPA
- Roetzel & Andress, LPA
- SGS Planning

**Bronze Level**
- Tucker Ellis LLP
- Vorys, Satter, Seymour and Pease LLP
- Moscarino & Treu L.L.P.
- Calfee, Halter & Griswold LLP
- Taft, Stettinius & Hollister LLP
- Veritext Legal Solutions

**Upcoming Topic**
June 12 – Cybersecurity and Data Privacy Regulations

CLEMetroBar.org/HotTalks
India has emerged as an attractive investment destination in recent years, with the economic growth rate at 7.1% in 2016–17 and the International Monetary Fund forecasting growth of 7.2% and 7.7% in 2017–18 and 2018–19 respectively. In 2016 U.S. goods imports from India totaled $46.0 billion, up 2.7% from 2015, and up 110.7% from 2006, accounting for 2.1% of overall U.S. imports in 2015 (https://ustr.gov/countries-regions/south-central-asia/india). The Indian Government's bold reforms like demonization, Goods and Services Tax Act, etc. has helped facilitate growth enabling a shift from an unorganized to an organized sector, thus increasing opportunities for cross border transactions. This article articulates some key nuances of contracting with Indian entities.

Contract Laws in India
India’s judicial structure is an integrated system of courts that administer both federal and state laws. It has a pyramidal structure with the Supreme Court of India (SC) at the apex, a High Court in each State, a hierarchy of subordinate courts underneath. Article 141 of the Constitution of India provides that the ruling of the SC shall be binding in all courts within the territory of India. Apart from courts, tribunals are also invested with quasi-judicial powers by special statutes to decide on certain matters like income tax and consumer issues. Pursuant to the United Nations Commission on International Trade Law (UNCITRAL) adopting the UNCITRAL Model Law on International Commercial Arbitration in 1985, India enacted the Arbitration and Conciliation Act in 1996 applicable to the territory of India, which consolidates the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and conciliation.

India’s contract laws are derived from English Common Law. Any contract for sale would be governed by The Sale of Goods Act, 1930 and the general principles of The Indian Contract Act, 1872 (Act). The Act is a legislation governing the contractual relationship between two or more parties and deals with all aspects of contracts, like formation, performance, enforceability, indemnities, guarantees, bailment, pledge and agency. The contracting parties themselves decide rights, duties and terms of the agreement. The court of law acts to enforce agreement in case of non-performance.

Essentials of Contract (K)
Section 2(h) of the Act defines a contract as an agreement enforceable by law. The word ‘agreement’ has been defined in Section 2(e) of the Act as every promise and every set of promises, forming consideration for each other. Although, India recognizes oral and implied Ks; it is preferred to have written Ks. It is interesting to note that there are similarities in contract rules between Indian and U.S. laws, for example, both hold (a) the

mail box rule — K is established when the acceptance letter is mailed, (b) silence does not generally constitute an acceptance of the offer. A valid K in India must contain — competent parties, offer, acceptance, consent and consideration.

As seen in the chart below, there are many clauses that form part of a well-drafted K. Starting point for any K is identification of parties. In India, identifying parties with name, place, occupation, and government ID if individual and individual power of authority for corporations is the most common practice. The second part is recital or preamble, where it provides a background of the parties and how K was initiated.

Consideration
Consideration is a technical term in the sense of ‘quid pro quo’. Under section 25 of the Act, a contract without consideration is void subject to certain exceptions. Some of which include agreements expressed in
writing and registered under the law made on account of natural love and affection between parties standing in a near relation to each other, compensation for voluntary services, promise by a debtor to pay a time barred debt. However, it is to be noted that the rule ‘agreement without consideration’ does not apply to a completed gift. In essence, remember the thumb rule — “No C (Consideration), No K (Contract)”.

Obligations
This section forms the heart of any K, wherein the parties explicitly state their duties for the performance of K and includes conditions precedent, conditions subsequent, closing, post closing obligations etc. Non-compete, confidentiality and non-disclosure clauses are some of the important aspects under this section. Depending on the type of contract, these clauses may be considered as a separate section or agreement in itself.

Non-compete clauses are those that restrict one party’s ability to work or do business in a restricted area for a restricted time. Enforceability of such restrictive covenants is always heavily debated in courts of India. Section 27 of the Act provides for agreement in restraint of trade. An agreement wherein one party agrees to restrict its liberty in the future to carry on trade with persons outside K in such a manner as he chooses. An exception to this general rule is Ks on sale of business and goodwill, where restrictive covenants imposed are valid, provided such an agreement it passes the reasonability test of courts.

With respect to employment Ks, such clauses are considered reasonable while in employment. Unlike the law in the United Kingdom, the Act does not distinguish between partial and total restraint of trade and therefore if the clause in the agreement amounts to post termination restraint, then the same is void. Though section 27 of the Act does not provide specific conditions for a valid restrictive covenant; test of reasonability is applied.

Breach Provisions
Section 73 of the Act affirms the rule of the Common Law of England as laid down in 
Hadley v. Baxendale ((1854) EWHC 170), that provides for damages based on the foreseen and unforeseen breaches. It allows compensation for loss caused directly by breach of K. However, consequential or indirect damages like lost profits, revenues, time, damage to reputation, reduction in value sustained due to breach, is not provided under the Act.

Section 74 of the Act deals with the situation where the parties agree that the contract itself will stipulate the penalty for its breach, i.e. liquidated damages. The underlying principle is to promote certainty in commercial contracts. It provides that damages, not exceeding the amount stipulated in K, must be given to the injured party on breach of K. It further provides that such damages must be given to the injured party irrespective of any actual proof of loss. The explanation to Section 74 distinguishes between a genuine pre-estimate of damages and a penalty. Hence, care should be taken while negotiating breach and damages clause.

Governing Law & Dispute Resolution
Opting for litigation, as the mode of dispute resolution with governing law outside India is one of the ways for dispute resolution. In such instance, post foreign judgment is obtained, the same has to pass muster of courts cease to exist; and (c) judicial intervention reduced by restricting the review by Courts to a ‘prima facie’ review of the existence of an arbitration agreement; thus encouraging parties to choose arbitration.

Boilerplate Clauses
In most standard contracts, the last third of K consists of standard contractual terms that are routinely included known as boilerplate. These include assignment, waiver, force majeure, severability and notices. Although, in most negotiations, the parties spend little or no time focusing on these clauses; these insignificant clauses have a greater impact while in a contract dispute.

A force majeure clause is designed to excuse one party (or both) from performing affected obligations following the occurrence of certain events. Generally, these events would include war, riots, fire, flood, earthquake, strikes and acts of governmental action prohibiting or impeding any party from performing parties’ obligations. For instance, if a hurricane occurred that shut down a port, the seller shipping through that port would not be liable for late delivery of goods. Over the years, its scope has expanded to include any event not existing as of the date of K, not reasonably foreseeable as of such date, and not reasonably within the control of either party that prevents or renders the performance commercially unreasonable.

