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I have a bone to pick with the United States Supreme Court. Actually, I suppose I have a bone to pick with the Court, the Solicitor General’s Office, the Department of Justice, current and past Presidents, current and past attorneys general, and — oh, the list goes on and on.

But the issue seemed so simple — and non-confrontational — when I initially posed it. In May, I attended the Sixth U.S. Circuit Court of Appeals’ Judicial Conference, of which I am a Life Member. It is a wonderful educational conference, held biennially, in a major city in one of the four states that make up the Sixth Circuit (Tennessee, Kentucky, Ohio and Michigan). Every year, I learn something new. This year, it was held in Detroit.

One of the highlights of the Conference for me is the “report” of our Circuit Justice on the current Supreme Court year.1 I was looking forward to hearing from Justice Elena Kagan. For a law junkie like me, sitting in the same room with a Supreme Court Justice is dazzling; having the opportunity to ask a question of her was breath-taking.

There were about 800 of us at the banquet: federal judicial officers from Magistrate Judges, Bankruptcy Judges and District Judges through Circuit Judges and senior status and retired judges; federal service attorneys; private practice federal court practitioners; law professors; and a few non-lawyer guests. We had a lovely meal and then settled in for a question and answer session between Chief Circuit Judge R. Guy Cole, Jr. and Justice Kagan. Following a lively discussion of current and recent cases (in generalities, of course), Judge Cole opened the floor for questions. This was my chance.

I watched a few others ask their questions and listened intently to Justice Kagan’s answers, and, when the microphone assistant came near me, I held up my hand. I knew what issue I wanted to address, and I believed that Justice Kagan would deliver an answer that would both satisfy and encourage me. I was wrong.

“Justice Kagan, during your five years on the Supreme Court, what have you seen in terms of increasing diversity, as to gender, race and other forms of self-definition, in the attorneys coming before you?”

I anticipated hearing about advances made, programs implemented, enhanced opportunities, and so on. Here is the answer I got (and of necessity, I am paraphrasing, because while I rehearsed my question and remember it vividly, I only heard the answer once).

I haven’t come as far in that regard as we should, said Justice Kagan. Because the Solicitor General’s office argues the majority2 of the cases that come before the Supreme Court, we tend to see the same attorneys over and over again, and most of them are white men. In the cases that don’t involve the Solicitor General’s office, most of those cases are argued by one of a group of attorneys in the D.C. area who have made arguing before the Supreme Court a specialty, so again, we see the same attorneys over and over again, and most of them are white men. I don’t think we want to move away from this professionalized bar, because these attorneys know what issues we care about, and how we like to have them presented. That makes our process more efficient. I would like to see more diversity in the attorneys before us, but I just don’t know how to make that happen.3

Disappointed is one word for my reaction to this answer. Shocked is another. Outraged is a third. Let us not forget that, for the two years before she was appointed to the Supreme Court, Justice Kagan was the Solicitor General — the first woman to hold that post. I do not know what efforts she made in that role to enhance diversity in the Solicitor General’s office.

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I hope they were many and at least partially successful. Today, she says she would like to see more diversity there, and I am glad of that.

What deeply concerns me is the seeming complacency of the answer regarding a “professionalized bar.” It worries me that the attorneys presenting cases before the U.S. Supreme Court are a handful of people, primarily older white men, who appear in that Court over and over again. The insulation this provides to the Court from the views, issues, tactics, style and power of the rest of the litigants and attorneys in the land can only serve to increase the gap between the Court and the majority of the American people, as well as divergent legal thinkers. In separate conversations later with several friends in the federal judiciary who heard Justice Kagan’s answer, each judge affirmed vigorously the necessity of having unfamiliar advocates presenting unanticipated issues in unaccustomed ways, so that judges can learn, evaluate and possibly adopt a new point of view. If the same preacher always talks to the same people, primarily older white men, who appear in that Court over and over again. The insulation this provides to the Court from the views, issues, tactics, style and power of the rest of the litigants and attorneys in the land can only serve to increase the gap between the Court and the majority of the American people, as well as divergent legal thinkers. In separate conversations later with several friends in the federal judiciary who heard Justice Kagan’s answer, each judge affirmed vigorously the necessity of having unfamiliar advocates presenting unanticipated issues in unaccustomed ways, so that judges can learn, evaluate and possibly adopt a new point of view. If the same preacher always talks to the same choir, very few new ideas can be generated.

Further insulating the Justices of the Supreme Court from the rest of the lawyers in the country — not to mention the majority of the American people — is the fact that with one exception, every justice graduated from law school at either Harvard or Yale. Consider the ideological pedigree of each of those law schools, and then consider the breadth of vision likely to emerge from a Court composed almost exclusively of graduates of only those two schools.

There obviously is nothing wrong with Harvard and Yale graduates — indeed, as two of the oldest and most prestigious such institutions in our relatively young country, each has been prominently represented on the Court and in the highest reaches of our profession throughout our history. By the same token, though, it used to be the case that we recognized the excellence of other law schools and their graduates, too.

In terms of broad representation of excellent American law schools, the Court of fifty years ago — in 1965 — was substantially more diverse than today’s Court.

In 1965, Justices of the U.S. Supreme Court were graduates of the law schools at the University of California, Northwestern University, Yale University, Harvard University, New York University, the University of Texas, Columbia University and the University of Alabama. Every one of the Justices was a white man, so there was zero gender or race diversity. The breadth of their educational and ideological diversity cannot be denied.

What has changed? Are Harvard and Yale now the only superior law schools in the country? Surely not. Do the students who attend other law schools lack the ability to rise to this important appointment? Surely not — or at least they used not to — since Sandra Day O’Connor is a graduate of Stanford University Law School; Thurgood Marshall was a graduate of Howard University Law School; and Hugo Black was a graduate of the University of Alabama Law School.

When we limit the decision-makers on issues of Constitutional importance to a handful of persons with essentially identical educational backgrounds, irrespective of other diverse elements of their histories, we constrict the possible outcomes of cases before that body. Likewise, when we limit the advocates before those decision-makers to a single race and gender, the life experiences and intellectual breadth that make up our nation are poorly represented. We permit these limitations at our peril. Ours is a young, diverse, and evolving representative democracy. All of us should have some representation in the arguments presented before and the intellectual makeup of our Supreme Court.

1 Each Judicial Circuit is assigned one Justice of the Supreme Court to handle time-sensitive, one-Justice matters, such as emergency stays and injunctions, in matters from that Circuit pending before the Supreme Court. Because there are more Circuits than there are Justices, many Justices handle two circuits. Justice Elena Kagan is the Circuit Justice for the Sixth and Seventh U.S. Circuit Courts of Appeal.

2 Two-thirds of all Supreme Court cases are argued by attorneys from the Solicitor General’s office, according to the Solicitor General’s website.

3 To the best of my recollection, this is the gist of Justice Kagan’s answer — any of you who were there and remember it differently, please let me know. I do not intend to misrepresent her statement.

4 Justice Ruth Bader Ginsburg graduated from Columbia Law School.

Photo credits: Collection of the Supreme Court of the United States

Anne Owings Ford has over 25 years’ experience in the world of litigation, from her first judicial clerkship to, most recently, her partner status at a national law firm. She has been a CMBA member since 1991. Anne currently is a litigation consultant, and she can be reached at aoford@roadrunner.com.
CMBA Member Q&A

Tressa Trodden
Firm/Company: CMBA
Title: Events and Facility Coordinator
Start Date: September 2008
College: John Carroll University

IF YOU WERE NOT ON CMBA STAFF, WHAT WOULD BE YOUR PROFESSION?
I love being creative! I would do something artistic like graphic design, fashion design, or interior design.

IF YOU COULD GOTO DINNER WITH A FAMOUS PERSON, LIVING OR DEAD, WHO WOULD IT BE AND WHY?
Audrey Hepburn. She had such style and class as an actress, woman, and humanitarian. I would love to hear how the struggles during her childhood shaped her into the legendary icon she is today. Also, my favorite movie is Breakfast at Tiffany’s.

TELL US ABOUT YOUR FAMILY.
I recently got married to my best friend, Michael. I have one older sister and two amazing parents who I admire more and more everyday! I come from a large Italian family and couldn’t be more proud of my heritage! All of our family gatherings are loud, and involve more food than anyone could ever eat in one sitting, but I wouldn’t change it for the world.

WHAT ARE YOUR HOBBIES/CLUBS/ORGANIZATIONS OUTSIDE OF WORK?
My husband and I really enjoy going down to the Cuyahoga Valley National Park on the weekends to walk the trails and grab lunch on an outside patio. I also enjoy reading, traveling to new places, and spending time with friends.

Jennifer Stueber
Firm/Company: Ohio Turnpike and Infrastructure Commission
Title: General Counsel
CMBA Join Date: 1996
Undergrad: The Ohio State University
Law School: Cleveland-Marshall College of Law

IF YOU WERE NOT PRACTICING LAW, WHAT WOULD YOUR PROFESSION BE?
Probably a party planner.

IF YOU HAD ONE SUPER POWER, WHAT WOULD IT BE AND WHY?
Stretch (like Elastigirl in The Incredibles movie) so that I can try to be everywhere to get all of the things done that I want to do.

WHAT ADVICE WOULD YOU GIVE A LAW STUDENT?
Stay focused on your long-term goals.

WHY DID YOU RENEW YOUR CMBA MEMBERSHIP?
To take advantage of CMBA’s great CLE programming.

WHAT ARE YOUR HOBBIES/CLUBS/ORGANIZATIONS OUTSIDE OF WORK?
As president of Project Learn (an adult literacy program), I’m working with the Board on a strategic plan to bring programing to more students. When I’m not at the Ohio Turnpike or working on adult literacy, I spend time with my boys who are both involved in various sports, but mostly hockey.

Adrian D. Thompson
Firm/Company: Taft Stettinius & Hollister LLP
Title: Partner / Chief Diversity Officer
CMBA Join Date: 1991
Undergrad: Bowling Green State University
Law School: The Ohio State University College of Law

IF YOU WERE NOT PRACTICING LAW, WHAT WOULD YOUR PROFESSION BE?
Probably would have followed my father’s footsteps and worked on the railroad.

MOST MEMORABLE CMBA MOMENT?
Working with Hugh McKay and many others on the creation and implementation of The 3Rs.

WHAT ADVICE WOULD YOU GIVE TO A LAW STUDENT?
Take advantage of a new lawyer mentor program. Hone your written and oral communication skills. Also, our communities desperately need you and are relying on you to use the abilities that you’ve demonstrated over the last three years to make your mark on the world, by serving your communities, by bettering our legal community, and thereby enriching the lives of everyone that you touch.

TELL US ABOUT YOUR FIRST EVER JOB?
During the summers of my 8th grade and 9th grade years, I worked at the high school of my hometown as a custodial helper. Each work day, the assistant custodian at the building, Mr. David Tanner, would unlock the library doors and send me there to read a book that he had selected specifically for me. The first book that he selected was the Autobiography of Malcolm X. The last was The Count of Monte Cristo.

WHAT WOULD REALLY SURPRISE PEOPLE ABOUT YOU?
I am from Willard, Ohio and am an avid motorcycle rider.
MENTAL HEALTH & WELLNESS COMMITTEE

Co-Chairs
Cathleen M. Bolek
Bolek Besser Glesius, LLC
cbolek@bolekbesser.com

Robert M. Wolff
Littler Mendelson, PC.
rwolf@littler.com

Staff Liaison
Carrie Cravener
ccravener@clemetrobar.org

Goals
The goals of our committee are to promote mental health and wellness among our members; educate lawyers and law firm administrators on the warning signs of mental illness; provide better understanding of treatment success rates to reduce the stigma associated with a diagnosis of mental illness; encourage attorneys experiencing symptoms of mental illness to seek early, appropriate treatment; disseminate information regarding the resources available to attorneys in need; and educate the bench and bar regarding the rights and needs of those with mental illness.

What Can Members Expect?
Our Committee members are knowledgeable, interesting and supportive. They are attorneys from all areas of practice and background. They are judges, partners, associates and law clerks. Some, but not all, have been impacted by their own or a colleague or loved one’s mental illness. Our members are learning about the prevalence and symptoms of mental illness, how to best help friends, colleagues and family members who have mental illness, ethical pitfalls associated with lawyer mental illness, associated employment issues, and ways to reduce work stress and achieve better work/life balance.

Upcoming Events/Activity
The Committee has made significant contacts in the local health care community. Our seminars include counselors and doctors who offer stress management techniques as well as insights. In the upcoming year, we plan to host events focused on meditation and other stress relief methods, as well as more traditional seminars.

Recent Events
Within the last 10 months, in addition to our regular meetings:

- We gave presentations at local law schools on the issue of depression, particularly as it affects law students and may impact their bar application.
- We spearheaded efforts to lobby the Bar Committee on Merit and Fitness regarding illegal questions appearing on the bar application concerning an applicant’s history of mental illness.
- We participated in the Women in Law presentation on work/life balance.
- We gave a CLE on Anxiety and Depression in the Legal Profession, with Judges and mental health providers participating.
- We held committee meetings with licensed therapists to help us better provide peer support for colleagues suffering mental illness, and have begun the process of establishing a peer-support group with the purpose of helping affected attorneys understand that they are not alone and to guide them to appropriate professional help.

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

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

BANKRUPTCY & COMMERCIAL LAW SECTION

Beth Ann Schenz, Chair
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bethann.schenz@huntington.com

Jeremy M. Campana, Vice Chair
Thompson Hine LLP
jeremy.campana@thompsonhine.com

The Bankruptcy and Commercial Law Section has long served its diverse membership by hosting timely and innovative CLE programs and luncheons, which promote education and debate about the latest bankruptcy and commercial issues, legislation and case-law. Our William J. O’Neill Great Lakes Regional Bankruptcy Institute is one of the most respected bankruptcy programs in the Midwest, attracting premier national speakers, judges and our best local practitioners.

CRIMINAL LAW SECTION

Paul M. Shipp, Chair
Weston Hurd LLP
pshipp@westonhurd.com

Dominic J. Coletta, Vice Chair
Synenberg, Coletta & Moran, LLC
dcoletta@synenberg.com

The purpose of this Section is to promote study and research in the field of criminal law, to disseminate by lecture, seminars and publications the knowledge of skilled practitioners and experts in the area of criminal law, to provide a forum for the exchange of ideas among prosecutors, criminal defense attorneys, members of the judiciary, and other interested persons regarding criminal practice, to adopt positions on issues of public concern in the field of criminal law and to promote the proper administration of criminal justice by making recommendations to relevant authorities concerning alterations, innovations and improvements. The section usually meets quarterly and publishes a newsletter at least twice per year.
Remembering Our Friend, Congressman Louis Stokes

On a snowy, miserable day this past February, a man walked into the bar association, and wherever he walked, with whomever he spoke, a lightness followed. It sounds like the start to a corny novel. It isn’t. The man was Congressman Louis Stokes. I happened to see him just as he walked into our lobby. My brain attempted to reconcile his unexpected presence while his signature smile spread across his face. He stretched out his hand and offered kind words of greeting. As we slowly walked and talked our way to the coatroom, a small crowd of CMBA staff appeared almost instantaneously, eager for the chance to offer their own words of greeting. One by one, Congressman Stokes took the time to say hello to every staff member who came to greet him, recalling more than a few names, inquiring as to family members, asking about existing and new projects, and offering genuine praise for their dedication to the community.

Over the span of sixty years — he first joined our predecessor organizations, the Cleveland and Cuyahoga County Bar Associations, just after passing the bar in 1953 — Congressman Stokes became a permanent member of our bar association family. In so many ways, too many to recount here, he was an integral part of and inspiration for our engagement with our community, our schools and our profession. He was an enthusiastic supporter of law-related education programs created for the benefit of both students and the general public. In particular, he applauded CMBA efforts to partner with others in the community — from the Cleveland Metro-
politan School District, to the Legal Aid Society of Cleveland, The City Club of Cleveland, and Cleveland-Marshall College of Law. Fundamentally he believed in collaboration. Given his connections to so many of Cleveland’s institutions and organizations, as well as his determination to serve his community, getting big things done was always possible with Louis Stokes.