Another noteworthy clause is ‘time is the essence of contract’. Although in the United States, it is mostly assumed that transactions are time bound, it is not true in Indian contracts. Section 55 of the Act states, if there is a promise to be fulfilled within specified time in K, it becomes voidable if it was the intention of the parties to make time the essence of the contract. Further, it says that if the parties did not have the intention to make time the essence of the contract, the promise should be entitled to claim compensation for any loss incurred. Thus, an insignificant clause would be of utmost importance whilst K dispute regarding delivery, payment, etc.

Other Issues
While contracting with Indian entities, one should be aware of registration and stamp duty costs. Certain documents like property documents require mandatory registration pursuant to Indian Registration Act, 1908, failing which, it would be considered invalid. Stamp duty based on the value of the consideration must be paid for instruments executed in India before execution.

A well-executed contract can simplify and help navigate a new market with ease and comfort. Starting or expanding trade relations with the 9th largest U.S. trading partner can be both fruitful and safe while mitigating unforeseen challenges.
Apporting Liability to the Immune Empty Chair

BY COLLEEN C. MURNAE

No defendant wants to pay for someone else’s negligence. Imagine your client makes a product used in city building projects. A worker is seriously injured when the product fails. The worker’s employer knowingly violated OSHA by misusing the product. Further, the city involved used poor judgment in selecting and using the product. The employee sues only your client because the employee cannot prove “deliberate intent” for an employer intentional tort, and the city has statutory immunity. Can your client apportion fault to the absent employer and city at trial?


Yet a split of authority exists over the right to apportion fault to an immune employer. The Fifth Appellate District in Romig held that an absent employer cannot be assessed any fault. 2012-Ohio-321 at ¶ 45, 56. In Romig, the employee truck driver was killed when propane tanks loaded by the tank manufacturer fell on him during a delivery. Id. at ¶ 7, 9, 14. The manufacturer sought to introduce evidence that decedent’s employer was negligent to allocate fault to it. Despite acknowledging “the statute contains no exceptions for employers or any other potential non-party who enjoys immunity from liability,” the Fifth District concluded “there is no such thing as employer negligence, and a tortfeasor cannot raise the affirmative defense of the empty chair as to an employer for negligent acts.” Id. at ¶ 31, 45.

Conversely, the Eighth Appellate District came to the opposite conclusion in Fisher v. Beazier East, Inc., 8th Dist. Cuyahoga No. 99662, 2013-Ohio-5251. The Fisher Court permitted the defendant to apportion fault to the decedent’s absent former employers for purportedly causing his mesothelioma. The court noted that the statute “does not exclude employer negligence from the apportionment. Nor does it exclude any party who may be entitled to immunity or who otherwise could not be made a party.” Id. at ¶ 37.

The question then becomes what does “tortious conduct” mean and who is a “person from whom the plaintiff does not seek recovery in this action?” The statute defines the latter phrase to include (i) settling parties, (ii) parties the plaintiff does not seek a recovery. R.C. 2307.23(A)(1)(ii) and (G)(1)-(4). There is no definition of “tortious conduct” in the statute. However, the definition of “person” includes political subdivisions and the State. R.C. 2307.011(F). The express inclusion of such agencies invites apportionment to entities that enjoy statutory immunity.

The inclusion of persons who were, but are no longer, parties to the tort action from whom plaintiff seeks a recovery; and (3) each person from whom the plaintiff does not seek a recovery. R.C. 2307.23(A)(1)&(2).

The sum of that apportionment must equal 100%. R.C. 2307.23(B). Thus, if a person causing the harm is not listed on the jury interrogatories for apportionment, the omitted person’s fault will be assessed to those listed. There is no mechanism to assess that fault elsewhere. In short, a defendant sitting in the courtroom will be responsible for the harm caused by the absent entity.

The question then becomes what does “tortious conduct” mean and who is a “person from whom the plaintiff does not seek recovery in this action?” The statute defines the latter phrase to include (i) settling parties, (ii) parties the plaintiff has dismissed with or without prejudice, and (ii) “persons who are not a party to the tort action from whom plaintiff seeks a recovery; and (3) each person from whom the plaintiff does not seek a recovery. R.C. 2307.23(A)(1)&(2).”

The timing simply differs.

But what about “tortious conduct?” A plain reading of that term focuses on the act that may have caused harm. Was the person’s conduct of a wrongful nature? The phrase is not centered on answering for the harm caused. In discussing proximate cause, the Second Appellate District has indicated that “tortious conduct” means wrongful conduct; it is not premised on whether the party is liable for a resulting loss. See Innovative Technologies Corp. v. Advanced Mgt. Technology, Inc., 2d Dist. Montgomery No. 23819, 2011-Ohio-5544 ¶ 31. Similarly, the Tenth Appellate District has found the phrase “liable in tort” — arguably more restrictive than “tortious conduct” — to mean more than “susceptible to suffer an adverse judgment in a maintainable action by plaintiff.” Fisher v. Consolidated Stores Int’l Corp., 89 Ohio App.3d 417, 422, 624 N.E.2d 796 (2d Dist. 1993) Since the statutory language is not contingent upon answering for the fault, “tortious conduct” necessarily encompasses persons who are immune or judgment proof.

This interpretation furthers the goal of apportionment, which is “to ensure that no defendant pays more than its fair share of the plaintiff’s damages.” Root v. Stahl Scott Fetzer Co., 8th Dist. Cuyahoga No. 104172, 2017-Ohio-8398, ¶ 79 (citing Romig v. Baker Hi-Way Express, Inc., 5th Dist. Tuscarawas No. 2011AP-02-0008, 2012-Ohio-321).
presenting evidence of contributory fault, and submitting jury instructions or interrogatories on that issue. Id. at ¶38. Romig was never discussed.

In Root, the Eighth Appellate District recently reaffirmed its decision in Fisher and rejected Romig. Root alleged that his employer’s parent company negligently oversaw safety reviews and evaluations at the facility where his fingers were amputated by a press. The jury found the parent company liable for its negligence, but apportioned fault to the subsidiary employer. Root, 2017-Ohio-8398, ¶ 31. On cross-appeal, plaintiff asked the Eighth District to adopt the holding in Romig. The Eighth District refused, stating “the statute is unambiguous that all persons, whether recoverable or not, are included in the allocation under R.C. 2307.23.” Id. at ¶ 80. The Root Court expressly disagreed with “the Fifth District’s inability to reconcile R.C. 2307.23 [apportionment statute] and 4123.74 [worker’s compensation statute/employer immunity],” reiterating that “the goal of apportionment is to ensure that no defendant pays more than its fair share of the plaintiff’s damages.” Id. at ¶ 78, 80.

The Eighth District’s focus on the nature of the conduct, not the absent tortfeasor’s immune status, is consistent with both the language and intent of Ohio’s statutory apportionment scheme. The statute does not speak in terms of recoverability, but fault — who caused or contributed to the harm suffered? If the focus shifts from the conduct causing the harm to the ability to recover for it, the goal of fair allocation is thwarted. In that instance, the named parties found to be at fault at trial will necessarily bear the liability for the absent, judgment proof tortfeasors.

The soundness of apportioning liability to absent, immune entities has been endorsed by various trial courts in Ohio. See Wise v. Merry Moppet Early Learning Ctr., Inc., Franklin C.P. 13 CVC-12349, 2015 Ohio Misc. LEXIS 8348 (July 24, 2015) (allowing parental contributory negligence to reduce a child’s negligence claim); Farley v. Complete Gen. Constr. Co., Franklin C. P. 12CVC-09-123494, 2014 Ohio Misc. LEXIS 9060 (Feb. 12, 2014) (allowing immune County Defendants to be apportioned fault); Lu Swartz v. McCormick Equip. Co., Union C. P. No. 2011-CV-0020, 2013 Ohio Misc. LEXIS 7943, *9 (July 13, 2013) (“From the plain language of the statute it appears that apportionment is to include even those persons who could not have been added as a party to the tort action.”). Whether the Ohio Supreme Court will resolve the current split of authority on apportionment to immune employers remains to be seen. Until that happens, defendants are well advised to argue vigorously that every potentially responsible person be given a line on the jury interrogatory for allocation of fault — even if that tortfeasor is immune from liability or otherwise judgment proof.

Colleen Murnane is a partner at Frantz Ward LLP whose practice focuses on commercial litigation, product liability and construction litigation, as well as the craft beer industry. She has won verdicts for manufacturers of various products, successfully defendant trade secret and contract cases, and obtained favorable outcomes for companies in the excavation, highway, and building industries. Colleen proactively advises companies on best practices to identify and avoid potential future liability, to minimize business risks, and to develop strategies for resolving disputes prior to litigation. She has been a CMBA member since 1996. She can be reached at (216) 515-1627 or cmurnane@frantzward.com.
Overview of the Tax Bill

In enacting sweeping overhaul of the tax law in late 2017, Congress included a provision that prohibited employers from deducting expenditures on sexual harassment settlements if those settlements were also subject to a confidentiality provision. Specifically, §162(q) of the new law states as follows:

… no deduction shall be allowed under this chapter for — (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a non-disclosure agreement, or (2) attorneys’ fees related to such a settlement or payment. The intention was a noble one — to prevent employers who allow workplaces rife with sexual harassment from covering up such claims.

The seeming quick-fix here is to simply delete any reference to "sexual harassment" from a standard employment release and add this language only when sexual harassment is specifically at issue. For cases that have already been filed that do not include claims for sexual harassment, this fix might work. However, this runs the risk that the claimant may later bring the sexual harassment claims to light and would not be barred from pursuing it. Should the claimant have already been given enough attention, and we have taken a step in the right direction. The new tax law that went into effect this year seeks to reflect these positive trends in society in an effort to help correct the problem. The law generally prevents the deductibility of attorneys’ fees and settlement amounts for claims related to sexual harassment when the settlement agreement is subject to a confidentiality provision. The intent of the bill is to disincentivize employers from covering up sexual harassment in an effort to incentivize them to make it stop happening. While the intent is undoubtedly good, the actual effect of the law may make settling any employment claim, including those having nothing to do with sexual harassment, much more complicated and could even hurt the victims it intended to protect.

The New Tax Law and the Settlement of Sexual Harassment Claims

BY SHAWN ROMER

The intention was a noble one — to prevent employers who allow workplaces rife with sexual harassment from covering up such claims by paying-off victims and making the payments contingent upon confidentiality. Under the new tax law, employers can still do this, but if they do, then the payments and attorneys’ fees related to settling the claim are not tax-deductible. Depending upon how much an employer has to fear from disclosure, it may still cover up the claim and take the tax hit. In that way, some argue that the law did not do enough to protect against the very evil it intended to attack.

Further, this portion of the law was passed with relatively little debate. For obvious reasons, it may have been politically unpopular to publicly oppose it. Although this portion of the new tax law has victims’ best intentions at heart, its actual effect may create many issues that do not serve its intended purpose.

The Road to Confusion Is Paved with Good Intentions.

Settling employment cases now just became significantly more complicated. Previously, releases of employment claims generally included “catch all” provisions in which any and all employment claims (other than those prohibited by law) were released. In an abundance of caution, defense attorneys would normally insist on catch-all provisions that include release of sexual harassment claims even when the claimant did not appear to be raising such a claim.

Now, including a “catch-all” release of employment claims in an otherwise confidential settlement would, under the new tax law, make the entire amount non-deductible (in addition to all attorneys’ fees the employer paid in order to achieve settlement). Attorneys using boilerplate releases including the release of sexual harassment claims, even when those claims have nothing to do with the situation, could inadvertently destroy the deductibility of the settlement. The seeming quick-fix here is to simply delete any reference to “sexual harassment” from a standard employment release and add this language only when sexual harassment is specifically at issue. For cases that have already been filed that do not include claims for sexual harassment, this fix might work. An individual would likely be barred from making a sexual harassment claim against the employer in the future because doing so would have been compulsory in the suit that the individual just filed. In such situations, an employer would likely feel more comfortable excluding a release of sexual harassment claims in the settlement and thereby allowing it to keep the amount confidential and deductible.

However, an issue arises in settling pre-suit claims that do not seemingly involve sexual harassment. Because no lawsuit has been filed, an individual would not be prevented from filing a future lawsuit alleging sexual harassment unless the claim is specifically waived. An employer should be more cautious in altering its “catch-all” release in such a situation, and it is presented with two options, each of which has its own consequences. First, an employer could exclude the release of sexual harassment claims (thereby allowing the settlement to be confidential and deductible). However, this runs the risk that the claimant may later bring the sexual harassment claims to light and would not be barred from pursuing it. Such might be particularly risky when settling gender discrimination claims that are often paired with sexual harassment causes of action.

Second, the employer could include a release of sexual harassment claims, regardless of how unlikely such claims may be. However, the employer will then have to choose between deductibility and confidentiality. In this particular situation, the law punishes the non-sexually harassing employer who wishes to be cautious and ask for the release of a claim that probably will not arise. In this way, the new law negatively affects all employers, not just those who allow rampant sexual harassment in the workplace.

Another proposed solution to the problem might be execute two releases — one confidential release for non-sexual harassment claims, and another release for the sexual harassment claims that could be deductible but not confidential. Apportioning correct settlement amounts and attorney’s fees in each situation will be difficult. Further, this raises the possibility that the IRS will potentially have to come in and determine whether the allocations between the two settlements appropriately reflect the claims made. Admittedly, it is true that the IRS is sometimes already involved.
in reviewing the apportionment of employment settlements to determine whether the appropriate amounts have been allocated towards lost and future wage damages, as these amounts are taxable. However, adding to the IRS’s involvement in overseeing settlement apportionments is not a reality that anyone, probably even the IRS, wants. The Law Could Harm the Very People It Intended to Protect.

While settling employment claims, even those that do not purport on their face to include sexual harassment, has become much more complicated, the law could also have negative consequences for the individuals who were supposed to benefit from it. For instance, the victim might have some interest in keeping the claim confidential. Experiencing sexual harassment can be very personal and potentially embarrassing. Individuals may be less likely to bring up claims of sexual harassment if they know that the claims are now less likely to be kept confidential. Accordingly, it may discourage victims from making the claims in the first place.