In 2006, the CMBA launched the 3Rs – Rights, Responsibilities & Realities — a program designed to foster personal connections between volunteers from the legal community and high school students in Cleveland and East Cleveland through the use of a real-world curriculum focused on the U.S. Constitution and career counseling. A fierce advocate for the power of education, Congressman Stokes stood front and center as a driver of the program some said would never succeed. During the inaugural rally in Public Square, he remarked with great emotion: “I’ve stood on podiums on this Public Square for all kinds of causes. I have stood on podiums on Public Square here with candidates for the presidency of the United States. I have stood here with presidents of the United States. I have stood here with civil rights leaders for civil rights. I have stood here with women fighting for women’s rights. I’ve stood here for all kinds of causes. This is the first day in my career I’ve been asked to stand on a podium on Public Square on behalf of students in the Cleveland public system. First time. Thank you. First time. And it makes me so proud…”

Now celebrating its 10th year in the Cleveland and East Cleveland Public Schools, the 3Rs program has reached nearly 30,000 high school students with the help of nearly 2000 CMBA volunteers.

Over the past decade, Congressman Stokes’ commitment to the 3Rs never waned. He challenged students to be diligent in pursuing their education, as he and his brother Carl had done, so that they might become better educated citizens who could step up as the next generation of civic leaders. He often repeated to CMSD students, “If Carl and I could do it, so can you.”

When we created a new college-level diversity initiative in 2012 to bridge the law-related education pipeline from our 3Rs high school program to our Minority Clerkship Program for law students, Congressman Stokes again served as our inspiration. The Louis Stokes Scholars Program provides graduates of the Cleveland and East Cleveland schools who are enrolled in college and have an interest in pursuing law-related career with paid summer internships at Cleveland law firms, courts and legal nonprofits. Congressman Stokes took great pride in this program, which included 17 outstanding students this past summer. He often asked his friend and frequent co-conspirator Mary Groth, CMBA Director of Development and Community Programs, how “his students” were doing in the program, as well as in their college studies and personal lives. Every student’s success mattered to Congressman Stokes. As Mary shared, “He was delighted to learn that our first Stokes Scholar alumni, Brandon Brown, enrolled at Cleveland-Marshall College of Law and received the Louis Stokes Scholarship from the law school. He also encouraged his grandson, Brett Hammond, to serve as a mentor in the Stokes Scholars Program this summer. He loved hearing about the many positive contributions Brett made to the program.”

With Congressman Stokes’ passing at the age of 90 last month, we lost a champion of equality and access to justice for all. We also lost a consummate gentleman and a friend. Fortunately, his legacy lives on — in his family, in our Stokes Scholars, in the legions of 3Rs volunteers who invest so much Cleveland’s youth and in the irrepressible spirit that can still be felt in the halls of the CMBA.

Rebecca Ruppert McMahon is the Executive Director of the CMBA and the CMBF. She has been a CMBA member since 1995. She can be reached at (216) 696-3525 or rmcmahon@clemetrobar.org.
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Cleveland Metropolitan Bar Association, 2015 Legal Directory, PO Box 931852, Cleveland, Ohio 44193 or fax to: (216) 696-2413
Open to the public, this event benefits the CMBF which funds “Lawyers Giving Back” charitable community outreach programs, including The 3Rs, helping students in the Cleveland and East Cleveland City Schools.

For more information, contact: Hermes at (216) 623-9933 or HermesCleveland.com, or contact the Cleveland Metropolitan Bar Foundation at (216) 696-3525 or CleMetroBar.org.

**Location**  
The Galleria at Erieview, 1301 E. 9th Street, Cleveland, Ohio 44114 (downtown)

**Time**  
Race Day Registration: 7:30 a.m.  
All events begin: 9 a.m.  
Packet pick-up Friday, October 30 from 4 – 6 p.m. at the Galleria

All participants registered before October 16 will receive a long-sleeved Halloween Run shirt. Participants registered on or after October 16 will receive a shirt based on availability.

**Awards presented**
- Top female and male runners overall (Chip Timed 5K and 5-Mile Runs)
- Top three female & male runners in the following age groups: 10 & under, 11-14, 15-19, 20-24, 25-29, 30-34, 35-39, 40-44, 45-49, 50-54, 55-59, 60-64, 65-69 and 70+
- Team Awards – Top teams in these categories: firm/company, law school, college and high school (male, female, mixed)  
  *Teams can compete in the 5K or 5-Mile run events*
- Best Costume – children, adult, families, couples and teams (Costumes encouraged!)
- Top Lawyer, Top Judge, Top Paralegal/Legal Assistant, and Law Student (female and male)

**ENTRY FORM**

Name: ____________________________________________  
Address: ____________________________________________  
City/State/Zip: ________________________________________  
Phone: ( ) __________________________ E-mail: __________________________

____ Age on Race Day  
Date of Birth  ____ / ____ / _____  
☐ Male  ☐ Female

☐ Individual Entry ($20) before October 16. October 16 and after ($25).

☐ Family Entry ($50) Families must mail in registrations by October 16.  
Rate not available for online registration.  
Families must mail all four entry forms in one check.  
(One entry form for each family member. Family fee includes 4 shirts.)

☐ Team Entry ($90) Teams must register by October 16. (Four-person teams)  
Each team must mail all four entry forms in one envelope with check.

Team Name and Category ____________________________________________

Award Category: ☐ Lawyer  ☐ Judge  ☐ Paralegal/Legal Assistant  ☐ Law Student

Event: ☐ 5-Mile Run  ☐ 5K Run  ☐ 5K Walk  ☐ 1-Mile Walk/Fun Run

Shirt size: ☐ youth small  ☐ youth medium  ☐ youth large  ☐ adult small
☐ adult medium  ☐ adult large  ☐ adult XL  ☐ adult XXL

☐ I cannot participate, but I have enclosed a tax-deductible donation to the Cleveland Metropolitan Bar Foundation in the amount of $__________  
Total Amount Enclosed $__________

In consideration of your accepting this entry, I hereby for me, my heirs, executors and administrators, waive and release any and all rights and claims for damages I may have against the Cleveland Metropolitan Bar Association, Cleveland Metropolitan Bar Foundation, Hermes Sports and Events, all event chairs, sponsors and co-sponsors, their representatives, successors and assigns for any and all injuries suffered by me in said event or in transit to and from said event. I further attest that I am physically fit and have sufficiently prepared for this event. I will additionally permit the use of my name and/or pictures in Cleveland Metropolitan Bar Association and/or Foundation publications.

signature of participant  date  signature of parent or guardian if participant is under 18 years  date
Saturday, October 31st
The Galleria at Erieview
Featuring chip-timed 5K and 5-mile races, 1-mile fun run and 5K walk, along with activities for the whole family. Costumes are encouraged and rewarded!

Proceeds help fund law-related education, tutoring and mentoring in the Cleveland schools and improving access to justice.

Contact the Cleveland Metropolitan Bar Foundation at CleMetroBar.org/Foundation or (216) 696-3525.

Artwork by Alexandra Meluch, Graphic Design Intern
The Volunteer Lawyers for the Arts Committee of the CMBA is always looking for more volunteers, and we would like to invite you to join us! Our committee does important and rewarding work, and offers the chance to gain enjoyable and practical experience with new clients and new areas of law. We meet at the CMBA offices, usually on the second Thursday of each month at noon. We will be holding a special meeting this month on September 24 to meet and welcome new recruits. Stop by for a light lunch and to learn what the VLA is all about!

Cleveland’s VLA has been nationally recognized; only a handful of cities boast programs like ours. Over the past year alone, we have connected 15 applicants to the help they need, most often by providing direct pro bono representation and sometimes by directing them to outside resources suited to their needs. We have two primary functions: handling requests for pro bono assistance, and presenting educational events for lawyers and artists on topics of mutual interest.

The VLAs pro bono opportunities for lawyers are interesting and varied. We hear from artists and arts organizations who need advice on many areas of law: our requests have included such diverse practice areas as corporate formation and dissolution, contract drafting and review, nonprofit governance, protection and licensing of intellectual property, taxation and exemption, real property, and litigation. VLA volunteers often find this work very rewarding, and from time to time, clients have engaged their VLA counsel beyond their initial pro bono relationship. If the client's needs are unusual or involve more than one practice area, VLA volunteers will team up to combine expertise, or learn something new from a colleague.

VLA members also present a variety of clinics, seminars, and other educational programs for the Greater Cleveland community. For lawyers, the VLA presents one or two CLE-eligible seminars each year to help train volunteers in meeting the legal needs of artists and arts organizations, ranging from nonprofit tax exemption to obtaining alcohol permits for events, or the copyright implications of jointly-authored works.

For artists and the general public, VLA volunteers have spoken to many groups on various topics of interest and importance; offering numerous speaking opportunities for lawyers who support public education. We have presented programs in conjunction with Cleveland State University, The Museum of Contemporary Art Cleveland, SPACES Gallery, Zygote Press, Cleveland Public Theatre, The Legal Aid Society of Greater Cleveland, and the CMBA’s Reach Out for Nonprofits program. Just in the past year, VLA volunteers have presented to Community Partnership for Arts and Culture fellowship applicants, staff and docents at the Canton Museum of Art, and working photographers at the Cleveland Print Room.

Outside the core work of our committee, the VLA also sponsors social activities: our volunteers have enjoyed summer concerts at the Bop Stop and Lakewood Park, behind-the-scenes tours at Playhouse Square, the Progressive Art Collection, the Rock and Roll Hall of Fame and Museum, and the Intermuseum Conservation Association, and also attended musical and theater performances all around Greater Cleveland.

Join Us as We Advocate For a Strong and Vibrant Arts Community!

**VOLUNTEER LAWYERS FOR THE ARTS COMMITTEE**

* Jaclyn Matayoshi Vary (VLA Chair) of Schneider, Smeltz, Ranney & LaFond L.L.L.P. can be reached at (216) 696-4200 or jvary@ssrl.com. At the Walnut Hill School for the Arts in Mass., Jackie majored in ballet and continued to dance ballet, swing, and hip-hop while at Columbia University prior to entering the legal field. Jackie loves attending Cleveland Orchestra concerts at Blossom, where she can dance at the back of the lawn with her husband and three children. She enjoys participating in adult ballet, yoga, Pilates and Ballroom classes.

* George Carr (VLA Vice Chair) of Janik L.L.P. can be reached at (440) 838-7600 or georgecarr@gmail.com. Before his legal career, George Carr earned a Bachelor of Music from The Ohio State University in jazz studies and orchestral performance, and toured Europe under the baton of Robert Shaw. He continues to play trombone, in a wide variety of jazz and classical music ensembles including the Cleveland Jazz Orchestra, Ernie Krivda, Paul Ferguson, and The No-Name Band.

**MEET THE VLA LEADERSHIP!**
Thanks, VLA!
A Client’s Perspective

Last year the Cleveland Institute of Music’s Alumni Association (now dissolved) sought help from the Volunteer Lawyers for the Arts Committee. Liz Huff and Char Rapoport Nance describe their experience with the VLA, along with volunteer attorney Steve Day.

**Liz Huff**
During my term as President of the Cleveland Institute of Music Alumni Association (CIMAA), we realized that we needed legal assistance in dissolving the organization as a separate 501(c)(3) organization; the Association simply didn’t have the resources to maintain that status... We needed legal assistance and our budget really didn’t allow for hiring a lawyer. We decided to call the VLA because I know VLA people are well-versed in the kind of help we would need and both acquainted with and interested in supporting the arts community.

Our experience with the VLA through our volunteer attorney, Steve Day, was fantastic! I was pleased to find that Steve had done other work with small music-oriented nonprofits, and that he very much understood the issues we were facing. He was helpful, calm, and encouraging, and went above and beyond to help us make the smartest decisions we could for the organization. It was a perfect fit and solution!

**Char Rapoport Nance**
Liz knew about the VLA and made the contact, and I would just say “WOW!” Steve made time for us, listened to the peculiarities of our problem, and worked with us through the solution. Believe me, it was not a straight road. We had many twists and turns as we tried to do everything according to the letter of the law. Steve was there for us at every turn, and he always kept a smile on his face as we worked through what seemed to be never-ending problems. He was wonderful. And we can feel secure that we accomplished the dissolution with every “T” crossed and every “I” dotted. It was done correctly — no cutting corners.

**Steve Day**
As an attorney at Calfee, Halter & Griswold, LLP, my practice focuses mostly on tax and securities issues related to compensation for employees of public, private and nonprofit companies. I also advise non profit organizations, primarily arts organizations, on general governance and operational issues, which is a large part of the pro bono services I provide to clients through the VLA.

I started volunteering for the VLA during my second year out of law school. I knew I wanted to be involved with the music/arts scene in Cleveland and the VLA presented a great opportunity. Prior to law school, I worked in the music industry for Sony Music — until Napster came out. I’ve played various musical instruments throughout my life, but haven’t given up my day job.

Because of my tax background, much of my work with the VLA involves helping tax-exempt organizations with formation issues and applying for tax-exempt status with the IRS. However, the CIMAA project was unique, because they were looking to dissolve an existing tax-exempt organization to streamline the Cleveland Institute of Music’s alumni relations program. CIMAA contacted the VLA, knowing that dissolving a nonprofit can have some tricky issues. We worked through issues like holding a special meeting for members to vote on the dissolution (they have thousands of members) and making sure the organization’s money went to an appropriate organization to further CIMAA’s charitable purpose. It was a great experience working with one of Cleveland’s premier arts institutions and meeting several great people involved with the program.

I also like doing any part to strengthen the so-called “creative class” in Cleveland, which I believe is vital for a city to attract and retain the younger generation that is going to drive our economy for the next 10–20 years. Organizations like the VLA make it a little easier for artists and other creative types to live and work here. In just the ten years that I’ve lived in Cleveland, I’ve seen the city grow from an essentially abandoned downtown to a growing, exciting place to live and work. The creative artists in Cleveland are a vital part of that — ranging from the trendy new restaurants up to the tremendous renovation of the Playhouse Square district.

I think anybody who is interested in seeing Cleveland become a more attractive place to live and work should get involved.

**ABOUT THE CONTRIBUTORS**
After her time as President of the (now-dissolved) Cleveland Institute of Music Alumni Association, **Liz Huff** continues to teach Distance Learning classes at CIM. By day, Liz is Director of Annual Giving + Alumni Relations at the Cleveland Institute of Art. **Char Rapoport Nance** works as a development officer for CIM, one of seven independent conservatories in the U.S., working primarily with alumni. **Steven W. Day’s** practice at Calfee, Halter & Griswold, LLP focuses on tax and securities issues, as well as governance and operational advice for nonprofits. Steve can be reached at (216) 622-8458 or sday@calfee.com.

For more information about the VLA and how you can get involved, please visit CleMetroBar.org/VLA or contact Jessica Paine at the CMBA at jpaine@clemetrobar.org or (216) 696-3525.

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**Volunteer Lawyers for the Arts:**

**Special Luncheon For CMBA Members**

Thursday, September 24th
Noon – 1 p.m.
CMBA Conference Center

Join the VLA for a light lunch during their September meeting to learn more about the Committee and upcoming opportunities to get involved! Please RSVP by September 22 to jpaine@clemetrobar.org.
Hugh E. McKay

Rock On, Mary!
Mary Groth Is a Jewel in Our Crown

It was a rainy, cold October Saturday morning at 6:30 a.m. many years ago, and Mary Groth had bustled her shock absorbers by overloading her car with bananas, drinks and other supplies for the first Bench-Bar Halloween Run. Undaunted, but muttering a bit, she unloaded her car and made order out of the chaos of that first Halloween Run. Thanks to Mary’s fortitude, that first Halloween Run was enough of a success to survive and ultimately thrive (mark your calendars for October 31 and come on out to run, walk, get your face painted or just eat bananas and cheer).

This vignette of a (long) day in the life of CMBF/CMBA Director of Programs and Development, Mary Groth, is illuminating and typical. Mary similarly went the extra mile over many long days to make sure Rock the Foundation got off the ground and became a great success annually. The examples are nearly endless. Mary’s dedication above and beyond the call of duty for the good of the CMBF and CMBA has been a North Star of our Bar for decades.

Beyond her remarkable efforts making our events successful, Mary’s tireless commitment to the programs funded by those events have helped assure that the mission of the CMBF — “Lawyers Giving Back” — is realized. Mary should be very proud of this award, and we should be proud of her, as she is recognized for her role in so many of the programs; the launch of the comprehensive law-related education programs making a difference in the community. The CMBA has earned the reputation as a leader among bar associations in creating and sustaining outstanding law-related education programs and many other bar associations look to us for inspiration and assistance in developing similar programs. Mary has been essential to our success.