Moreover, employers are now more motivated to litigate claims that they might otherwise have settled. One large incentive employers have for confidentially settling any claim pre-suit is to prevent other employees with baseless claims from believing that the company will pay anyone who makes a claim, however frivolous. Now, if an employer is less-able to settle sexual harassment claims confidentially, it will be motivated to contest such claims and litigate them in court, at the very least to send a message to other employees that all claims will be vigorously contested. An individual making such a claim could see more opposition to it and less chance he/she will receive a settlement. Also, re-living sexual harassment through the litigation process is not something many will want to do, and they might have preferred to have received a pre-suit settlement in compensation for their loss.

Lastly, nothing in the law, on its face, excludes the claimant from these tax consequences. Although preventing deduction of confidential sexual harassment lawsuits was intended to punish the employer, the employee will likewise experience the law’s negative effects. A more careful articulation of the language of this portion of the law could have prevented this from happening.

Conclusion

In spirit, the new law’s purpose to incentivize employers to address sexual harassment is good (and much needed). However, the spirit behind the law would have been better served had Congress taken more time and gained more input from employment lawyers when crafting its language. Talk of clarifying the law to better effectuate its purpose exists and hopefully is forthcoming. In the meantime, however, it will be necessary for attorneys litigating employment cases to consider the implications of the law, as written, in settling employment claims, even when the claims do not seem to involve sexual harassment at all.

Shawn Romer is the principle at the Romer Law Firm, where he focuses his practice on representing individuals in employment and civil rights litigation. He is a member of the CMBA’s section on Labor and Employment. He has been a CMBA member since 2017. He can be reached at (216) 644-3722 or sromer@romerlawfirm.com.

Nicola, Gudbranson and Cooper, LLC
Your Workforce Business Solution

Employment Law
Matthew T. Fitzsimmons
James H. Grove

Workers’ Compensation Law
Michael J. Bertsch
Kathleen E. Gee
Amy Berman Hamilton

Immigration Law
Karen Gabriel Moss
Bradley L. Ortman
Give a Little, Get a Lot
How Volunteering Benefits Attorneys
Launching Careers and During Job Transitions

BY JACLYN VARY

For attorneys at all stages of their career, volunteering can enrich your life and help shape a sense of purpose and community. For attorneys just starting their careers or in transition, volunteering offers a range of special benefits as well. Jaclyn Vary (mentor and volunteer leader with the CMBA’s Reach Out for Nonprofits and Volunteer Lawyers for the Arts programs) offers her thoughts on common questions attorneys may have when considering how and when to volunteer.

Q. What do potential employers think when they see non-legal work on a resume?
A. For individuals I informally mentor, I am interested in learning what skills (work ethic and interpersonal skills) they developed during their non-legal work. I have a section on my resume covering community involvement and volunteer activities, which I believe is helpful to employers. You show a different side of yourself in what you choose to do with your downtime. If you volunteer while working at your current position, you also show your ability to manage multiple projects and priorities.

Q. What if volunteering takes away time from the job hunt?
A. Yes, volunteering takes time away from the job hunt. However, if you are volunteering at Legal Aid’s Brief Advice Clinics or take on a pro bono case with the Volunteer Lawyers for the Arts (VLA), you can show that your legal experience continued during a period which would otherwise be a gap in work history.

Q. What advice do you have for someone who takes on a pro bono opportunity then has a job come up?
A. Most pro bono organizations/clients will be understanding if you need to appropriately transition the project, especially if you’ve mentioned upfront that you were concurrently searching for a paid position. Additionally, most employers will understand that you need time to transition from what you are doing to the new job, and many may support your volunteer/pro bono services. Keep things professional and give your current position proper notice so that you have time to appropriately transition matters if necessary.

Q. How do you balance volunteer work with your career?
A. For many, true “balance” may seem impossible, but integrating volunteer work with my career is a priority for me. Volunteering gives me the opportunity to gain valuable experience outside my usual legal practice. While I normally do not work in the Medicaid area, I recently reviewed an issue for an artist on Medicaid who was interested in setting up a trust. I have now utilized the information I learned about QIT/Miller Trusts on a fee-paying matter. Volunteering is also an opportunity to network. One of the best parts of working with the VLA is that our volunteers often partner together so that a newer attorney may gain experience in other practice areas.

Q. Are volunteer positions worth it?
A. I often think that Legal Aid Brief Advice Clinic clients will not need my estate planning
knowledge. However, the issues I addressed at a recent clinic were interesting and applicable to my practice area:

- A daughter was living with her elderly mother who then passed away. The mother’s will was destroyed by her other children. What will happen to the mother’s home?
- Will a limited power of attorney allow a couple moving out of town to allow someone else to transport their dog?

In my opinion, volunteer positions are what you make of the experience. I find that volunteering can be very personally rewarding. If I make the time, it is well worth the effort. The true impact when someone gives their time, talent and treasure is immeasurable.

Jaclyn Vary’s day job is serving clients as an Estate & Succession Planning attorney at Calfee, Halter & Griswold LLP. Her side hustles include serving as a member of the CMBA Volunteer Lawyers for the Arts Committee, the Reach Out: Legal Assistance for Nonprofits organizational committee, and the Justice For All Committee, along with raising her four kids. She has been a CMBA member since 2013. She can be reached at (216) 622-8338 or jvary@calfee.com.
In the modern workplace, the most common form of communication is without a doubt email. With employees using work email accounts every day, the question becomes can employers restrict their employees’ work email use and if so, to what extent? The National Labor Relations Board has been quite clear that under Section 7 of the National Labor Relations Act (NLRA), when an employer gives an employee access to a work email account, the employee has a right to use it.

Section 7 of the NLRA
Section 7 of the NLRA guarantees all employees the right to engage in concerted activities for the purpose of mutual aid or protection. Both unionized and nonunionized employees are covered under Section 7. Section 8 of the NLRA makes it unlawful for employers to interfere with, restrain or coerce employees in the exercise of their Section 7 rights. These rights apply to protected concerted activity both on — and offline.

The Board’s Precedent
The Board has held that employees have the right under Section 7 of the NLRA to use their employer email account during “nonwork” time for any concerted activity. In its decision, the Board established a new presumption that employees who have access to email at work must be permitted to utilize that system. The burden is on the employer to prove that a policy restricting email access is necessary. However, the Board cautioned employers that the special circumstances necessary to permit such a restriction would be rare.

Purple Communications, Inc., 361 NLRB 126 (2014)
The Board established its precedent — setting decision concerning employee email use in Purple Communications, Inc. Purple Communications, Inc. is a company that provides real-time sign language interpretation during video conference calls. Each employee at Purple Communications is assigned an individual email account that can be accessed from their work computer, personal computer, or personal smart phone. At issue before the Board was Purple Communication’s electronic communication policy that stated:

Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by the [sic] Purple to facilitate Company business. All such equipment and access should be used for business purposes only.

Employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment in connection with any of the following activities:
• Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.
• Sending uninvited email of a personal nature.

The handbook also provided that the Company may punish an employee’s violation of this policy with discipline up to and including termination.

After reviewing the policy, the Board agreed with the Administrative Law Judge’s determination that the Company violated Section 8(a)(1) of the NLRA by maintaining an overly broad electronic communications policy that unlawfully restricted employees’ use of the Company’s email system for Section 7 purposes. The Company’s policy restricted use of the email system during nonworking hours. As discussed, a restriction is only permissible when the employer can show that the restriction is justified by special circumstances necessary to maintain production or discipline. The Board and the Administrative Law Judge both failed to find a justification for such restriction. Without a justification for the restriction, the Company’s electronic communication was overly broad and thus unlawful.
This case remains open and is currently being appealed to the United States Court of Appeals for the Ninth Circuit.

UPMC, 362 NLRB 191 (2015)

Following Purple Communication, the Board addressed electronic communication rules again in UPMC. University of Pittsburgh Medical Center (UPMC) and its subsidiaries are hospitals located throughout the state of Pennsylvania. The hospitals maintained the following Electronic Mail and Messaging Policy and Acceptable Use of Information Technology Resources Policy:

UPMC electronic messaging systems may not be used:

- To promote illegal activity or used in a way that may be disruptive, offensive to others, or harmful to morale; or
- To solicit employees to support any group or organization, unless sanctioned by UPMC executive management;
- In a manner inconsistent with UPMC policies and directives, including, but not limited to policies concerning commercial communication, solicitation, sexual harassment, job performance and appropriate Internet use.

The UPMC policy went on to say that “The UPMC information technology resources (computers, servers, Internet, e-mail, etc.) shall only be used for supporting the business, clinical, research, and educational activities of UPMC workforce members.” Further, “UPMC workforce members shall only use UPMC information technology resources for authorized activities. Authorized activities are related to assigned job responsibilities and approved by the appropriate UPMC management. To the extent that a UPMC information technology resource is assigned to an employee, the employee is permitted de minimis personal use of the UPMC information technology resource.” The Handbook defined “de minimis personal use” as use of the information technology resource only to the extent that such use does not affect the employee's job performance and prevents other employees from performing their job duties.

The Board upheld the Administrative Law Judge's ruling that UPMC's Electronic Mail and Messaging Policy and Acceptable Use of Information Technology Resources Policy violated Section 8(a)(1) of the NLRA.

In regards to the Electronic Mail and Messaging Policy, the Administrative Law Judge took issue with the broad and ambiguous terms used to distinguish whether nonwork email use was permitted or prohibited. While the policy did not bar all employee nonwork use of email, it did restrict some nonwork use of the email system. The policy was a violation of Section 8(a) (1) because nonwork email usage can only be restricted if justified with special circumstances. UPMC was unable to prove that the special circumstances existed to justify the policy. Ultimately, the Electronic Mail and Messaging Policy was found to be an ambiguous rule that “would reasonably chill employee use of the email system to discuss any Section 7 activity.”

In regards to the Acceptable Use of Information Technology Policy, UPMC placed overly broad and vague restrictions on employee use of technology resources, which employees could avoid only if they sought and received permission from the employer. There was nothing in the policy that indicated protected activity would be exempt, and thus, facially, the rule chilled Section 7 activity. The Administrative Law Judge explained that “employees confronting an employer's rule should not have to decide at their own peril what information is not lawfully subject to such a prohibition.” This policy violated Section 8(a)(1) and thus was unlawful.

Looking Forward with the Board

With the shift in the political climate, uncertainty continues to grow around the future of an employee's right under Section 7 of the NLRA to use their work email during nonwork time. The Purple Communications decision was split down party lines with 3 Democratic members in the majority and 2 Republican members dissenting. Today, the Board is governed by two Democratic members, two Republican members, and one vacant seat that will likely soon be filled by the Republican administration. John Ring has been nominated to fill the vacant seat. On March 14, 2018, Mr. Ring was approved by the United States Senate's Health, Education, Labor and Pensions Committee by a partisan vote of 12-11. Mr. Ring's nomination will now go to the full United States Senate for a confirmation vote. Depending on the outcome of Mr. Ring's confirmation process, the Board's political tilt could lead to the overturning of its precedent on these employee rights.

However, unless the Board reverses its decision in Purple Communications, employees under Section 7 of the NLRA have the right to use their employer email to conduct protected activities during nonwork time.

Brooks W. Boron is an associate with Muskovitz and Lemmerbrock, where he represents labor unions in both the public and private sector. Brooks graduated from The Ohio State University Moritz College of Law in 2017, during which time he served as the Editor-in-Chief of The Ohio State Journal on Dispute Resolution. Brooks is a member of the Cleveland Employment Inn of Courts and serves on the Saint Ignatius Young Alumni Committee. Brooks has been a CMBA member since this year. Brooks can be reached at (216) 621-2020 or at boron@mllabor.com.
On the heels of their newly modified mission statement rejecting the United States as a nation of immigrants, instead shifting emphasis to "protecting Americans, securing the homeland, and honoring our values," U.S. Citizenship and Immigration Services (USCIS) recently issued a 7-page policy memorandum affecting placement of H-1B workers at third-party worksites.

The memo, which became effective February 22, bolsters the documentary requirements for off-site employment arrangements and represents increased scrutiny on legal, employment-based immigration programs. While many practitioners may see this merely as a pronouncement of an already-implemented form of extreme vetting, there is an aspect of this which some may be overlooking: the concept of speculative H-1B employment.

The H-1B program has historically allowed a petitioner to place an H-1B worker at third-party worksites provided certain requirements are met, such as posting of required notices, documentation of petitioner’s control over the worker while off-site, detailed itineraries, contracts, work orders, etc. between the petitioner and third-party where the H-1B worker is placed.

It may be fair to say that some H-1B petitioning employers and their third-party clients/customers, have gotten lax in adequately documenting these off-site assignments, and USCIS has seized on this in the memo:

H-1B petitions do not establish a worker’s eligibility for H-1B classification if they are based on speculative employment. ... Petitioners who regularly place their workers at third-party worksites often submit uncorroborated statements describing the role the H-1B beneficiary will perform at the third-party worksite. Such statements ... are often insufficient to establish by a preponderance of the evidence that the H-1B beneficiary will actually perform specialty occupation work. ... If the petitioner does not submit corroborating evidence or otherwise demonstrate that there is a specific work assignment for the H-1B beneficiary, USCIS may deny the petition.

A few examples of off-site H-1B petitioners impacted may include those utilizing:

• Resident engineers and other professionals assigned to key customers’ facilities;
• Software and other IT resources assigned to projects at end-user sites;
• Physicians with a given hospital system with privileges at non-related worksites, such as clinics and university research laboratories; and
• Accountants and auditors engaged in projects at client sites.