Mary has played a key role in the bar association’s longstanding, evolving partnership with the Cleveland public schools and Shaw High School, dating back to the 1980s and the popular “Adopt A Class” program and the Young Lawyers Section annual Law Day school visitation programs; the launch of the comprehensive Education Initiative including the Cleveland Mock Trial in the 1990s and the implementation and expansion of The 3Rs – Rights, Responsibilities, Realities and Louis Stokes Scholars Program. Mary has a long and effective history with the OCLRE’s Ohio Mock Trial Competition, as well. She has been involved as a staff liaison or volunteer in each of the program’s years in the Cuyahoga District and Regional competitions since its inception in the 1980s.

I asked Mary to reflect on her work for the CMBA and CMBF. Her thoughts are inspiring and remind us all of why we can be so proud of our Bar, and our support of it:

“In so many ways, I consider my position at the CMBA as the very best job a person could have. As a Cleveland native and lawyer, I am committed to making this community the best place to live and work. I am passionate about law-related education and the contributions that Cleveland lawyers are making every day to promote citizenship education, to increase opportunities through diversity and inclusion programs, and to make justice more accessible to all. I have had the great fortune to work with so many outstanding and visionary volunteer leaders at the bar association who have given back so much to this community by sharing their wisdom, experience, strength, talent and treasure to create programs that continue to matter and make a difference. It is a joy to work with an army of energetic and generous volunteer lawyers, judges and law students who contribute so much through their leadership and community service in our many programs. Cleveland lawyers demonstrate each day that they can be counted on to give back through volunteer service and financial contributions.

I also have the pleasure of working with our many community partners who contribute so much to our programs —
I respect and treasure my colleagues at the Legal Aid Society of Cleveland, the Cleveland Metropolitan School District, the courts and our law schools, who help us provide meaningful opportunities for lawyers to give back. I have been blessed to work with the very best staff members at the CMBA over the years whose commitment to community, teamwork and excellence is reflected in our successful programs. I offer special shout outs to my current teammates Becky McMahon, Jessica Paine and Kris Wisnieski, and to former colleagues, Dave Watson, Alan Skerl and Jane Flaherty.

It is such a great experience to be able to see the best that lawyers can be on a daily basis and to witness the impact their efforts are making on the lives of so many. I also get to enjoy the opportunity to volunteer in our programs, currently in the classroom as a 3Rs Team Captain and as a Louis Stokes Scholars mentor. I count our Louis Stokes Scholars among my inner circle and words cannot describe how much they encourage and inspire me. We met each of them in tenth grade in The 3Rs program and through the CMBA’s diversity pipeline programs, we are helping them pursue their dreams of becoming Cleveland lawyers, too.”

Mary Groth is a jewel in our Bar. She has been a key to the success of the CMBA’s programs, and has had much to do with the dramatic growth of the CBMF’s endowment and events so supporters like you know that you are supporting impactful programs that really make a difference for our Bar and our community. Thank you, Mary!

CMBF President Hugh McKay grew up in East Cleveland, attended Brown University (BA ‘78) and the University of Pennsylvania (JD ’81). He is the former President of the CMBA, creator of The 3Rs program, and is Partner-in-Charge of the Cleveland office of Porter Wright where he practices complex commercial litigation. He has been a CMBA member since 1982. He can be reached at (216) 443-2580 or hmckay@porterwright.com.

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(L-R) Roger Synenberg, Nadoen Hayden, Clare Moran, Dominic Coletta
The April 2015 Proposed Amendments to the Federal Sentencing Guidelines

BY DARRELL A. CLAY

On April 30, 2015, the United States Sentencing Commission adopted a series of proposed amendments to the federal Sentencing Guidelines. Among the most significant recommendations were those related to economic offenses, which should result in shorter sentences for most offenders. Another significant change was made to the guideline for a mitigating role in the offense. This article discusses those changes.

For those unfamiliar with the Sentencing Guidelines, each federal crime has a corresponding guideline establishing a Base Offense Level. Various upward and downward adjustments (called "enhancements") are applied based on the specific facts and circumstances of the offense to determine the Final Offense Level. The recommended sentence derives from a table that correlates the Final Offense Level with the defendant's Criminal History Category.

Inflationary Adjustments To Economic Loss Enhancements

For crimes resulting in a monetary loss to an identifiable victim, the defendant's sentence is enhanced based on the greater of the actual or intended amount of loss, according to a table in U.S.S.G. § 2B1.1. This guideline applies to nearly a hundred different offenses — 12.1% of all federal offenders sentenced in 2014 — so the net effect of the proposed amendments should be pervasive.

The loss table in § 2B1.1 was last updated in 2001, and the amendments note that $1.00 in 2001 is worth $1.34 in 2014. Accordingly, the figures in the loss table have been increased by amounts ranging from 125% to 150%, based on the Consumer Price Index.

Among the most significant changes are that no enhancement is required for losses of $6,500 or less (a change also made to multiple other guidelines); a +12 level enhancement now requires a $250,000 loss, an increase of $50,000; and a +18 level enhancement is not triggered until $3.5 million, up from $2.5 million. The maximum loss enhancement of +30 levels, formerly triggered at $400 million, now is not triggered until $550 million.

Similar inflationary adjustments were made to the loss tables for burglary (§ 2B2.1) and robbery (§ 2B3.1) offenses, with increases of between 188% and 200%. Changes were also adopted for the loss tables in § 2R1.1 applicable to antitrust offenses (adjustments of 100% to 125%) and § 2T4.1 applicable to tax offenses (adjustments of 125% to 150%).

The Department of Justice opposed any inflationary-related adjustments to the loss tables. In written comments to the Commission, the Department argued that inflationary-related adjustments would lead to "unwarranted" reductions in sentences for many offenders. See U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 16, 2015 (March 9, 2015) at p. 12 (available at http://tinyurl.com/q2n9cj6). The Department asserted that "[l]essening penalties for economic crime would be contrary to the overwhelming societal consensus that exists around these offenses." Id. at 13.

Obviously, the Commission was not persuaded by the Department's arguments. In fact, during the vote adopting the amendments, the Commission's Chair, Chief Judge Patti B. Saris from the District of Massachusetts, cited the amendments as a "key example of the Commission's good government focus to ensure the Guidelines and federal sentencing work well." See U.S. Sentencing Commission, Public Meeting – April 9, 2015 (available at http://tinyurl.com/pyxp56g).

The Commission also proposed adjustments to the tables for recommended fines for both individuals (§ 5E1.2) and corporations (§ 8C2.4). Individual fines increased between 167% to 200%, while corporate fines increased between 150% to 207%. The amendments specifically provide that these adjustments are prospective only; thus, for any offense committed prior to November 1, 2015, the sentencing court should use the recommended fines from the pre-amendment tables. This cautionary language was necessary to avoid ex post facto concerns if the increased fines applied to offenses occurring before the amendments took effect.

Other Changes To Economic Crime Guidelines

The Commission has proposed another series of amendments to § 2B1.1 that are likely to impact sentences for many offenders.

A +2 level adjustment will now apply to offenses that result in substantial financial hardship to one of more victims. "Substantial financial hardship" includes becoming insolvent; filing for bankruptcy; losing retirement, education, savings, or investment accounts; making substantial changes to employment (e.g., postponing retirement) or living arrangements (e.g., moving to a less expensive residence); and substantial harm to one's ability to obtain credit. This list is explicitly noted to be non-exclusive.

The amendments propose to eliminate upward adjustments that formerly applied if the offense involved more than 50 victims (+4 levels) or more than 250 victims (+6 levels), or if it "substantially endangered the solvency or financial security of 100 or more victims" (+4 levels). However, under the amendments, if the offense results in substantial financial hardship to 5 or more victims, a +4 level enhancement is triggered, and if substantial financial hardship is caused to 25 or more victims, a +6 level enhancement applies.

In the commentary to § 2B1.1, the Commission has amended the meaning of "intended loss." Formerly, intended loss included "pecuniary harm that was intended to result from the offense." That language now reads "pecuniary harm the defendant purposely sought to inflict." This change is intended to resolve disagreement over how to construe the former language. According to the Commission, the new language reinforces that "intended loss is an important factor in economic crime offenses, but also recognizes
that sentencing enhancements predicated on intended loss, rather than losses that have actually accrued, should focus more specifically on the defendant's culpability."

Application of the +2 level enhancement under § 2B1.1(b)(10)(C) for use of a sophisticated means has been narrowed. Now, this adjustment will apply only if “the defendant intentionally engaged in or caused the conduct constituting sophisticated means.” In so doing, the Commission intends for the focus to be on the scope of the individual's personal conduct, rather than the nature of the offense itself. This could be particularly helpful to minor participants in conspiracies that otherwise employ sophisticated means.

Mitigating Role in the Offense
Pursuant to § 3B1.1 and § 3B1.2, a defendant's role in the offense can result in an upward or downward adjustment of the Total Offense Level, depending on whether the role was aggravating or mitigating. The Commission has proposed amendments to the downward adjustment for a mitigating role that it believes will result in more defendants receiving this adjustment.

The pertinent changes appear not in the text of § 3B1.2 itself, but rather in the commentary of Application Note 3(C), which instructs sentencing courts to apply a fact-based determination in deciding whether the mitigating adjustment should be -4 levels (a “minimal” role), -2 levels (a “minor” role), or -3 levels (roles falling between minor and minimal). Specifically, the Commission has added text setting forth a non-exclusive list of factors to examine, including: the defendant's understanding of the scope and structure of the crime; the degree of the defendant's participation in planning or organizing the crime; the extent to which the defendant exercised or influenced decision-making authority; the nature and extent of the defendant's participation in the offense itself; and the degree to which the defendant stood to benefit from the unlawful activity.

Significantly, Application Note 3(C) advises sentencing courts that merely because “a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in this criminal activity.” This language was added in specific response to cases that concluded a defendant's indispensable role was incompatible with a mitigating role adjustment. See, e.g., United States v. Skinner, 690 F.3d 772, 873-84 (6th Cir. 2012) (holding that a “defendant who
plays a lesser role in a criminal scheme may nonetheless fail to qualify as a minor participant if his role was indispensable or critical to the success of the scheme”).

Conclusion
A complete copy of the amendments, which stretch approximately 70 pages and contain changes to several other guidelines, is available at http://tinyurl.com/o7chnay. Barring contrary action by Congress, the Commission’s proposed amendments will take effect on November 1, 2015. Although these amendments do not represent a sea-change in federal sentencing policy, they should nonetheless have a real and substantial impact on many of the most common federal offenses, particularly economic offenses.

Darrell A. Clay is the Vice President of the CMBA and a former Chair of the Criminal Law Section. He is a partner in the Litigation Section of Walter | Haverfield LLP, where he practices in the areas of white collar criminal defense, complex civil litigation, and aviation law. He has been a CMBA member since 1997. He can be reached at dclay@walterhav.com.
In cases — thus requiring that he go through the claims objection process repeatedly and in his view unnecessarily. He decided to take a stand and filed an adversary case against one of the country’s largest debt buyers, LVNV Funding, LLC (LVNV), alleging that the filing of a claim in a debtor’s chapter 13 bankruptcy case which was barred by the applicable state statute of limitations constituted a violation of the Fair Debt Collection Practices Act (FDCPA). Nick lost his argument in the bankruptcy court and again in the district court. Undeterred, Nick took his case to the Eleventh Circuit Court of Appeals. There he won.

In Crawford v LVNV Funding, LLC, 758 F.3d 1254 (11th Cir. 2014), the Eleventh Circuit concluded that LVNV’s “filing of the proof of claim fell well within the ambit of a ‘representation’ or ‘means’ used in ‘connection with the collection of any debt’” and that such action “violated the FDCPA’s plain language”. 758 F.3d at 1262-1263. In reaching this result, the court observed:

A deluge has swept through U.S. bankruptcy courts of late. Consumer debt buyers — armed with hundreds of delinquent accounts purchased from creditors — are filing proofs of claim on debts deemed uncollectible under state statutes of limitations. Id. at 1256.

The motivation for debt buyers to file these proofs of claim is obvious. They have no recourse in state court, and no means of collection other than voluntary payment by the debtor. Claims filed in chapter 13 bankruptcy cases are automatically allowed and are paid a distribution unless an objection is sustained. Often, these claims are small and go unnoticed and thus are paid, or the motivation of debtor’s counsel or a chapter 13 trustee to object is simply not there. Repeated thousands of times in cases filed throughout the country, the practice generates substantial revenue for what is otherwise an uncollectible debt. In short, its free money and it has become a routine business practice for large debt buyers.

Debtors who challenge these claims using the FDCPA combined with a claim objection and potentially a sanctions motion, if successful, can recover Statutory Damages of $1000 which can be available to the estate or with the consent of the Court and Trustee in some cases the debtor, reduce the unsecured debt owed by the estate by the amount of the out of statute claim recover attorneys fees and in some cases make the Chapter 13 plan more feasible. The Crawford court found that LVNV was a “debt collector” and that its action in filing a proof of claim constituted “debt collection” within the meaning of FDCPA at 1261. The court analogized the filing of a proof of claim with the filing of a lawsuit and concluded that the later was clearly an FDCPA violation when the claim was filed outside of the applicable statute of limitations in a non-bankruptcy forum. Id. at 1260. On April 20, 2015, the United States Supreme Court denied LVNV’s petition for writ of certiorari. Crawford v LVNV Funding, LLC, No. 14-858 (U.S. 2015). Significantly, LVNV raised for the first time in its petition its most potent argument — namely that the Bankruptcy Code preempts the FDCPA and provides the sole process for adjudicating claims in bankruptcy. The Courts are now split on the issue, although this author would dare say that the trend favors viability of FDCPA liability for the filing of time-barred claims.

Since Crawford, courts have been split. Recent attacks have focused on the argument that LVNV failed to raise in the lower courts — preclusion. This argument is essentially that the Code and the FDCPA have an irreconcilable conflict in that the Code gives debt collectors the absolute right to file knowingly time-barred claims, and the FDCPA conflicts with the Code by punishing the exercise of that right.

This line of cases is exemplified by a federal district court in Alabama which just sidestepped Crawford, finding that the Code and the FDCPA were in conflict on this issue and the Code prevails. Johnson v. Midland Funding, LLC, No. 1:14-cv-00322-WS-C, Doc. #28 (S.D. Ala. March 24, 2015). In Johnson, the plaintiff filed for bankruptcy relief under Chapter 13. The defendant then filed a proof of claim that disclosed on its face that the claim is barred by the statute of limitations. The plaintiff subsequently sued the defendant, alleging that the filing of the proof of claim was deceptive and misleading under 15 U.S.C. § 1692e and unfair and unconscionable under 15 U.S.C. § 1692f.

The defendant filed a motion to dismiss, arguing in part that the plaintiff’s FDCPA claim was precluded by the Code. The district court recognized the clear holding of Crawford, but framed the question to be whether “tension” between the Code and the FDCPA precludes the plaintiff’s FDCPA claim. Importantly, the Johnson court noted that this issue was not presented or decided by the Eleventh Circuit in Crawford. The Johnson court found that there was an irreconcilable conflict between the Code and the FDCPA. In effect, the Johnson court found that the FDCPA negated the Code, giving rise to an irreconcilable conflict that required that the FDCPA “give way” to the Code.

This preclusion argument is best addressed by the Seventh Circuit which holds separately in a series of rulings that the Bankruptcy Code does not preclude recovery for violations of the FDCPA, Randolph v. IMBS, Inc 368 F.3d 726 (7th Cir. 2004), that the filing of a civil suit to collect time-barred debt is a violation of the FDCPA, Phillips v. Asset Acceptance Corp, 736 F.3d 1076 (7th Cir. 2013), and that 15 U.S.C.S. § 1692e(2)(A) specifically prohibits the false representation of the character or legal status of any debt, that whether a debt is legally enforceable is a central fact about the character and legal status of that debt and that a misrepresentation about that fact violates the FDCPA. McMahon v. LVNV Funding, LLC, 744 F.3d 1010, 1012 (7th Cir. 2014). While the Sixth Circuit has yet to weigh in on the preclusion issue, at least one court within the circuit has, holding that there is no broad rule that FDCPA claims are precluded by the Code. “Defendant has neither shown that an irreconcilable conflict exists between the bankruptcy code and the FDCPA, nor identified any legislative intent for the bankruptcy code to replace the FDCPA in areas of overlap. Accordingly, the bankruptcy code does not preclude plaintiff’s
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Alternatively, an argument can be made that there is no conflict between the Bankruptcy Code and the FDCPA, because there is no valid claim for an unenforceable, time-barred debt.

Under the Bankruptcy Code, "debt" means "liability on a claim," 11 U.S.C. § 101(12), and "claim," in turn, includes any "right to payment," § 101(5)(A). We have said that "claim" has "the broadest available definition," Johnson v. Home State Bank, 501 U.S. 78, 83, 115 L. Ed. 2d 66, 111 S. Ct. 2150 (1991), and have held that the "plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation." FCC v. NextWave Pers. Communns. Inc., 537 U.S. 293, 302-303, 123 S. Ct. 832, 839, 154 L. Ed. 2d 863, 875 (U.S. 2003), citing Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 559, 109 L. Ed. 2d 588, 110 S. Ct. 2126 (1990). See also, Ohio v. Kovacs, 469 U.S. 274, 83 L. Ed. 2d 649, 105 S. Ct. 705 (1985). Reading these cases together, if a claimant does not hold an enforceable obligation, then that claimant has no right to payment, and ultimately no claim. A time-barred claim is not an enforceable obligation. Nothing less than an "enforceable obligation" is a right to payment, and without that, there is no "claim" as defined by 11 U.S.C. § 101(12). One cannot be a creditor unless one has a claim, and therefore any "invitation" under 501(a) for a creditor or trustee to file a claim simply does not apply to a party attempting to collect an unenforceable, time-barred debt. Applying that definition, attempts to characterize an unenforceable, time-barred debt as being the same thing as an enforceable right to payment for purposes of filing a claim fail, and thus there is no conflict between the Code and the FDCPA which would require preclusion.

In addition to the preclusion argument, courts are divided as to the question of whether the filing of a proof of claim that accurately describes the debt as time-barred is a violation of the FDCPA. Perhaps no court is more illustrative of the conflicting views on this issue than the Northern District of Illinois. Two separate cases decided within days of each other came to very different conclusions. Judge Goldgar concluded that borrowers in chapter 13 bankruptcy have the benefit of counsel and the obligations of the Trustee as protection, and thus the bankruptcy claims process does not suffer from the deception and unfairness of untimely lawsuits that would give rise to an FDCPA violation. Murff v. LVNV Funding, LLC (In re Murff), 2015 Bankr.LEXIS 2028 (Bankr. N.D. Ill. June 15, 2015) This holding relied heavily upon an earlier case, decided by Judge Wedoff, LaGrone v. LVNV Funding, et al., 2015 Bankr.LEXIS 212 (N.D.Ill. Bankr. Jan. 21, 2015). In contrast, Judge Schmetterer concluded that the filing of such claims are inherently deceptive, in that Chapter 13 trustees would only pay on a stale claim on behalf of debtors if they have been deceived or misled, and that the very fact that debt collectors are systematically engaged in this practice suggests that it succeeds in deceiving some part of the debtor population. Because there is no good reason to allow proofs of claim for stale debt, the frequent allowance of and payment on such claims would be enough to show deception. It would be sufficient proof to assemble a large enough representative sample of proofs of claim filed by debt collectors, isolate the proofs of claim for stale debt, and analyze that set to determine how often those proofs of claim are allowed. That would show the rate at which courts, trustees, and debtors are deceived into paying those claims.
Within the Sixth Circuit, The United States Bankruptcy Court for the Western District of Michigan held that where the proof of claim accurately discloses the date of last activity (and thus that the debt is time-barred), and the debtor had listed the creditor in her bankruptcy schedules, there could be no FDCPA violation, 

Perkins v. LVNV Funding, LLC (In re Perkins), 2015 Bankr. LEXIS 2357, 533 B.R. 242 (Bankr. W.D. Mich. July 8, 2015). The United States Bankruptcy Court for the Middle District of Tennessee reached substantially the same conclusion, that:

The FDCPA should not be implicated with regard to stale debts when a creditor merely (a) files an accurate proof of claim in a bankruptcy case, (b) when the proof of claim includes all the required information including the timing of the debt, (c) the applicable statute of limitations is one that does not extinguish the right to collect the debt but merely limits the remedies, and (d) no legal impediment to collection or factual circumstances exist that would invoke the FDCPA other than merely the applicability of a statute of limitations. Triggering the FDCPA based on "implied" deception solely because of the applicability of a statute of limitations simply creates an unnecessary disharmony in both the statutory schemes.


Debtors counsel should consider bringing "Crawford" claims on behalf of their clients for several reasons. First, the removal of the out-of-statute claim and the payment of statutory damages can make their client's plan more feasible. There is also risk to a Chapter 13 debtor who does not attack out-of-statute claims filed in their case. Payments by the trustee could potentially create an argument that such a statute would be revived should the debtor fall out of the Chapter 13 plan and the case be dismissed.

In summary, courts throughout the country are split regarding Crawford claims. Whether or not such claims present such an irreconcilable conflict that the Bankruptcy Code precludes actions for violations of the FDCPA is less clear. Such a determination likely rests upon whether or not time-barred debt is considered an enforceable obligation such that its holders have a right to payment as the legitimate basis for filing a proof of claim. If not, the filing of such claims is in reality an attempt to deceive the consumer debtor, the trustee, and even the court into making payments that have nothing more than at best a moral obligation to be made. Such claims harm not only the debtor who pays them, but also other holders of non-time barred debt with legitimate claims. While the Sixth Circuit has yet to face this issue, it is only a matter of time. In the meantime, like many novel and unresolved issues in the Bankruptcy court, these claims may be ripe for a reasonable compromise because risk exists for both sides.
Deborah A. Coleman

Solos, Are You Prepared?
New CMBA WIP Program Helps Solos Prepare for Business “What Ifs”

As I prepared to leave the firm where I had practiced for years and hang out my own “shingle,” I grappled with all the “what ifs” that arise with the launch of any new venture.

Will anyone call? (Yes.) Will I enjoy it? (Yes.) What if I get hit by a truck? (???)

This last wasn’t paranoia. I had a two week trip abroad scheduled soon after my launch date. I was used to a pre-vacation crunch, but this trip triggered greater concern, both because it involved air travel to another continent, and because I was now solely responsible for my clients and matters.

I addressed this big “what if” by taking two steps — I arranged for a “backup lawyer” and I listed for him all the information that I thought he would need to know if for some reason, I couldn’t get right back to work after the trip. Of course, there is no reason to wait for a big vacation to take these steps. It’s possible for any of us to be “hit by a truck” any day of any week by an unexpected event, and the risk for clients and the burden for loved ones is the same no matter what puts us out of commission.

Now all solo practitioners can prepare for the “What Ifs” of business life with the help of CMBA’s What If Preparedness (WIP) Program, developed by the CMBA Ethics Committee. It is available now through the CMBA website at www.CleMetroBar.org/Committees/Ethics_Professionalism. By taking advantage of the WIP program, you provide important information that can be used to protect your clients and to aid your family members who may not know where to start. And if none of the scary “what ifs” come to pass, the information that you compile and update will help you prepare to bring in a new associate or partner, sell your practice, or wind it down yourself.

There are three elements to What If Preparedness, the first of which you are probably already doing. 1. Keep your list of clients and matters, your calendar, and your accounting current. Keeping all of this information current is essential day-to-day for client service and business management. It will also be a valuable resource for any backup lawyer who must step in to figure out how your clients and business will be served in your absence. 2. Select a backup lawyer. The backup lawyer whom you choose should be an Ohio licensed lawyer whom you trust. Your backup lawyer does not need to be capable of handling all of your outstanding matters, but he or she should be able to assess what has to be done in your absence, find coverage, and if necessary, wind down your practice. Preferably, your backup lawyer will be someone who won’t be placed in a conflict of interest when he or she examines your files to figure out what next steps are needed. In addition to choosing the backup lawyer, you should:

a. Meet with him or her, and confirm the lawyer’s agreement to serve;

b. Enter a formal agreement if you wish (example available on the CMBA website);

c. Provide an attorney with your membership record;

d. Inform the CMBA, your office staff and family of your backup attorney selection, using the designation form on the CMBA website. CMBA will keep the name and contact information for your backup attorney with your membership record, and it will be used only in the event of your death, disability or disappearance;

e. Avoid making your backup lawyer’s job harder than necessary. This is a good time to review your records management and retention practices.

3. Complete the Practice Inventory, and put it in a safe place. The Practice Inventory is a fillable form that you can use to record all key information about your practice, including clients, contracts, service providers, and passwords. The complete Practice Inventory form can be downloaded from the CMBA WIP Program page. You don’t have to give these “keys to the castle” to anyone now, but the Practice Inventory will be a great aid for your trusted backup lawyer.

The WIP program webpage also includes a link to a bibliography of articles and forms on the variety of contingencies and transitions that lawyers face, including disaster preparedness and sale of a law practice.

Participating in CMBA’s WIP Program will help assure that in a worst case scenario, your work in process is completed for the benefit of your clients, and your practice is managed and, if need be, wound down, for the benefit of your family. Join me in taking these important steps.

Deborah A. Coleman has a solo practice providing counsel and representation on legal ethics matters, and mediation and arbitration services. She is a past chair of the ABA Standing Committee on Professional Ethics and Responsibility, and of the CMBA’s Ethics Committee. She was a member of the Task Force that recommended the adoption of the Rules of Professional Conduct to the Ohio Supreme Court. She has been a CMBA member since 1977. She can be reached at (216) 991-4510 or dac@dacolemanlaw.com.
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Each month, these pages will be dedicated to highlighting just some of the activities and programs of your Cleveland Metro Bar.

2015 SMALL BUSINESS CONVENTION

Registration is now open for the largest small business convention in the Midwest, October 21–22. Co-Presented by the Cleveland Metropolitan Bar Association, the COSE Small Business Convention brings entrepreneurs together to get inspired and learn from national keynote speakers, take advantage of educational workshops and network with peers.

This year’s speakers include:

Jennifer Hyman and Jennifer Fleiss Co-Founders, Rent the Runway – Launched in 2009, Rent the Runway has transformed the retail industry by making designer dress and accessory rentals a convenient and accessible luxury experience for millions of women. Hear how these Harvard Business School classmates joined forces and turned an idea into a nationwide venture with millions of customers, 250 employees and hundreds of designer partners — a true entrepreneurial success story!

Robert Stevens Founder, Geek Squad – With $200, a bicycle and a subsequent collaboration with Best Buy, Robert Stephens transformed the small cryptic world of tech support and made it glamorous and accessible when he founded The Geek Squad in 1994. Hear his inspiring story of entrepreneurship, his perspectives on advancing technology, smart marketing and thoughtful business strategy and what he thinks is the next “big thing.”

Derreck Kayongo Founder, Global Soap Project – From child refugee to U.S. citizen to fearless visionary, Derreck Kayongo has served in leadership roles in some of the world’s most respected non-government organizations. In 2009, Kayongo and his wife Sarah started The Global Soap Project, which focuses on repurposing partially-used soap from hotels into new soap for needy populations, particularly in Africa. Hear how his passion and tenacity led to his success and how those lessons can be applied to successful business practices in the 21st century.

Visit www.smallbizconvention.com for information.

CALL FOR COMMITTEE MEMBERS

Do you have ideas to help make the CMBA stronger and even more valuable than it is today? Do you want to help tell the story of the CMBA to others and get them more involved? Are you ready to help make that happen? Then you may be right for our membership committee. The committee meets monthly and is seeking additional members to get engaged and help enhance the membership experience, including efforts for attorneys in transition, small and solo firms, law students, benefits, events and more. Your involvement, perspective and ideas can help improve and strengthen OUR bar association.

To express interest, contact Rita Klein at (216) 696-3525 or rklein@clemetrobar.org.
THE IMPORTANCE OF MEMBERSHIP

Each and every CMBA member helps keep the association strong so we can continue to serve the Greater Cleveland legal community and the community at large. Already renewed for this year? Thank you. You should have received a new membership card in the mail, or a full member packet if you are new to the CMBA. If you have not yet renewed, please be sure to get that off your “to do list” today so you do not have any lapse in benefits at the end of this month.

If you are not receiving regular communication from the CMBA, please be sure your email and address are up to date. Contact the CMBA or login to the site to make updates to your profile.

UPCOMING CAP EVENTS

**CAP Meetings**  Held the third Wednesday of every month at varying locations
- September 22 – 6:30 p.m. at Winking Lizard, Galleria, Downtown Cleveland
- October 21 – 6:30 p.m. at Ursuline College, Building and Room Number TBD
- November 18 – 6:30 p.m. at Harry’s Steakhouse, 5664 Brecksville Road, Independence
- December 16 – 6:30 p.m., Location TBA

**Misc. Events**
- October – CMBA Run for Justice. If you are interested in being part of the CAP Team please send an email to president@capohio.org.
- November – Canned food drive for the Cleveland Food Bank
- December 16 – 6:30 p.m.  CAP Holiday Social and Toys for Tots event

Watch for information on upcoming Technology Seminar, Probate Seminar and Student Reception. Dates and locations to be determined. CAP will also be holding Lunch ’n’ Learns. Information will be provided through email. We hope to see you there!

A membership survey will be sent out through email. Please share your thoughts with us.

**Not a member of CAP — why not?** Join today!
CleMetroBar.org/Membership/Paralegals or CapOhio.org/JoinCap

CONGRATS TO THE NEW 2015–16 CAP BOARD!

President/CMBA Liaison/NFPA Primary
Jessica Kubiak

Vice President/OSBA Liaison/Ethics Coordinator
John Primm

Director of Membership/Student Membership Coordinator
Valerie Gamertsfelder

Secretary/Parliamentarian/Statewide Alliance Primary
Jennifer Sybyl

Treasurer/NFPA Secondary
Amy Yates

Vacant Coordinator Positions
- Membership Coordinator
- Technology Coordinator
- Education Coordinator
- Business Law Coordinator
- Vendor Relations Coordinator
Sample Forms Help Lawyers Draft Documents

Regardless of the number of years they have practiced, many lawyers are often faced with new legal issues for which they need to create documents they have never drafted before. This situation naturally creates anxiety, and attorneys can struggle with new content and language. However, sample forms can provide a solution. In addition to including the basics no attorney would want to unintentionally forget, sample forms often suggest alternative claims, phrases, or clauses that lawyers may not have thought of when drafting a document for the first time. Sample forms can also address particularly granular, technical, or industry-specific issues that could stump even a seasoned practitioner.

Lawyers looking for forms should narrow their search first by asking these simple questions:
1. Does the jurisdiction matter? Is it for Ohio, another state, or a particular court?
2. What type of form is it? Does it have a name? What is it supposed to do?
3. Is it for litigation? Is it for a particular transaction?
4. What is the subject matter, and how important are the particular facts at issue?

There are many places where lawyers can find helpful forms. Starting with court web sites, supremecourt.ohio.gov provides free access to uniform probate, domestic relations, juvenile, stalking, and sexually-oriented offenses forms, as well as free court rules that contain many standard practice forms. Appellate, Common Pleas, and Clerk of Court web sites like those linked at cuyahogacounty.us also offer many standard forms for local practice. Federal court forms are easy to find at uscourts.gov, ca6.uscourts.gov, and web sites for the Northern/Southern District Courts.

Lawyers can also search actual court filings in online dockets at the Ohio Supreme Court, various Ohio courts, and PACER.gov to find complaints with similar claims against parties they wish to sue, motions and briefs on issues in their pending cases, exemplary templates for depositions, and sample expert witness testimony and reports. A free Firefox and Chrome extension called recapthelaw.org provides free access to PACER documents that other lawyers have already viewed.

Some lawyers already know the secret that the Ohio Revised Code (codes.ohio.gov) contains free statutory forms for: a) power of attorney; mortgages; and warranty, quit-claim, and survivorship deeds. State and local agency web sites such as ohio.gov can be another source of standardized forms for routine transactions. The Ohio State Bar Association and its partners have posted free online forms for living wills and health care powers of attorney at this link: http://recorder.frankcountyohio.gov/assets/pdf/living-will-packet.pdf. There are also a number of free sample jury instructions available at: http://clevelandlawlibrary.org/Public/Misc/Sites/Jury_Instr.html.

The Cleveland Public Library (cpl.org), the Cuyahoga County Public Library (cuyahogalibrary.org), and the Cleveland Law Library (clevelandlawlibrary.org) provide card holders with access to Ohio forms through Gale Legal Forms, which covers adoptions, bankruptcy, divorce, guardianships, incorporation, landlord-tenant, name changes, powers of attorney, real estate, wills and estates, and many other topics.

With free registration, the LexisNexis/LexisONE Communities Portal on the Internet offers many free forms (although Ohio is not included). This web site also sells automated forms powered by Hot Docs® document-assembly software.