Under the new USCIS memo, third-party assignments such as these will require detailed evidentiary support for the entire term of the H-1B petition, usually three years, in order to be considered non-speculative. If an employer cannot sufficiently identify and document the duties of the assignment for an entire three-year period absent speculation, it could instead document what it can specify for a shorter period, and then subsequently file amended H-1B petitions for new third-party assignments as the details and documentation of these are developed and become available. However, this also means that what previously may have been accomplished via a single, three-year H-1B petition may become several shorter petitions in succession. This would necessarily multiply the petitioner’s legal and filing fees—already in the thousands of dollars — as well as USCIS caseload. It could also lead to increased expense on the part of third party end-users.

In order to keep petitioners honest, USCIS deploys investigators in the field who pay unannounced visits to the worksites listed in H-1B petitions, who typically interview H-1B workers to make sure they are working in the position indicated in the petition, are taking direction only from the petitioner and not the third-party, are being paid the correct wage, etc. In light of the greater scrutiny alluded to in the new policy memorandum and USCIS’s amended mission, the door may be opening for enforcement actions we have not seen before.

For instance, what if an H-1B worker placed off-site is found to be performing duties other than those specified in the underlying petition? Or is found to be taking direction from the third-party, and not the petitioner? In the former instance, USCIS could issue a Notice of Intent to Revoke the petition, as they have in the past, forcing the termination of the worker. The latter scenario could conceivably trigger enforcement action against the third-party for knowingly “employing” an unauthorized worker.

How the agency will conduct itself in such circumstances going forward is an open
question. The answer hinges on factors such as whether USCIS will place appropriate focus on the employer and end-user, rather than on the foreign national, or whether USCIS will ramp up enforcement or just let the memo stand without any significant change in practice.

In the last year, we have seen sharply increased pressure on the H-1B program in the form of challenges to Level 1 prevailing wages, and an unprecedented 45% issuance rate for Requests for Evidence (administrative challenges to the petition process). So, how does an employer avoid these potential pitfalls? By walking the walk, and not just talking the talk.

Make sure:
• H-1B petitions are fully specific in terms of duties performed for the entire validity period of the petition at all locations;
• Supporting evidence fully complies with the terms of the memo; and
• H-1B workers never deviate from the terms and conditions of the underlying H-1B petition.

Not all employers are able to predict (and thus, document) where and what a given worker may be doing a year or two or three into the future. Accordingly, we could see a marked change in off-site H-1B employment practices. For instance, if we are to assume that petitioners and their third-party clients will limit their H-1B petition validity periods to real, non-speculative projects, we might see a reduction in the overall number of cap-subject H-1B petitions filed each year. If this happens, the H-1B program itself could become a more viable and available option to U.S. employers in general.

For more information or for case specific guidance, please contact Ritter Halliday, LLP (www.ritterhalliday.com).

Brian J. Halliday is a founder and partner with Ritter Halliday LLP. He is a graduate of Ohio University, and earned his Juris Doctor degree from the C|M Law. He has practiced U.S. immigration and nationality law since 2001, having started his career in the field in 1994. He has been a CMBA member since 2004. He can be reached at (216) 896-0855 or www.ritterhalliday.com.
A sk almost any Plaintiff’s employment lawyer what their favorite kind of case is and they will invariably say age discrimination. Why? Everyone gets old and an older employee who loses his or her job after years of faithful service is inherently sympathetic. The framework for the narrative is simple and relatable. Sexual harassment cases, by contrast, are almost always complicated. Not legally complicated, but factually complicated, most often turning on motive, intent, honesty, and credibility. And then add sex. See, it’s complicated.

Although the law is clear that anyone can be a victim of sexual harassment, male or female, and the perpetrator can be the same sex or the opposite sex, by far the most common occurrence involves a male harasser and a female victim. For purposes of this article, therefore, (and ease of pronoun use), we default to a male harasser and female victim, but all of the observations contained in this article are equally applicable to atypical harassment situations.

In order to prevail, a sexual harassment victim must show that she was subjected to unwelcome harassment (sexual advances, sexual language/images, verbal or physical harassment of a sexual nature and requests for sexual favors are common examples), and that the harassment was “sufficiently severe or pervasive” so as to unreasonably interfere with work performance or create an intimidating, hostile or offensive work environment.

In response to allegations of sexual harassment, employers typically rely on one of two defenses: (1) the complained of conduct never happened, or (2) the complained of conduct was not unwelcomed by the plaintiff. The first defense puts the victim’s credibility squarely on trial and the second puts her sexual proclivity at issue. It is not uncommon for the employer to try to build themes around the plaintiff’s conduct outside of work, her manner of dress, past relationships/partners, and appearance. If this sounds like hyperbole, I promise it’s not. I have had a client cross-examined about the height of the heels that she wears on weekends, pictures that she had from vacation of herself in a bikini, and the length of her skirt when she goes out to bars (and that was all in a case where the defense was that the plaintiff had entirely fabricated the allegations). When the defendant is claiming that the harassment was “welcomed” by the plaintiff, it has the potential to expose the plaintiff to far-reaching—and sometimes highly personal—lines of inquiry that are arguably “relevant” because of the inherent credibility issues in such cases. To be a plaintiff in a sexual harassment case can be a punishing and independently injurious pursuit.

And, like so many of us, sexual-harassment victims are imperfect people. The savviest sexual harassers pick their victims with the victim’s vulnerability in mind. The typical sexual harassment case is rarely as simple as we’ve heard about in the news over the last six months. The brazen executive who demands sex in exchange for a promotion or job benefit (quid pro quo sexual harassment) is thankfully an uncommon occurrence. But most sexual harassment cases do involve a demonstration of power and control over someone who is weaker. Weaker in position, someone who is without a voice to speak up, or someone who won’t be believed if they do. Of the sexual harassment victims that present to our office, almost every one has been previously victimized, usually sexually, in some other way in their lifetime. Many times, victims of sexual harassment have their own involved and complex issues around relationships and sex. They may have a troubled background, a criminal record, mental health conditions, or be poor performers. Each imperfection becomes a vulnerability for an attack on a plaintiff’s credibility.

So, historically when a victim of sexual harassment reports that conduct either internally or through formal legal action, most often there has been a huge credibility gap to overcome. Whether it’s with Human Resources, a judge or jury, these claims in my experience, evoke a presumption of skepticism toward the victim. It’s a significant hurdle to overcome especially when the harasser is well-heeled, respected and successful, as they often are.

While we are still assessing the impact of the #MeToo movement, the presumption of credibility appears to be changing. After the parade of allegations against high-profile business, entertainment, and political figures, the public now knows that this conduct actually happens, and people will not immediately dismiss such claims.
as an attempt to garner money or attention. We can see this already with the counterpart hashtag to #MeToo, #BelieveWomen. Harassers and their employers appear to be on much shakier footing should they choose to base their defense on impugning the victim's credibility. While this was once perhaps a reliable page of the playbook, it now could serve to anger a judge or juror and thereby exacerbate the consequences of the defendant's underlying conduct. By encouraging women to share their experiences, the public has now been inundated with countless accounts of sexual misconduct, from both famous and anonymous women. In turn, this increases the likelihood that a single, isolated story will be believed, because sexual harassment is better understood as something that could happen anywhere, at any time, to anyone, and by anyone.