CMBA members can access Fastcase at CleMetroBar.org for access to U.S. Legal Forms, which offers a vast database of legal forms for purchase. You can choose from over 36,000 legal documents, and most forms may be downloaded in Word format.

The Ohio State Bar Association also provides access to Casemaker, which provides over 100 "OSBA Jury Instructions," links to various court forms, and a database of forms available for purchase.

LexisNexis and West/Thomson Reuters still publish several good Ohio form books online and in print. These vendors also publish many topic-specific Ohio treatises on appeals, bankruptcy, business organizations, civil procedure, creditor’s rights, criminal practice and procedure, elder law, employment, landlord-tenant, family law, probate, and real property. They also publish print and electronic versions of federal and national form books on quite a few topics.

LexisNexis and Westlaw provide databases containing pleadings, motions, briefs, jury instruction filings, and expert documents that have been filed in actual cases. Savvy lawyers can use these documents as models for their own cases.

Many CLE publications often contain sample forms related to seminar topics. Lawyers without access can check a local law library for seminar materials from local, regional, and national bar associations.

Findlaw.com, which is powered by Thomson Reuters, maintains a Forms Store where lawyers can purchase forms on a variety of topics. With a subscription, Loislaw.com provides an extensive collection of online treatises and forms on over 25 legal topics, including employment law and discrimination, elder law, family law, insurance, intellectual property, §1983 litigation, partnerships, and legal practice. Finally, the online library from the National Consumer Law Center at library.nclc.org offers treatises and forms on various topics, including automobile fraud, collections, bankruptcy, warranties, credit discrimination, fair credit reporting, fair debt collection, foreclosures, repossessions, mortgage lending, and truth in lending.

Kathleen M. Dugan serves as the head Librarian of The Cleveland Law Library. She has been a CMBA member since 2003. She can be reached at (216) 861-5070 or kdugan@clelaw.lib.oh.us.
it is impossible to go one day without turning on the television and hearing allegations of police violence in places like St. Louis, Baltimore, New York, South Carolina and our own hometown of Cleveland, Ohio. Yet amid all this news, there is surprisingly little discussion on how these cases are presented to a grand jury and why some citizens within the communities may feel that police officers get “special treatment.”

Grand Jury proceedings are often called secret proceedings. With the word “secret” may also come the suggestion of being deceptive, especially as it relates to cases against officers. As of late this has been echoed in high-profile situations where the outcome differs from what the public thinks it should be, whether that is an indictment or a decision not to indict. Be that as it may, the intent behind a grand jury is to protect citizens’ rights and instill a feeling of autonomy.

Ohio law does not require that police use of fatal deadly force cases be presented to the grand jury. The prosecutor can simply review the evidence and make a decision in private. Most prosecutors in other counties do not present them to a grand jury, however in Cuyahoga County, Prosecutor Timothy McGinty has decided to present all fatal use of deadly force cases to the grand jury. He believes that it is such an important action when an officer takes the life of a fellow citizen, that a thorough review by this body of citizens is necessary to maintain the confidence of the public in the integrity of its criminal justice system.

I will admit that as a new prosecutor I had no real understanding of grand jury proceedings. Nor did I appreciate how the law leaves no choice but to present police cases differently. With time I became involved with presenting various types of cases to the grand jury including police use of deadly force cases. To better understand how cases are presented and how police cases may differ, it is important to understand the basic functions of the grand jury. It is equally important to dispel myths that undermine the grand jury process while openly acknowledging some controversial procedures that do exist. This article will walk you through the process and explore how it impacts police use of deadly force cases within Cuyahoga County.

GRAND JURORS ARE NOT CHERRY PICKED BASED ON PREFERENCE

The Cuyahoga County Grand Jury is governed by Criminal Rule 6(A). Procedurally the jury is composed of 14 people selected from the persons whose names are contained on the annual jury list. This list is made up of citizens who hold drivers licenses in the county. These names are randomly drawn. A Court of Common Pleas Judge, based on a rotation, is charged with overseeing the impaneling of the grand jury. The Judge may select any person who satisfies the qualifications of a juror to preside as foreperson of the grand jury.

Prosecutors take no part in who is called from the annual jury list. Prosecutors do question potential jurors on whether they will be able to be fair and impartial and whether they can commit the necessary time required to hear the cases. The grand jury prosecutor is also charged with teaching the grand jury the relevant law and directing the presentation of the cases that the jurors will hear.

DESpite What Some Critics Might Say, Grand Juries Are Intended To Be Independent Voices

No, jurors are not used to the workings of criminal law such as prosecutors and defense attorneys may be. But, it is this distinction that sets them apart and helps define their independence. The jurors are the voice of the community. It is this raw unfamiliarity that causes jurors to formulate questions and use their common sense when reviewing cases. The standard of proof needed.
to get a case indicted is probable cause: Is there sufficient reason based upon known facts to believe a crime has been committed?

Grand jury proceedings differ drastically from the actual courtroom prosecution. In the grand jury the atmosphere is relaxed and although the prosecutor is directing the presentation of witnesses and evidence, the members of the grand jury have far-reaching power to ask questions of witnesses and to request that the prosecutor present additional witnesses or evidence to aid them in their decision. Jurors are encouraged to be vocal. This is especially so in cases where officers are accused. These cases involve alleged abuse of public trust. The grand jury members are a part of that public and can request as much evidence as they want. An example would be the case of State v. Michael Brelo. This was a very complex case that involved more than 100 police officers. This case presented questions of policy, authority, deadly force and criminal law. There were breaks in presentation along with additional evidence being presented so that the jurors were satisfied that they had considered everything prior to reaching a decision.

Once evidence has been heard, the members of the grand jury vote. In Cuyahoga County, nine grand jury members vote and the remaining members are seen as alternates. The six non-voting members are asked to leave the jury room. Additionally, any prosecutors, detectives/officers or witnesses are also commanded to leave the room. Only the voting grand jury members are allowed behind the closed door. During this time the prosecutor is not privy to the thought process or to possible dissension that may be taking place inside. When a decision has been reached, the foreperson comes out and informs the prosecutor. An indictment, also referred to as a true bill, does not require a unanimous vote, only that seven of the nine voting members agree. Anything less than seven results in no indictment being issued.

**WHETHER YOU CALL IT “SPECIAL TREATMENT” OR SOMETHING ELSE, POLICE USE OF FORCE CASES ARE INDEED TREATED DIFFERENTLY**

Police officers and the general public are governed by different laws.

Unlike the average citizen, police officers are granted authority to carry firearms as part of their job duties. They are expected to use them to protect the public as well as protect their own lives. Because of this, the prosecutor must educate grand juries on police policy, training, and the standard of law as it relates to police officers.

A grand jury is empaneled for four months and hears a number of cases. When considering the potential charges against the everyday citizen, the law requires grand juries to look at circumstances and actions from a reasonable person standard. Alternatively, cases against officers are to be looked at through the eyes of an “objectively reasonable officer.” Hearing police use of deadly force cases requires a mind shift. Any decision to charge the officer should be made upon “whether a reasonable police officer, facing the same circumstances, would respond to the same perceived, imminent threat in the same manner as other officers,” as held in *Tennessee v. Garner*, 471 U.S. 1 (1985). This is the law to be used in the grand jury as well as in the courtroom when attempting to prove a case beyond a reasonable doubt. I think it is safe to say that at this point jurors have to put themselves in the shoes of a police officer. This could be difficult because most jurors have never been police officers. They look at the officer’s explanation and work their way backwards. As such, grand jury presentation usually includes a number of officers who testify about what they may have witnessed and it may be necessary for jurors to delve into questions about past incidents that may be similar in facts and how those incidents were handled by officers for comparison — yet again leaving the jurors in a position where they may have to rely on a police officer’s word absent independent witnesses. Love it or hate it, prosecutors are bound by the reasonable police officer standard when presenting.

It is important to keep transparency at the forefront when presenting all cases.

I’m sure everyone has heard the phrase “you can indict a ham sandwich” implying that a prosecutor can get any case indicted if he or she really wants to. That may be true if dishonesty is involved. Whether the accused is a police officer or not, being forthcoming with evidence in a prosecutor’s possession should always be a priority. This requires integrity in the pursuit of justice regardless of the outcome. In Cuyahoga County, jurors often make independent decisions not to indict.

By their very nature police cases are going to come with a lot more evidence and result in more time when presenting. Thoroughness is appropriate regarding the investigation, reports and evidence so that the facts are well known and available. As with any case, a detective does an investigation and then turns the case over to the prosecutor’s office. As history has shown, use of force cases usually get an extensive work-up from agencies separate from the County Prosecutor’s Office. Police use of deadly force cases may not get turned over to the prosecutor’s office for months and when they do they are accompanied by masses of documents. That information must then be reviewed so that the prosecutor can be articulate when presenting it to the grand jury. This may be a small inconvenience to some members of the public but may also be viewed as an unnecessary delay by others. Nevertheless, it must be done.

At the end of the day, ending the old culture of secrecy will improve the professionalism of law enforcement, make the public aware of the dangers they encounter and thereby reduce the number of deadly encounters. Police officers should not stand above the law, but they undoubtedly stand apart from the average citizen when governed by it. The grand jury is and will remain a worthy means of justice seeking, but prosecutors must show heightened skill in educating jurors, take the time needed to review evidence and exercise full disclosure when presenting cases against officers.

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Is a Consumer a Person, and Why Does It Matter?  
Consumer Standing Under the Ohio Deceptive Trade Practices Act

BY GREGORY R. FARKAS & BRITANY N. BRANTLEY

The starting point for analyzing standing under the overall statutory structure of the Act.  

The Conflicting Authorities  
On first impression, the language of the DTPA does not appear to contain any limitation on claims by consumers. The Act allows a “person” to pursue a civil action under the statute, and then defines person to include an “individual.” The DTPA does not require a plaintiff to prove it is a competitor of the defendant to pursue a DTPA claim.

The Statutory Language  
The starting point for analyzing standing under the DTPA must be the language of the statute itself. R.C. 4165.03(A)(2) states that “[a] person who is injured by a person who commits a deceptive trade practice that is listed in division (A) of section 4165.02 of the Revised Code may commence a civil action to recover actual damages from the person who commits the deceptive trade practice.” R.C. 4165.01(D) in turn defines a person as “an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, unincorporated association, limited liability company, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity.” R.C. 4165.02(B) further provides that a plaintiff does not need to prove it is a competitor of the defendant to pursue a DTPA claim.

Judge Rice’s decision was based in part on the absence of Ohio authority limiting the DTPA to commercial claims. However, following the decision in Bower, several Ohio courts concluded that the DTPA does not apply to consumer claims. See, e.g., Hamilton v. Ball, 4th Dist. No. 13CA3533, 2014-Ohio-1118, 7 N.E.3d 1241, ¶ 33; Dawson v. Blockbuster, Inc., 8th Dist. No. 86451, 2006-Ohio-1240, ¶ 21-25; Blankenship v. CFMOTO Powersports, Inc., 161 Ohio Misc. 2d 5, 2011-Ohio-948, 944 N.E.2d 769, ¶ 21-29 (Clermont Co. Com. Pl.). While not controlling, it is interesting to note that the Ohio Supreme Court declined to review the issue following the decision in Dawson. Dawson v. Blockbuster, Inc., 110 Ohio St. 3d 1442, 2006-Ohio-3862, 852 N.E.2d 190 (2006).


Based on this trend, Bower appeared to be an isolated result outweighed by more recent authority. However, in Schumaker v. State Auto. Mut. Ins. Co., 47 F. Supp. 3d 618 (S.D. Ohio 2014), a second court within the Southern District of Ohio held that the language of the DTPA permitted consumer claims. The court adopted the Bower analysis and questioned why the word “individual” was included if the legislature “had not intended to give individual consumers the...
Who has the better argument?
Schumaker reinvigorated the dispute over
application of the DTPA to consumer claims.
Upon first review, the statutory analysis in
Schumaker and Bower is appealing. The DTPA
allows a person to bring a claim, and person is
defined as including an individual. In the absence
of any explicit limitation on a consumer’s ability
to bring a claim, these definitions would seem to
permit DTPA claims by consumers.

However, a closer examination of the DTPA
as a whole casts doubt on this initial conclusion.
First, the court in Schumaker was perhaps
too quick to reject the comparisons between the
DTPA and the Lanham Act. The Lanham Act also
allows a “person” to sue for violations of that Act.
defines a person to include a “natural person.” 15
U.S.C. 1127. Despite this definition, courts inter-
preting the Lanham Act have held that the defini-
tion of a person in the context of the Act is in-
tended to allow natural persons engaged in com-
ercial transactions to bring claims for Lanham
Act violations, not to allow claims by consumers
See, e.g., In re Porsche Cars N. Am., 880 F. Supp. 2d
at 874-75. A similar construction of the DTPA is
reasonable, based on the inclusion of the language
“or any legal or commercial entity” as a qualifica-
tion of the word “person” in R.C. 4165.01(D). See,
e.g., Gascho, 863 F. Supp. 2d at 698 (explaining that
“while an individual may be able to sue a person
engaged in deceptive trade practices during the
course of his or her commercial activities, it must
be in that individual’s capacity as a participant in
commercial activity.”); Robins, 838 F. Supp. 2d at
650; Phillips, 290 F.R.D. at 482-83; Chamberlain,
1999 U.S. Dist. LEXIS 22636 at *60.

Moreover, the substantive limitations in the
DTPA all address commercial activity, not
practices directed at consumers. R.C. 4165.02.
Again, these provisions mirror provisions of the
as a whole, rather than focusing exclusively on the
definition of “person,” supports the conclusion
that the Act was never intended to apply to
consumer transactions. See, e.g., Gascho, 863 F.
Supp. 2d at 698 (explaining that applying DTPA
beyond the context of commercial transactions
would render the Act “nonsensical”).

Finally, applying the DTPA to consumer claims
could create conflicting standards of conduct and
undermine the protections provided by the CSPA,
which specifically addresses deceptive practices
targeting consumers. The CSPA contains specific
limitations on the remedies available to consum-
ers in a class action, including the requirement
that the Attorney General must have previously
provided notice that the conduct at issue was de-
ceptive or unconscionable. R.C. 1345.09(B). The
DTPA contains no similar limitations, which is a
primary reason application of the DTPA to con-
sumer claims is such a heavily litigated issue.

The General Assembly also amended the
CSPA in 2012 to provide suppliers with a
right to cure alleged violations of the Act. R.C.
1345.09(2)(A). No similar right to cure exists un-
der the DTPA, creating yet another potentially
inconsistency if both the CSPA and DTPA are
applicable to consumer claims. The fact the Gen-
eral Assembly did not act to provide for a right
to cure under the DTPA when it amended the
CSPA is perhaps some indication that the legisla-
ture did not view the DTPA to apply to consumer
transactions. The existence of specific consumer
remedies under the CSPA, and the potential in-
consistencies that would result from applying
both the CSPA and DTPA to such claims, is an-
other basis to conclude the DTPA is limited to
commercial transactions. See, e.g., Phillips, 290
F.R.D. at 484 (holding that applying DTPA to
c consumer claims would circumvent the require-
ments of the CSPA); Robins, 838 F. Supp. 2d at
650; Blankenship, 161 Ohio Misc. 2d at ¶ 28.
Cf. Johnson v. Microsoft Corp., 106 Ohio St. 3d 278,
288, 2005-Ohio-985, 834 N.E.2d 791, ¶ 25 (refus-
ing to allow a consumer to pursue a CSPA claim
for anticompetitive injury because “[t]he legisla-
ture created separate statutory schemes for anti-
trust issues and for consumer sales practices”).

Conclusion
The weight of authority and the overall statu-
tory scheme of the DTPA support limiting the
scope of the Act to commercial transactions.
However, the issue remains unsettled. Both
businesses and consumers deserve clarity on
whether the DTPA applies to consumer claims.

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Privacy, My Butt [Dial]

BY VIRGINIA DAVIDSON, FRITZ BERCKMUELLER & SARAH CLEVES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

– The Fourth Amendment to the U.S. Constitution

If Fourth Amendment discussions evoke images of dusty cassette tape recorders and telephoto lenses in stake-outs of smoke-filled motel rooms, now might be the time to update your thinking. As even the silvery heads on the Supreme Court recognize, "modern cell phones are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." Riley v. California, 134 S. Ct. 2473, 2484 (2014). Besides making phone calls, smart phones capture our most private thoughts and actions. They take and store photos and videos, send and receive emails, texts, SMS and social media instant messages, track health data, observe and participate in social media, read the news, transact trades, purchases and sales, get directions, manage banks, offer opinions, track movements, whether or not we know or agree to it. Any of those cell phone capabilities may or may not be considered private information. But who would consider the information private — the user? The police? The victim of a crime? A court, reviewing the question perhaps years later? Smart phone owners inadvertently expose more information than they ever know or intend. Courts are creating a new body of Fourth Amendment law to deal with smart phones, including (to use the polite term) pocket-dialing and text messaging, leaving privacy more at risk than ever before.

The Supreme Court's decision in Riley provides current, baseline protections for information stored on, or accessible through, smart phones. At its core, it holds that police need a warrant to search data within a cell phone that is obtained incident to the arrest of an individual. 134 S. Ct. at 2485.

The Court considered the privacy interests at stake, given that modern cell phones contain what amounts to "millions of pages of text, thousands of pictures, or hundreds of videos," and that cell phones essentially hold "the privacies of life." Id. at 2488-91, 2495. Directing its comments to the broader array of data potentially accessible in the "cloud" via a smart phone, the Court opined that "[s]uch a search would be like finding a key in a suspect's pocket and arguing that it allowed law enforcement to unlock and search a house." Riley, 134 S. Ct. at 2491.

On July 29, 2015, a federal judge relied on Riley in upholding a magistrate's denial of a search warrant for cell tower location records. In Re: Application for Telephone Information Needed for A Criminal Investigation, Case No. 15 XR-90304-HRL-1 (LHK), Northern District of California (Koh, J.). The government wanted to obtain the cell site location information, commonly called CSLI, that smart phones generate by pinging off cell towers whether or not the user has even turned on the phone. The judge in the case actually read the privacy notices, reproduced in tiny print, that most of us skip by clicking "next" at our own risk. "Subscribers of Verizon and AT&T cannot possibly have consented to the government's acquisition of CSLI generated by their cell phones but collected by an entirely different provider," the judge wrote.

Not all courts are following Riley’s protections for information on smart phones, however. For example, a key in a pocket might be protected, but pocket-dialing is not, according to a Sixth Circuit July 21, 2015 decision. Smart phone users do not have a reasonable expectation of privacy "with respect to statements that are exposed to an outsider by the inadvertent operation of that device." Huff v. Spaw, Case No. 13 cv 00212, 2015 U.S. App. LEXIS 12538, *20 (6th Circuit July 21, 2015). The court likened the situation to the plain-view doctrine, writing that just as people can easily draw their blinds, so they can easily use "well-known" measures such as locking the phone or downloading an application to prevent pocket-dialing. Id. The conclusion that such measures are "well-known" is critical, and troubling. Drawing blinds is an obvious solution to protecting privacy at home, but can the same really be said for downloading "apps"? Who among us understands more than five percent of what our smart phones can do?

Pocket-dialing is just one example of inadvertent disclosures of information, such as location or contacts, made possible by default or unknown settings on smart phones; advice blogs are filled with others. When does that advice become so public or well-known that it changes notions of privacy and informs what behavior is protected?

Our own Sixth Circuit quoted the Riley opinion for its recognition that modern phones contain the equivalent of a personal computer, then discarded Riley's holding that individuals have important privacy rights in that content. United States v. Bass, Case No. 14-1387, 2015 U.S. App. LEXIS 7074 (6th Cir. April 15, 2015), Opinion at 7. The court held that a warrant seeking to examine the entire contents of the defendant's smart phone was not overbroad, even though the only evidence discussed was the defendant's telephone number, offered by the government at trial to prove that it matched a number used to make fraudulent calls to banks. Even though the telephone number could have been established without searching the phone at all, or at the most by unlocking it and viewing the number on an opening screen, the court found the warrant sufficiently specific. It wrote that courts regularly reject challenges to the scope of warrants in this area "because criminals can — and often do — hide, mislabel, or manipulate files to conceal criminal activity [such that] a broad, expansive search of the [computer] may be required" Id., quoting United States v. Richards, 659 F.3d 527, 539 (6th Cir. 2011) and United States v. Stabile, 633 F.3d 219, 237 (3d Cir. 2011).

Courts also have held that individuals do not have a reasonable expectation of privacy in text messages because they should know that text information is recorded. Commonwealth v. Diego, No. 1989 MDA 2014, 2015 Pa. Super. LEXIS 367, *1 (Pa. Super. Ct. June 23, 2015). During a heroin investigation, an individual
agreed to act as an informant for the police and set up another drug deal through texts on the informant’s iPad. Id. at *1-2. The defendant moved to suppress on the grounds that he had a reasonable expectation of privacy in his text message communications. Id. at *4. The trial court agreed, but the appellate court reversed, stating, “[w]hen Appellant engaged in a text message conversation with [the informant], he knew, or should have known, that the conversation was recorded. By the very act of engaging in the means of communication at issue, Appellee risked that [the informant] would share the contents of that conversation with a third party.” Id.

And in United States v. Epstein, Cr. No. 14-287 (FLW), 2015 U.S. Dist. LEXIS 48574, *8 (D.N.J. Apr. 13, 2015), the court held, “the subscriber information provided by the third party cell phone service providers [under the Stored Communications Act] was cell site location data from their historical databases ... these are business records created and maintained by the service providers, which are not entitled to protection under Defendants’ Fourth Amendment rights.”); Gipson v. Sheldon, No. 3:13-cv-1997, 2015 U.S. Dist. LEXIS 57432, *27-28 (N.D. Ohio May 1, 2015) (cell site location data and cell phone call records obtained through a subpoena did not violate the defendant’s Fourth Amendment rights because the data were not obtained from the phone itself, but from the carrier, because “there is no reasonable expectation of privacy in cell phone records, ... or in cell site location information.”).

The issue of whether cell site location data should require a warrant supported by probable cause has made its way to the Supreme Court again. In the case of United States v. Jones, 132 S.Ct. 945, 565 U.S. ___ (2012), a majority of the Court held that the placement of a GPS tracking device on the defendant’s car was a “search” within the meaning of the Fourth Amendment. Epstein, above, justified the absence of a search for evidence obtained by way of an order under the Stored Communications Act, 18 U.S.C. 2701 et seq. based on a lesser finding of “reasonable cause.” Recently, in United States v. Davis, 573 Fed. Appx. 925 (11th Cir. 2014), the Eleventh Circuit held that although the government should have obtained a warrant before obtaining cell site location data, it upheld the defendant’s conviction and sentence because it found the government acted in “good faith.” Davis petitioned for certiorari on July 29, 2015 (Case No. 15-146).

In 1986, when the Stored Communications Act was enacted, the Internet was a well-kept secret between Al Gore and Silicon Valley. People did not store their personal data on their home computers, much less their phones. House Bill 699 seeks to eliminate the Act’s “180-day rule,” which requires the government to show only “reasonable cause” to access data stored for more than 180 days, to the “probable cause” requirement for accessing data stored for 180 days or less. Even though Riley held that a smart phone cannot be used as a key to unlock a person’s “cloud” without a warrant, courts seem willing to uphold broadly-worded warrants and subpoenas to third parties in order to obtain documents related to a criminal investigation found on a person’s “cloud” files. See, e.g., In re A Warrant for All Content & Other Info. Associated with the Email Account xxxxxxxx@gmail.com Maintained at Premises Controlled by Google, Inc., 33 F. Supp. 3d 386, 388 (S.D.N.Y. 2014) (granting the government’s request for a subpoena seeking “all content and other information within the Provider’s possession, custody, or control associated with the email account, including all emails sent, received, or stored in draft form, all address book information, and a variety of other information associated with the account.”).

While we wait for lower courts to catch up to Riley, the legitimate question remains: who actually possesses the information we store on the cloud? Is a contractual agreement for cloud storage akin to placing a box of paper files out in the garage? Or is it more like stashing evidence of a crime in a rented locker down at the bus station? Either way, isn’t a valid warrant required? How can courts fail to recognize an individual’s privacy interest in his own data, stored wherever that individual sees fit?

At least one court has tried to tackle these concerns. The District Court of Kansas denied a search warrant for the contents of cell phones in the custody of the United States Drug Enforcement Agency because the government did not provide a valid search protocol for the information it sought. In re Cellular Tels., No. 14-MJ-8017-DJW, 2014 U.S. Dist. LEXIS 182165, *1-4 (D. Kan. Dec. 30, 2014). The court held that a search protocol was essential because of concerns that a broad warrant without any restrictions would lead to a violation of Fourth Amendment privacy rights. “With technological developments moving at such a rapid pace, Supreme Court precedent is and will inevitably continue to be absent with regard to many issues district courts encounter” Id. at *11. This has led to “an observable gap ... between the well-established rules lower courts have and the ones they need in the realm of technology.” Id. The court opined, “it seems counterintuitive that a warrant should be required for the search of a cell phone, but not for the search of an email account, simply because the email account is accessible via the cell phone.” Id. at *18-19. The court also found the potential for abuse high where the government could use a warrant to search a cell phone to gain access to an individual’s entire digital presence. Id. at *19-20 (stating that if courts grant warrants without limiting the scope, “every warrant issued for the search of ESI would give the government carte blanche to examine the entirety of an individual’s digital presence with impunity”).

Congress as well as the courts continue to struggle with the pace of change. Hopefully both will recognize the message of Riley that while change is constant, so is the right of the people to be secure in their “persons, houses, papers and effects.”

After this article went to print, the U.S. Department of Justice announced a new policy that “cell-site simulators may not be used to collect the contents of any communication in the course of criminal investigations. This means data contained on the phone itself, such as emails, texts, contact lists and images, may not be collected using this technology.” The DOJ announcement can be viewed at www.usdoj.gov.

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Are you tired of stories about Atticus Finch? Do you cringe at the notion of yet another hour and a half or two hour lecture on lawyer best practices? Do you bring your reading glasses to professionalism CLE presentations so that you can read the newspaper over the shoulder of the person sitting in front of you? Are you interested in a professionalism CLE that is entertaining, engaging, thought-provoking and instructive? Well then read on.

The CMBA Civility and Professionalism Task Force of lawyers and judges has devoted two years developing a unique series of interactive professionalism CLEs that have been enthusiastically reviewed by virtually all of the attendees at the several presentations in Cleveland and Columbus.

The programs involve video and movie clips of real and staged attorney encounters, anonymous voting, or response technology (or clickers for the Boomer generation), on questions of ethics and professionalism in the practice of law. A panel of experienced practitioners and judges leads the discussion with the audience to exchange ideas about issues of professionalism that are faced by lawyers, judges and clients in real-world situations. Many of the issues that are explored are ambiguous in the grey area, which provoke interesting discussion. In 2012, then-President of the CMBA, Carter Strang appointed a task force on civility and professionalism, the objective of which was to reinstate the organized bar’s focus on professionalism. Judge Michael Donnelly and Judge Joan Synenberg were appointed co-chairs of the Task Force. The purpose of the Task Force was to “increase civility and professionalism in the practice of law.”

One of the subcommittees of the Task Force is the Education Committee, which is charged to create a series of professionalism CLEs which are innovative in approach and inclusive in style. The intent is to engage the audience of lawyers attending the CLEs in interactive discussion on the concepts of civility and professionalism in the practice of law.

The Committee has created two professionalism CLEs and is working on a third. The first CLE is titled “The Judge as Mediator.” Using video of local attorneys and judges providing comical caricature performances of different situations involving a mediation before a judge, the CLE raised questions about ethics and professionalism issues surrounding the settlement process and communications with clients and the Court.

The second CLE is titled “Professionalism in the Deposition Battlefield.” Using film clips from movies, such as “The Fortune Cookie” with Walter Matthau and Jack Lemmon, and “The Verdict” with Paul Newman, staged deposition scenes, and excerpts from real depositions, the panel and audience electronically answered questions as a group and discussed issues of ethics and professionalism arising in the deposition setting. Practical suggestions were presented for dealing with these issues when they arise. The CMBA will be presenting this CLE once again on October 2, 2015.

The third professionalism CLE, tentatively titled “Sealing the Deal — Professionalism In Transactional Practice Of Law,” is scheduled to debut on December 11, 2015. Using the same format, clips from
movies and staged and real video clips of thorny ethical issues that frequently arise in transactions, the panel and the audience will answer questions electronically as a group, discuss the results of that voting, and explore ethics and professionalism issues that lawyers may encounter in these transactions.

So, how does Groucho Marx fit into lawyer professionalism? Well you are going to have to attend the transactional CLE on December 11 to find out the answer to that.

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The threat of rain did not stop the sold-out crowd at this year’s CMBA Golf Outing! This year’s outing, held at Westwood Country Club, included four hole-in-one contests, raffle prizes, fantastic food and lots of laughs with colleagues and friends. Thank you to the CMBA Golf Committee along with the staff at Westwood Country Club for making the outing such a success! If you are interested in helping to plan or sponsoring next year’s outing, please contact Tressa Trodden, Events Coordinator, at ttrodden@clemetrobar.org.
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**3rd Place** Daniel Filippi, Bill Hemann, Dan McClain, Matt Ziaja

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(team member Ari Sherwin not pictured)
Ohio Assembly Enacts Shift in Receivership Environment After Six Decades of Inactivity

BY CHRISTOPHER D. CASPARY

The last time the Ohio Assembly modified Ohio Revised Code (R.C.) §2735, Dwight D. Eisenhower was president, a gallon of gasoline cost twenty cents, and Mickey Mantle was in his third season as the starting centerfielder of the New York Yankees.

Moving beyond mere facilitation of judgment collection, the receivership remedy has evolved into a common, expedient, and generally cost-effective means to effectuate a defunct company’s dissolution or resolve ongoing issues within an insolvent organization. Due to these developments, R.C. §2735, the cornerstone of Ohio receivership law, was in drastic need of revision and expansion.

Due to a patch work of court decisions addressing issues that were not covered by statute or existing precedent, certain crucial aspects of receivership law were subject to conflicting interpretations. A statutory framework was needed to help standardize results in receivership actions. The current amendment to R.C. §2735 in House Bill 9 (H.B. 9) codifies certain best practices that are familiar in Cuyahoga County without restraining the court’s ability to appropriately tailor relief and receivership orders.

Key Changes to R.C. §2735

- R.C. §2735.01(C) expounds upon §2735.01(A) (6), which combine to specify that receivers “may be appointed to manage all the affairs” of the applicable business entity.
- R.C. §2735.04(B) codifies substantive powers of the receiver such as entering into lease or sale contracts that do not impact lien priority, executing construction contracts, and conveying real or personal property. The subsection also authorizes the commonplace practice of opening a deposit account.
- R.C. §2735.04(C) codifies and potentially expands upon existing case law on lien priority for receiver fees and expenses. See, e.g., Dir. of Trans. of Ohio v. Eastlake Land Dev. Co., 177 Ohio App. 3d 379, 388-389, 2008-Ohio-3013, 894 N.E.2d 1255 (8th Dist.) (allowing expenses from a mortgage sale to extinguish receivership fees with mortgage acquiescence and full participation in the matter); see also, Ohio v. Tokmenko, 112 Ohio App. 42, 43, 165 N.E.2d 804 (8th Dist. 1960) (noting that receivership expenses are generally payable out of the “corpus of the property”); but see, Wilkens v. Boken, Inc., 8th Dist. Cuyahoga No. 64230, 1993 Ohio App. LEXIS 6202, ¶ 16-19 (Dec. 23, 1993) (requiring that “unusual or substantial” expenditures provide notice, an opportunity to be heard, and receive eventual court approval).
- R.C. §2735.04(D) definitively establishes a comprehensive procedure allowing a receiver to dispose of real property.
- R.C. §2735.04(D)(1)(a) and §2735.04(D)(3) codify existing case law on a receiver’s ability to sell property “free and clear of liens” (with limited exceptions). See Huntington Nat’l Bank v. Motel 4 BAPS, Inc., 191 Ohio App. 3d 90, 94-95, 2010-Ohio-5792, 944 N.E.2d 1210 (8th Dist.).
- R.C. §2735.04(D)(1)(b)-(c) allows the court to order the receiver to provide evidence of the value of the property or solicit and consider additional offers prior to executing a conveyance.
- R.C. §2735.04(D)(2) sets forth specific procedures that must occur before a receiver can dispose of real property. This subsection specifically requires that the receiver file a motion with the court regardless of whether a specific offer to purchase has been received and provide at least ten-day written notice to all interested parties (defined in the Statute). If an objection is filed, a hearing must take place that allows all parties to be heard. Finally, an order of sale must be issued by the court.
- R.C. §2735.04(D)(7) requires that the court create a redemption deadline allowing a party to act and void the sale. This period cannot be shorter than three days.
- R.C. §2735.04(D)(10) requires that the receiver file and serve a certificate of sale and report that outlines important transactional details for property conveyance conducted under the auspices of R.C. §2735.04(D)(2)(a) (ii), which governs sales with a specific offer to purchase the real property in question. This allows a receiver to avoid having to obtain court approval for a contract sale twice.