The #MeToo movement has not been without its critics, of course. For example, the New York Times ran an op-ed decrying the prospect that #BelieveWomen would necessarily imply that we should not believe men, given that credibility serves as such a focal point of "he said, she said" sexual harassment claims. It was inevitable that concern for falsely-accused men would emerge, and it is certainly wise to tread carefully in dealing with absolutes. Such criticism of #MeToo, however, fails to fully address the long-standing, and often effective, history of denial as a primary reaction to credible allegations of harassment. That criticism also fails to acknowledge that one of the main reasons that #BelieveWomen has gained steam is that the current rash of high-profile allegations have almost all been substantiated.

To be sure, denials are still issued by some. And we still see (and will probably always see) the evasive, hedging, and essentially non-responsive replies issued by a harasser’s lawyer or public relations representative. But what is noteworthy is that many of the famous subjects of recent harassment complaints have responded to the allegations by essentially admitting that they occurred, while perhaps meekly qualifying that the harasser “remembers it a little differently.” We have then seen apologies, resignations, failed candidacies, and sales of entire companies to address the fallout.

Consistent with so many reports finding that harassment is under-reported, the #MeToo movement has provided a platform for the long-silenced to speak out. This may have served to not only bolster the public’s willingness to believe women but also to dissuade employers from questioning the accuser’s integrity. Those who practice in this area must be aware of the seismic shift in public awareness around these issues, and that while credibility determinations may still be at the heart of every case, the plaintiff no longer starts at a credibility deficit.

How #MeToo affects Ohio law if at all, will also be interesting to watch. Under Title VII, an employee is allowed to pursue claims against the employer only – she cannot bring claims against the individual harasser. The state law counterpart to Title VII, Ohio Revised Code Chapter 4112, provides a more robust resource for harassment victims. Specifically, Ohio Revised Code § 4112.02 permits an employee to bring a claim directly against the individual that committed the harassment, a right that was recognized by the Ohio Supreme Court in 1999 in Genaro v. Central Transport, 84 Ohio St.3d 293. Since that time, individual supervisor liability has been the subject of many bills seeking to eliminate that claim. It will be interesting to see if the #MeToo movement finally quells those attacks on § 4112.02, because in this climate of hyper-awareness of the issue, the ability to hold individual harassers responsible seems to be an unassailable principle.

Ann-Marie Ahern is a Principal, Board Member, and Head of the Employment Law Practice at McCarthy, Lebit, Crystal and Liffman, Co., LPA. She is an OSBA Board Certified Specialist in Labor and Employment Law. She has been a CMBA member since 1998. She can be reached at (216) 696-1422 x244 or ama@mccartheylebit.com.

Jack Moran is a Principal at McCarthy, Lebit and focuses his practice in Employment Law. He is the President of the Cleveland Employment Lawyers Association and an active member of the Cleveland Employment Lawyers Inn of Court. He has been a CMBA member since 2011. He can be reached at (216) 696-1422 or jem@mccartheylebit.com.

Together, Ann-Marie and Jack serve as advocates and advisors on a broad range of employment law issues, including sexual harassment, discrimination, unlawful retaliation, whistleblower matters and career transition negotiations.
**Employment**

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


**Immigration Lawyer** – Required to have at least 3 years experience in litigation, criminal or immigration law; graduated in top 5% of their law school class. Cleveland office of Margaret W. Wong & Assoc. Please send resume to wong@imwong.com.

**Paralegal** – Required to have at least a Bachelor’s degree and 3 years experience. Cleveland office of Margaret W. Wong & Assoc. Please send resume to wong@imwong.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**

**Downtown**

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

**Suburbs – East**

Beachwood – office space. Inside parking. Small office/windows. Reasonable. Some possible average. (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 – 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@sbcglobal.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.


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.

Crocker Park/Westlake area – Deposition, Video-Ready-Conferencing & Meeting Rooms for rent. Hourly, weekly rates available. Secure Network. Reliable WiFi. Easy I-90 access. Contact Aimee at aimee.lennox@msmctech.com or (440) 892-9200 x 111.

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.

Rocky River – 5 individual offices available in signature Rocky River Law Building. First class public space, conference room, and interview office included. Reduced rates for lawyers < 5 years. Contact Debby Milano (440) 356-2828, dm@milanolaw.com.

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, wi-fi and air conditioning, fire pit and patio. Rent for getaway weekend or week. (440) 725-1224.

Vacation Rental – Quaint Vermilion waterfront 2-bedroom cottage. Boat docking may be available. Call Sue (216) 392-4802.
Social media is where reputations are lost in an instant. Put the Hennes Communications specialists on your legal team. Because the Court of Public Opinion is always in session.
CMBA Leadership Academy

Bring Your Leadership Skills Full Circle

Apply Now at CleMetroBar.org/Leadership.

All written application and supporting materials must be submitted no later than 5 p.m. on Friday, June 1, 2018. Interviews will be scheduled thereafter. The 2018–19 Leadership class will be announced on Friday, June 29, 2018.

ACADEMY CALENDAR
• Kickoff: Thursday, September 27, 2018
• Monthly sessions are typically held on Thursdays, with the exception of the Annual Meeting.
• Graduation: 12th Annual Meeting, June 2019

For more information and to apply, visit CleMetroBar.org/Leadership. For questions, contact Rebecca Ruppert McMahon at (216) 696-3525 or rmcmahon@clemetrobar.org.
<table>
<thead>
<tr>
<th>MONDAY</th>
<th>TUESDAY</th>
<th>WEDNESDAY</th>
<th>THURSDAY</th>
<th>FRIDAY</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>14</strong> Professionalism Award Selection Committee Meeting – 8 a.m.</td>
<td><strong>15</strong> PLI – 8:30 a.m.</td>
<td><strong>16</strong> DR Court CLE – 8 a.m.</td>
<td><strong>17</strong> Family Law Section Meeting &amp; CLE</td>
<td><strong>18</strong> Tech Show – 8 a.m.</td>
</tr>
<tr>
<td><strong>21</strong> PLI – 8:30 a.m.</td>
<td><strong>22</strong> Diversity &amp; Inclusion CLE – 8:30 a.m.</td>
<td><strong>23</strong> PLI – 8:30 a.m.</td>
<td><strong>24</strong> Thought Leadership Committee – 8 a.m.</td>
<td><strong>25</strong></td>
</tr>
<tr>
<td><strong>28</strong> Memorial Day – Office Closed</td>
<td><strong>29</strong> PLI – 8:30 a.m.</td>
<td><strong>30</strong> PLI – 8:30 a.m.</td>
<td><strong>31</strong> Federal Court Training Video – 9 a.m.</td>
<td><strong>1</strong> PLI – 8:30 a.m.</td>
</tr>
<tr>
<td><strong>4</strong> CMBF Executive Committee Meeting – 8 a.m.</td>
<td><strong>5</strong> PLI – 8:30 a.m.</td>
<td><strong>6</strong> Land Bank CLE – 9 a.m.</td>
<td><strong>7</strong> YLS Council Meeting</td>
<td><strong>2</strong></td>
</tr>
<tr>
<td><strong>11</strong> PLI – 8:30 a.m.</td>
<td><strong>12</strong> Sexual Harassment CLE – 9 a.m.</td>
<td><strong>13</strong> UPL Committee Meeting</td>
<td><strong>14</strong> Media &amp; The Law CLE – 1 p.m.</td>
<td><strong>3</strong></td>
</tr>
<tr>
<td><strong>18</strong></td>
<td><strong>19</strong> PLI – 8:30 a.m.</td>
<td><strong>20</strong> PLI – 8:30 a.m.</td>
<td><strong>15</strong> Supreme Court CLE Simulcast – 9 a.m.</td>
<td><strong>4</strong></td>
</tr>
<tr>
<td><strong>25</strong> Golf Outing; Westwood Country Club</td>
<td><strong>26</strong> PLI – 8:30 a.m.</td>
<td><strong>27</strong> PLI – 8:30 a.m.</td>
<td><strong>21</strong> PLI – 8:30 a.m.</td>
<td><strong>5</strong> PLI – 8:30 a.m.</td>
</tr>
<tr>
<td><strong>27</strong></td>
<td><strong>28</strong> Thought Leadership Committee Meeting – 8 a.m.</td>
<td><strong>29</strong></td>
<td><strong>22</strong></td>
<td><strong>6</strong> Thought Leadership Committee Meeting – 8 a.m.</td>
</tr>
<tr>
<td><strong>31</strong></td>
<td><strong>23</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