Observations and Challenges Moving Forward

- Receivership case law in Ohio remains dynamic and growing, yet at times, incomplete.
- The most substantial amendment found in H.B. 9 addresses the disposition of real property by a receiver and the ability to do so “free and clear of liens.” Property rights can be difficult to protect in the current bad asset environment, where title reports are complicated, lengthy, and at times inaccurate.
- R.C. §2735.04(D)(2)(b) sets forth notice requirements that must be met before a receiver can dispose of real property. The statute notes that either a preliminary judicial report or a title commitment is acceptable for determining the parties that must be noticed.
- Case law interpreting the changes present in H.B. 9 will take time to fully develop. Although the amendment codifies important receivership precedent, certain gap-filling decisions were not specifically addressed by the General Assembly, and their continued applicability may be in question. For example, though R.C. §2735.04(C) empowers the court to “require an additional deposit” (to be deposited by the requesting or consenting parties) “to cover funds” that will be expended pursuant to a R.C. §2735.04(B)(4) contract, the Statute does not specifically address whether a court can require the original movant (or acquiescing and full participating party) to cover all receivership costs not extinguished by the receivership estate.
• R.C. §2735.02 adds language that a court should afford "priority consideration... to any of the qualified persons nominated by the party seeking the receivership," but cautions that "[n]o nomination of qualified persons for the receivership is binding upon the court." Though the Statute is clear that the court retains ultimate discretion in deciding who to appoint, the law now views receiver nominations by the movant favorably.

• Whether courts, in interpreting R.C. §2735.04(C), will maintain the aforementioned "unusual or substantial" standard for expense authorization and priority despite such a distinction not being present in the Statute.

Conclusion
The amendment of R.C. §2735.01 et seq. provides needed statutory guidance and predictability to the receivership environment and is a net positive for receivership practitioners as the lack of predictability in receivership orders was one of the largest disadvantages when utilizing state court remedies. The amendment specifically codifies certain receivership powers that have become commonplace in many jurisdictions, such as disposing of real property "free and clear of liens," scheduling hearings and allowing an opportunity to be heard before entering certain receivership orders, and creating a blanket rule of receivership fee and administrative expense priority.

H.B. 9 does not inhibit the ability of the court to tailor the order appointing a receiver to the specific facts of the matter at hand and allows the receivership remedy to continue to be an important, powerful, and flexible resource available for attorneys in bad asset liquidation or business salvage environments. Mickey Mantle would be proud; the General Assembly has just hit a homerun.

Disclaimer: The contents of this article are not intended to serve as legal advice. Appropriate legal counseling or other professional consultation should be obtained prior to undertaking any course of action related to the topics explored by this article.

Christopher D. Caspary serves as the Staff Attorney to Judge Nancy A. Fuerst in the Cuyahoga County Court of Common Pleas. He completed his undergraduate studies at The Ohio State University and received his JD/MBA from Cleveland State University. Mr. Caspary has an interest in the diverse area of business law. He has been a CMBA member since 2012. He can be reached at (216) 443-5963 or ccaspary@cuyahogacounty.us.
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2015 Small & Solo Expo: From Start-Up to Sunset, and All the Days in Between
Friday, September 25, 2015 – 5.25 CLE with 1.25 Professional Conduct – Holiday Inn Independence, 6001 Rockside Road
8:00 a.m. Registration & Breakfast
8:25 a.m. Welcome & Introductions
8:30 a.m. State of the Practice
Rebecca Ruppert McMahon, Executive Director, CMBA
9:00 a.m. Ethical and Effective Business Development: The Value of a Good Story
Ian N. Friedman, McCarthy, Lebit, Crystal & Liffman Co., LPA; Michael “Ari” Liner, Liner Legal LLC; Roni R. Sokol, The Sokol Law Firm LLC
10:00 a.m. Break
10:15 a.m. IOLTA: The Devil Wears Green (.75 Professional Conduct Credit)
Monica A. Sansalone, Gallagher Sharp and Representative from PNC
11:00 a.m. I’ll Live Forever Is Not Retirement Planning
Presenter from The Oswald Companies
11:30 a.m. Mad for Your Brand
Christine Lobas, StudioThink
12:00 p.m. Lunch & Keynote Presentation
1:00 p.m. Preparing a Lawyer Inventory (.50 Professional Conduct credit)
Deborah A. Coleman, Coleman Law LLC
Kimberly Vanover Riley, Montgomery Rennie & Jonson
2:30 p.m. Big-Time Office, Small-Time Budget: How can I Do This by myself? ... And Not Go Completely Crazy
David B. Gallup, Gallup & Burns; Scott Heasley, Chernett Wasserman, LLC; Sandra M. Kelly, Ray, Robinson, Carle & Davies, P.L.L.
3:00 p.m. Adjourn to Networking Social

The CMBA’s Civility & Professionalism Task Force present:
Professionalism in the Deposition Battlefield
Friday, October 2, 2015 – 2.50 Professional Conduct CLE Hours requested – CMBA Conference Center
Registration: 12:30 p.m. Seminar: 1:00 – 3:30 p.m.
12:55 p.m. Welcome & Introductions
Frank R. DeSantis, Thompson Hine LLP, Seminar Co-Chair
Jack Kluznik, Weston Hurd LLP, Seminar Co-Chair
1:00 p.m. Professionalism in the Deposition Battlefield
Panelists: Hon. Dan Aaron Polster, United States District Court, Northern District of Ohio; Hon. Michael P. Donnelly, Cuyahoga County Court of Common Pleas; James L. McCrystal, Jr., Brzytwala Quick & McCrystal; Michael H. Diamant, Toft Stettinus & Hollister LLP
3:30 p.m. Adjourn

Contact the CLE Dept. at (216) 696-2404 or visit CleMetroBar.org/CLE for updates or registration.
The CMBA’s Estate Planning, Probate & Trust Law Section presents

42nd Annual Estate Planning Institute 2015

Friday, October 23, 2015 – Submitted for 6.75 CLE Hours – CMBA Conference Center
7:45 a.m. Registration & Breakfast 8:15 a.m. – 4:30 p.m. Program

8:10 a.m. Welcome & Introductions
Erica E. McGregor, Tucker Ellis LLP, Institute Chair

8:15 a.m. Ohio Update
Timothy J. Pillari, Wickens Herzer Panza Cook & Batista Co.

8:45 a.m. Ohio Trust Company Legislation
Robert R. Galloway, BakerHostetler LLP

9:15 a.m. Come Back to Ohio!
Robert M. Brucken, Retired Partner, BakerHostetler LLP

9:45 a.m. Ohio Trust Company Legislation
Robert R. Galloway, BakerHostetler LLP

11:15 a.m. Administering Third Party Wholly Discretionary Trusts
David S. Banas, Hickman & Lowder Co., LPA

11:45 a.m. Lunch (with included registration)

12:45 p.m. Use of Beneficiary Designations, PODs and TODs in Estate Planning
Jaclyn M. Vary, Schneider, Smeltz, Ranney & LaFond P.L.L.

1:15 p.m. Financial Effects of Basis Step Up and Estate Tax Inclusion
Thomas J. Pauloski, J.D., National Managing Director for Wealth Planning and Analysis, Bernstein Global Wealth Management Private Client Group

2:00 p.m. Planning for Basis Step Up with Existing B Trusts
Edwin P. Morrow III, Vice President, Wealth Management, Key Private Bank

2:30 p.m. Break

2:45 p.m. Location, Location, Location: Advising Clients Who Own (Or Who Want to Own) Foreign Real Estate
James Spallino, Jr., Thompson Hine LLP

3:15 p.m. The Intersection of Estate Planning and Governing Agreements for Business Entities
Christina D. Evans, Hahn Loeser & Parks LLP

4:00 p.m. Charitable Giving with Business Interests and Unique Assets
Roger L. Shumaker, McDonald Hopkins LLC
Ginger F. Mlakar, The Cleveland Foundation

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WHY ABA LEAD LAW?
• Executive leadership development from top legal experts
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• Build skills to lead each other, clients and our community

9:30 a.m. Welcome & Introductions
Tom Bolt, Chair, ABA LP Division, Managing Attorney, BoltNagi PC Law Firm, U.S. Virgin Islands; John E. Mitchell, Moderator, Chair Elect, ABA LP Division, Principal, KM Advisors, Chicago

PART 1 – LEAD YOURSELF

9:35 a.m. The Mind of the Lawyer Leader: What is “Leadership and Why Is it Important for Lawyers to Be Skilled In It?”
Dr. Larry Richard, Founder and Principal, LawyerBrain, LLC

10:05 a.m. Basics of Application of Leadership to Law Firms
Mark Beese, President, Leadership for Lawyers, Professor at University of Denver College of Law

PART 2 – LEAD YOUR CLIENTS

10:35 a.m. Influencing Clients and Enhancing Their Experience by Maximizing Value
Patrick J. Lamb, Valorem Law Group

11:05 a.m. Break

11:20 a.m. Effective Leadership in Practice: Attorney Client Collaboration
Stewart L. Levine, Founder and Principal, Resolution Works

PART 3 – LEAD YOUR FIRM

11:50 a.m. Leading Lawyers in Times of Uncertainty
Tom Grella, Past Managing Partner, McGuire, Wood & Bissette; member, ABA House of Delegates

12:20 p.m. Lunch On Your Own

1:20 p.m. The Heart of the Law Firm Leader
Linda A. Klein, Baker Donelson, Atlanta, GA; President, ABA

1:45 p.m. Effective Leadership of a Practice Group or Client Project
Pamela Woldow, Partner and General Counsel, Edge International

PART 4 – LEAD YOUR FIRM

2:15 p.m. Panel Discussion: Leadership Through the Organized Bar
Christina M. Liu, Winget, Spadafora & Schwartzbert, Moderator; William C. Hubbard, Nelson Mullins Riley & Scarborough, Columbia, SC; Immediate Past President, ABA; Anne Ellefson, Deputy General Counsel for Academics and Community Affairs, Greenville Health System; President, South Carolina Bar Association; Lanneau W. Lambert, Turner Padget, Columbia, SC; President, National Conference for Bar Presidents; Jack Rives, Executive Director, ABA

1:45 p.m. Effective Leadership of a Practice Group or Client Project
Pamela Woldow, Partner and General Counsel, Edge International

2:50 p.m. Break

3:05 p.m. The Lawyer as a Servant to Society
Artika Tyler, Assistant Professor, University of Stain Thomas

3:35 p.m. Lawyer Leadership in the Rule of Law Initiative

3:50 p.m. Leading Through a Future of Change
Tom Daschle, Former U.S. Senator and Senate Majority Leader, Founder of The Daschle Group, a public policy advisory of Baker Donelson Law Firm
The Cuyahoga County Court of Common Pleas and the CMBA’s ADR Section present:

Best Practices for Mediation and Settlement Conferences

Friday, November 6, 2015 – 5.50 CLE and New Lawyer Training requested – CMBA Conference Center

Registration: 8:30 a.m.  Seminar: 9:00 a.m. – 4:30 p.m.

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9:00 a.m.  Introduction
9:15 a.m.  Overview of ADR
9:45 a.m.  Uniform Mediation Act
10:15 a.m.  Break
10:30 a.m.  Panel Discussion
11:45 a.m.  Luncheon (included) with Speaker
12:45 p.m.  Mock settlement conferences/mediations
1:30 p.m.  Break-out sessions
3:00 p.m.  Debriefing
3:30 p.m.  Impasse Strategies

Mail to P. O. Box 931891, Cleveland, Ohio 44193, or fax Reservation Form to (216) 696-2129 (all fax reservations must include a credit card number, expiration date, and signature). Call the CMBA at (216) 696-2404 for further information. For electronic materials, registrants will receive a link to download or print materials in advance, or view online using a mobile device. CANCELLATIONS must be received in the CLE Department in writing three business days prior to the program. Refunds will be charged a $15 administrative fee. Substitutions or one-time transfers to other programs are permitted with 24 hour written notice. Transfers are to a single program and may be made only once. No refunds are issued on transfers. Persons needing special arrangements to attend this program are asked to contact the CLE Dept. at (216) 696-2404, (fax 696-2129) at least one week prior to the program. Complete tickets may not be split between attendees. CLE credit will not be granted to more than one attendee per ticket.

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The 4th Amendment Reasonableness Requirement
An Analysis of State v. Forester

BY ANNE WALTON KELLER

On the afternoon of October 8, 2013, Daniel Forester was walking along Milford Avenue in Parma. Around the same time, a Parma resident called police dispatch and reported that a “suspicious male” wearing a white T-shirt and camouflage pants was walking along the street and looking down driveways in the area of Milford Avenue and Torrington Road. The caller did not tell the police that he witnessed any illegal activity and did not state that the male was entering the property of any residents.

Two uniformed Parma police officers were dispatched to the scene. They arrived in separate cars and observed a male (Forester) who matched the description provided by the caller. He was walking westbound on Milford Avenue, not making any furtive movements and not acting in a suspicious manner. Notwithstanding, both officers immediately exited their marked cars and “converged” on Forester.

The police report stated that at the beginning of the encounter one of the officers demanded to know what Forester was doing in the area. After he was stopped Forester complied when the police asked him for identification. At that time one officer stood face-to-face with Forester and questioned him while the other officer “quartered” Forester.

One of the officers pointed at Forester’s pocket and said, “What is in your pocket?” Forester responded that it was a knife. The officers then asked Forester to place his hands on the patrol car, patted him down, and took a knife from his pants pocket. He was arrested for carrying a concealed weapon.

The officers continued searching Forester and found a glass pipe with marijuana residue and collectable coins. Several days later, a Milford Avenue resident reported that coins had been stolen from his home. He identified the coins and the knife found on Forester as the stolen property.

Forester was subsequently indicted on one count of theft and one count of burglary. He filed a motion to suppress the evidence seized by the officers. The trial court conducted a suppression hearing and both officers testified. After considering the testimony of the officers, the trial court granted Forester’s motion. It determined that: “(1) Forester was “seized” when the officers approached him, (2) prior to that point, the officers had not observed any possible criminal conduct on Forester’s part, and (3) the informant had not provided the police with any information that Forester had been engaging in any possible criminal conduct.” State v. Forester, 8th Dist. Cuyahoga No. 101084, 2015-Ohio-98 at ¶ 10.

The State appealed on the basis that the officers simply were conducting a stop of Forester as authorized by Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The Eighth District Court of Appeals reversed the trial court’s decision, holding that “[t]he circumstances presented in this case demonstrate the officers were conducting an investigatory stop based upon specific articulable facts, and questioned Forester only for officer safety during the encounter.” State v. Forester at ¶ 16.

In holding that the encounter constituted an investigative stop that was supported by reasonable suspicion, the majority said that the officers were ordered to investigate suspicious behavior that might have constituted the crime of trespass, that they were told to look for a man wearing specific clothing on a specific street and that they were bound by their duty to investigate. After seeing Forester, they intended to engage him in a conversation about his activities. Id. at ¶ 14. In other words, to effectuate an investigative stop.

Further, the majority stated that the officers’ questioning of Forester concerning what he had in his pocket was posed for officer safety as permitted by Terry. Forester’s admission that he was carrying a knife provided the officers with probable cause to arrest him for carrying a concealed weapon. Id. at ¶ 15. The rest of the evidence was found during a search incident to his arrest.

The dissent stated that the trial court properly granted Forester’s motion to suppress because he was seized without reasonable suspicion to support the stop. In support of this conclusion, the dissent highlighted several important facts deduced at the suppression hearing. First, the officers testified at the hearing that they possessed no information to suggest that Forester had committed a crime, was about to commit a crime, or that Forester was armed. The officers also testified that they had no concern for their safety. Id. at ¶ 19. Second, the citizen caller did not witness any illegal activity and the tip did not provide the police with reasonable suspicion to believe that Forester was engaged in or about to be engaged in criminal activity. Id. at ¶ 23.

While the trial court, the majority of the appellate court, and the dissenting appellate judge all agreed that the initial encounter between the police and Forester was a seizure, the dissenting judge elaborated on the differences between consensual encounters and investigatory stops.