All events held at noon at the CMBA Conference Center unless otherwise noted.
Tailored Risk Management and Insurance Solutions

THE CMBA INSURANCE PROGRAM

In partnership with Oswald, CMBA is proud to offer its members an insurance package customized specifically to the unique needs of law firms. We’ve combined our expertise to bring you access to:

- Exclusive premium discounts for CMBA members
- Broad coverage forms
- Risk management tools & resources

INSURANCE COVERAGES

- Lawyers Professional Liability
- Group / Individual Medical Plans
- Bonding & Surety
- Life Insurance
- Disability Insurance
- Long-Term Care
- Business Owners Coverage
- Management Liability Coverage

The law firm practice at Oswald partners with hundreds of firms to provide comprehensive insurance and risk management solutions. Our experienced team offers services in the areas of coverage placement, analysis and program recommendations, claims analysis and coverage counseling, risk management and exclusive specialty programs including Intellectual Property Risk Preferred (IPRP) and Collection Lawyers’ Insurance Program (CLIP).

Get to know more about this distinctive program and the features that make it the right fit for your law firm.

Contact us today!

Visit us online at
www.clemetrobar.org/insurance
or contact Oswald at 216.658.5202
**New Associations & Promotions**

**Christopher G. Hawley** has joined McDonald Hopkins as an associate in the Business Department. Hawley, who comes to McDonald Hopkins from Brouse McDowell, LPA, has a practice focused on corporate transactions, including mergers and acquisitions, real estate and lending matters.

**Reminger Co., LPA** recently elevated **Arthur W. Brumett II** to shareholder status. Arthur’s practice focuses on advising and defending employers of all sizes.

**Thacker Robinson Zinz LPA** welcomed **Nicholas Kopcho** to its Cleveland office in March. Nick focuses on advocating for policyholders in insurance disputes as well as representing businesses in contractual and consumer disputes in state, federal, and appellate courts.

Bonezzi Switzer Polito & Hupp Co. LPA is pleased to announce that **Jay C. Rice** has recently joined the firm as Of Counsel. Mr. Rice’s practice is primarily devoted to litigation involving insurance coverage disputes. Mr. Rice is an OSBA Certified Specialist in Insurance Coverage Law.

Bonezzi Switzer Polito & Hupp Co. LPA is pleased to announce that **Kathleen A. Stamm** has recently joined the firm as an associate. Ms. Stamm concentrates her practice in the defense of physicians, hospitals, nursing homes and other healthcare professionals in litigation involving claims of professional negligence related to patient care.

**Reminger Co., LPA** is pleased to announce that **David J. Hudak** has joined their Cleveland office.

**Singerman, Mills, Desberg & Kauntz Co., LPA** is pleased to announce that **Michelle R. Reese** has joined the firm as an associate attorney.

**Dinn Hochman & Potter, LLC** is pleased to announce the addition of **Robert McIntyre** to its growing practice.

**Hickman & Lowder Co., LPA** is very pleased to announce the election of attorney **David S. Banas** as a Shareholder. He will also serve as a Director.

**Tucker Ellis LLP** is pleased to welcome **Amy Klimek** as counsel in the firm’s Environmental & Renewable Energy Group. Ms. Klimek has nearly two decades of experience advising and representing clients in environmental and energy matters.

**Reminger Co., LPA** is proud to announce the following attorneys were honored as 2018 Ohio Super Lawyers and Rising Stars. Super Lawyers include **Joseph E. Cavasinni, Adam M. Fried, Martin T. Galvin, Marc W. Groedel, Gregory G. Guice, Daniel Haude, Thomas B. Kilbane, Franklin Malernud, Clifford C. Masch, Rafael McLaughlin, William A. Meadows, Russell J. Meraglio, Jr., Ronald A. Mingus, Richard J. Rymond, Christine Santoni, Michelle J. Sheehan, John B. Stalzer, Brian D. Sullivan, James J. Turek, Stephen E. Walters, and Leon A. Weiss.** Rising Stars include: **Anthony M. Catanzarite, Adam J. Davis, Julian T. Emerson, Timothy Gallagher, Jonathan Krol, Brian C. Lee, Bethanie Ricketts Murray, Brian P. Nally, and Sean T. Needham.** Special distinctions include: **Adam Fried** – Top 100 Ohio, Top 50 Cleveland, **William Meadows** – Top 100 Ohio, Top 50 Cleveland. **Michelle Sheehan** – Top 100 Ohio, Top 50 Female Ohio, Top 50 Cleveland, Top 25 Female Cleveland.

**Announcements**

**Patricia J. Schraff** and **John P. Thomas** have started a new law firm called Schraff Thomas Law, LLC with offices in Willoughby Hills and Strongsville. The Firm practices elder law, estate planning and administration, and probate litigation.

**McDonald Hopkins** is pleased to announce its participation in the Cleveland Indians Community Partners program, the baseball club’s effort to strengthen youth in Greater Cleveland through service initiatives that focus on education, health and fitness.

On April 24, **McDonald Hopkins** hosted a discussion filled with a unique mix of market intelligence with an engaging panel of industry professionals regarding the challenges facing the solar energy market.

**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.
CLEVELAND MARRIOTT DOWNTOWN AT KEY CENTER

Annual Meeting 2010
Rock the Foundation 2009
Rock the Foundation 2012
Golf Outing 2009
Annual Meeting 2008
Greener Way to Work Day 2009

JUN 01, 2018

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