As noted in the opinion, the Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Not all interactions between citizens and the police, however, constitute a seizure. Interactions between citizens and the police can fall within three distinct categories: A consensual encounter, an investigatory stop, and an arrest. State v. Taylor, 106 Ohio App.3d 741, 667 N.E.2d 60 (2nd Dist. 1995). Consensual encounters occur...
when the police merely approach a person in a public place and engage the person in conversation, and the person remains free not to answer and to walk away. The Fourth Amendment reasonableness requirement is not implicated unless the police have by either physical force or show of authority in some way restrained the person’s liberty so that a reasonable person would not feel free to decline the officer’s requests or otherwise terminate the encounter. *Id.* at 747-48.

Succinctly stated, a person is subject to an investigatory stop when, in view of all the circumstances surrounding his or her encounter with the police, including police use of physical force or show of authority, a reasonable person would have believed that he was not free to leave or is compelled to respond to questions. *State v. Lewis*, 2nd Dist. Montgomery No. 22726, 2009-Ohio-158. See also *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct.1870, 64 L.Ed.2d 497 (1980). An order to a pedestrian to stop is a sufficient show of authority to demonstrate a Fourth Amendment seizure. *Michigan v Chesternut*, 486 U.S. 567, 108 S.Ct.1975, 100 L.Ed.2d 565 (1988).

The trial court and the appellate court properly concluded that the encounter with Forester was an investigatory stop. Two officers wearing police uniforms and driving separate marked vehicles pulled up to Forester and stopped him as he was walking along the street. Although one of the officers testified that they initially requested to speak to Forester, the police report indicated that the officers began the encounter with a demand to know what he was doing in the area. A demand for information is not consensual. Additionally, when approaching Forester, one officer was standing in front of him while the other circled behind him during questioning. A reasonable person would not feel free to terminate the encounter and go about his business.

Under *Terry*, an investigatory stop of a person by the police constitutes a seizure within the meaning of the Fourth Amendment and is unreasonable unless the police have a reasonable, articulable suspicion that the individual detained is engaged in criminal activity.

To determine whether reasonable suspicion exists, courts examine the totality of the circumstances and objectively evaluate whether the officer had a particularized and reasonable basis for suspecting that an individual was involved in criminal activity. It is clear from *Terry* and its progeny that a mere suspicion or hunch of criminal activity that is not supported by specific and articulable facts is an insufficient basis upon which to make an investigatory stop.

Reasonable suspicion to conduct an investigatory stop can be based on a citizen tip to law enforcement, law enforcement observations, or a combination of the two. A citizen tip may be an independent basis for an investigatory stop if it is reliable and communicates information to law enforcement that provides facts constituting a reasonable suspicion of criminal activity.

The majority determined that the police had a reasonable suspicion that Forester was engaged in criminal activity. Thus, it concluded that the stop was lawful. However, based on the surrounding case law and the facts of the case there is strong support for the dissent’s opinion that the stop was unlawful due to a lack of reasonable suspicion.

In *Forester*, a good argument can be made that the information provided by the “911” caller did not give rise to a reasonable suspicion that a crime was being committed. The caller did not witness any illegal activity. Asserting that someone is a “suspicious male” is an innocuous statement. The fact that the individual was looking down driveways does not support a conclusion that he may have been trespassing, or that he was engaged in or about to be engaged in any other criminal activity. Had the caller seen Forester walking down driveways and related that information to the dispatcher, the tip would have been stronger support for a reasonable suspicion concerning the crime of trespass.

Additionally, a solid argument can be made that the officers’ observations of Forester did not give rise to a reasonable suspicion of criminal activity. They testified that Forester was not acting unlawfully before they approached him or after they stopped him. Many cases have held that such facts are insufficient to provide a reasonable suspicion of criminal activity and are more akin to mere suspicion or a hunch.

For more than 35 years, Michael C. Hennenberg, has defended people accused of serious white collar crimes in federal and state courts in Cleveland and Northern Ohio. He has earned a reputation as an effective defense advocate for people charged with or accused of crimes such as embezzlement, wire fraud, mail fraud, health care, insurance fraud, tax fraud, mortgage fraud, corruption/theft of public funds, drug crimes, and other felonies. Michael C. Hennenberg and his comprehensive defense team will aggressively defend your rights and freedom at every step of the legal process.

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Anne Walton Keller is an associate at McCarthy, Lebit, Crystal & Liffman Co., L.P.A. The focus of her practice is criminal defense. She is the Treasurer of the Criminal Law Section of the CMBA. She can be reached at (216) 696-1422 or awk@mccarthylebit.com.
Gaining Leverage Through § 365 Consent Rights

Why Some Parties To Intellectual Property Agreements Should Seize The Moment When A Contract Party Resorts To Bankruptcy

BY TODD A. ATKINSON

Section 365(c) of the United States Bankruptcy Code, 11 U.S.C. §§ 101 et. seq. (sections of which are cited here as “ § ___”), sometimes referred to as “consent rights,” provides important limitations on assumption and assignment of certain agreements, including agreements for the use of intellectual property. Yet despite its force and increasing relevance, this section remains underused by some.

This is worth considering because intellectual property agreements, in one form or another, permeate the business landscape. Frequently, owners of trademarks, patents, or copyrights grant permission to others by entering into license or franchise agreements, allowing use of their intellectual property for a fee. A software license agreement is a good example, because in many instances the licensor holds a copyright on the software. When granting these and other types of intellectual property licenses to parties who then resort to bankruptcy, licensors and others are protected to an important degree under § 365(c). By leveraging these protections, the astute and active licensor can make the most of a potentially bad situation.

Through §§ 365(a) and (f), a debtor has the exceptional power to assume and assign executory contracts to third parties, even despite language in an agreement expressly prohibiting assignment. This power, however, is not without limits, and a licensor of intellectual property has reason to pay close attention when it learns a contract party has filed bankruptcy. A licensor may have strong footing, for example, to challenge a debtor’s attempt to assume and assign its license agreement (presumed here as an executory contract) in connection with a ubiquitous § 363 sale.

Relying on § 365(c)(1), an important exception to the general rule that assignments are favored, the licensor may have an argument that the agreement is neither assumable nor assignable. Section 365(c)(1) provides:

“The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if:

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and (B) such party does not consent to such assumption or assignment .]


In short, this means that if the licensor (as the non-debtor party) does not (and did not) consent to assignment, then § 365(c)(1) precludes a debtor from assuming and assigning an executory contract if “applicable law” would allow the licensor to refuse acceptance of performance from a party other than the debtor.

Generally, courts agree that laws protecting intellectual property rights, including the laws governing trademarks, patents, and copyrights, are “applicable law” within the meaning in § 365(c)(1)(A). See, e.g., In re Valley Media, Inc., 279 B.R. 105, 135 (Bankr. D. Del. 2002); In re Golden Books Family Entm’t, Inc., 269 B.R. 300, 307-10 (Bankr. D. Del. 2001); RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.), 361 F.3d 257 (4th Cir. 2004). In addition, licensors of most trademarks and non-exclusive patents or copyrights are in many cases allowed to refuse to accept performance from a party other than the debtor under such laws. See, e.g., In re Trump Entm’t Resor ts, Inc., 526 B.R. 116, 124 (Bank. D. Del. 2015) (explaining that “federal trademark law generally bans assignment of trademark licenses absent the licensor’s consent because, in order to ensure that all products bearing its trademark are of uniform quality, the identity of the licensee is crucially important to the licensor”); Perlman v. Catapult Entm’t, Inc. (In re Catapult Entm’t, Inc.), 165 F.3d 747, 750-51 (9th Cir. 1999) (concluding that “[s]ince federal patent law makes nonexclusive patent licenses personal and nonassignable, § 365(c)(1)(A) is satisfied”); Valley Media, 279 B.R. at 135 (stating that “a non-exclusive license of rights by a copyright owner to another party is not assignable by that party without the permission of the copyright holder under federal copyright law since the license represents only a personal and not a property interest in the copyright”). Consequently, it is possible — and perhaps likely — for a licensor to thwart a debtor’s attempt to assign an agreement for the use of a licensor’s trademarks and non-exclusive patents or copyrights by withholding consent to the proposed assignment. In doing so, the licensor or franchisor could potentially leverage “consent rights” to, among other things, obtain more favorable agreement terms.

Less clear, but more striking, is whether a debtor who has no plans to assign an agreement is even permitted to assume it. This could put a debtor in a precarious situation upon entering bankruptcy, giving a licensor “super” consent rights. Courts are divided on this issue, generally adopting two different approaches referred to as the “hypothetical” and “actual” tests.

Many courts, including four circuit courts of appeals, have adopted a “hypothetical test,” concluding under this test that a debtor may not assume an agreement if applicable law prohibits the assignment of the agreement to a hypothetical third party. See, e.g., Sunterra, 361 F.3d at 271; Catapult Entm’t, 165 F.3d at 751-55; City of Jamestown, Tenn. v. James Cable Partners, L.P. (In re James Cable Partners, L.P.), 27 F.3d 534, 537 (11th Cir. 1994); In re West Elecs. Inc., 852 F.2d 79, 83 (3d Cir. 1988). Applying this test could have significant results, as demonstrated by two recent bankruptcy court decisions. In In re Trump Entertainment Resorts, Inc., 526 B.R. 116 (Bank. D. Del. 2015), for example, even though the debtors had no immediate plans to assign the agreement to a third party, the Delaware bankruptcy court concluded that the debtors were prohibited from assuming a trademark license agreement allowing for the use of the “Trump” name and mark for branding various casino properties, including the Trump Taj Mahal. Applying the hypothetical test (as adopted by the Third Circuit), the bankruptcy court in Trump granted the trademark licensor relief from the
automatic stay to continue an action to terminate
the agreement. See Trump, 526 B.R. at 124. Similarly,
in Moe’s Franchisor, LLC v. Taylor Invest.
Partners II, LLC (In re Taylor Invest.
Partners, II, LLC), __B.R. __, 2015 WL 4083871 (Bank. N.D.
Ga. June 30, 2015), the Georgia bankruptcy
court applied the hypothetical test established in
the Eleventh Circuit and granted the franchisor
of the Moe’s Southwest Grill® brand relief from
the automatic stay to terminate a number of
franchise agreements with the debtor.

Though not addressed by the court, the fran-
chisor in Moe’s also argued that because § 365(c)
(1) applied to bar assumption, the franchise
agreements terminated automatically under the
agreements’ “ipso facto clauses.” While § 365(e)
(1) generally prohibits a non-debtor counter
party to an executory contract from terminat-
ing the contract under such clauses, this section
is not without exception. In particular, § 365(e)
(2) — a corollary to § 365(c) — provides that §
365(e)(1) does not apply if:

(A)(i) applicable law excuses a party, other
than the debtor, to such contract or lease from
accepting performance from or rendering
performance to the trustee or to an assignee
of such contract or lease, whether or not such
contract or lease prohibits or restricts assign-
ment of rights or delegation of duties; and (ii)
such party does not consent to assumption or

Accordingly, if the license or franchise agree-
ment contains an “ipso facto clause,” it may
in fact apply and give a licensor a relatively
straightforward path to termination.

With or without an “ipso facto clause,” where
§ 365(c) could apply to bar an assignment,
courts following the “hypothetical” test will
generally bar a debtor’s assumption and, if fol-

Other courts, including two circuit courts
of appeals and a large number of bankruptcy
courts, hold otherwise, adopting an “actual test,”
concluding under this test that § 365(c) does not
apply to bar assumption unless a debtor actually
seeks to assume and assign the agreement. See,
e.g., Bonneville Power Admin. v. Mirant Corp.
(In re Mirant Corp.), 440 F.3d 238, 247-51 (5th
Cir. 2006); Institut Pasteur v. Cambridge Biotech
Corp., 104 F.3d 489, 493 (1st Cir. 1997); see also
Ohio Skill Games Inc., 2010 WL 2710522, at “4-
5” (Bank. N.D. Ohio July 8, 2010); In re Adelphia
Comm’n’s Corp., 359 B.R. 65, 72 (Bank. S.D.N.Y.
2007). In other words, under this test § 365(c)
does not apply to bar a debtor merely seeking to
assume an agreement; the debtor must actually
seek to assign it under this test.

In sum, no matter what test might apply,
parties to intellectual property agreements
such as licensors and franchisors should be
mindful when a contract party enters bank-
ruptcy. Effectively leveraging § 365 “consent
rights” may ensure getting paid post-petition,
resolve uncertainties regarding assumption or
rejection, and provide a basis to modify or ter-
minate an agreement. In any event, the licen-
sor or franchisor likely stands to gain.

Todd Atkinson is an associate in the
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turing matters, in and out of court. He has been a
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### September

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<td>Estate Planning Section Mtg. &amp; CLE</td>
<td>Justice For All Committee Mtg.</td>
<td>CAP Mtg. – 4 p.m.</td>
<td>PLI: Select Concepts in Drafting Contracts – 8:30 a.m.</td>
<td>Small &amp; Solo Expo – 8 a.m.</td>
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<td>Court Rules Committee Mtg.</td>
<td>PLI: Cybersecurity 2015 – 8:30 a.m.</td>
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<td>VLA Committee Mtg.</td>
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<td>3Rs 10th Birthday Party – 5 p.m. (The Vault at The Metropolitan at The 9)</td>
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| 28     | 29      | 30        |          |         |
|        |         |           |          |         |
| Bankruptcy & Commercial Law Section Lunch & CLE | Real Estate Section Lunch & Guest Presentation | 3Rs Committee Mtg. | PLI: Securities Law & Practice – 1:30 p.m. | |
|        |         |           | GCs “Plus One” Event – 5 p.m. | Food for Thought Kick-Off – 5 p.m. |
|        |         |           |        |         |

### October

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<td>PLI: 32nd Annual Section 1983 – 8:30 a.m.</td>
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<td>PLI: Hot Topics in Mergers &amp; Acquisitions – 8:30 a.m.</td>
<td>Professionalism in the Deposition Battlefield – 1 p.m.</td>
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<td>YLS Council Mtg.</td>
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| 5      | 6       | 7         | 8        | 9      |
|        |         |           |          |        |
| CMBF Executive Committee Mtg. – 8:15 a.m. | Grievance Committee Mtg. | PLI: Pocket MBA – 8:30 a.m. | Ethics Committee Program – 11:30 a.m. | PLI: Financial Services Industry Regulation & Compliance – 8:30 a.m. |
|        |         | WIL Section Mtg. | Ethics Committee Mtg. | |
|        |         | | VLA Committee Mtg. | |
|        |         | | Lawyer to Lawyer Give Back for Justice Program – 4:30 p.m. |

| 12     | 13      | 14        | 15       | 16     |
|        |         |           |          |        |
| CMBF BOT Mtg. | ADR Section Mtg. | Insurance Law Section | CMBA Executive Committee Mtg. | TMA/CMBA CLE – 11:30 a.m. |
|          |         |          | UPOL Committee Mtg. | Family Law Section Mtg. & CLE |
|          |         |          | Workers’ Comp Section Mtg. & CLE (State Office Bldg.) | Membership Committee Mtg. |
|          |         |          | Bankruptcy & Commercial Law Section Council Mtg. |

| 19     | 20      | 21        | 22       | 23     |
|        |         |           |          |        |
| PLI: Fundamentals of Swaps & Other Convergence – 8:30 a.m. | Estate Planning Section Mtg. & CLE | CMBA BOT Mtg. | Court Rules Committee Mtg. | Estate Planning Institute – 8 a.m. |
|        | Grievance Committee Mtg. | Intellectual Property Section |        | |
|        | Pot Topics | |

| 26     | 27      | 28        | 29       | 30     |
|        |         |           |          |        |
| WIL Pro Bono Week | PLI: Health Care & Life Sciences Law – 8:30 a.m. | PLI: Outsourcing Critical Services | |
| CLE – 11 a.m. | 3Rs Committee Mtg. | Reach Out for Nonprofits Seminar (with the VLA) – 4 p.m. |
| VLA Brief Advice & Intake w/ Legal Aid – 3 p.m. (El Barrio) | | |

All events are held at the CMBA Conference Center at noon unless otherwise noted. Information is current as of publication date.
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The Lazzaro Luka Law Offices LLC is pleased to announce the Equity Partnership of Lori A. Luka and the addition of Gillian A. Steiger as an Associate.

Jackson Lewis P.C. is pleased to announce the addition of three attorneys to the Cleveland office. Suellen Oswald, formerly the Co-Chair of Little's Staffing and Contingent Workers Industry Group, and Patrick O. Peters, formerly with The Benesch Law Firm, have joined the office as Shareholders. In addition, Michael Kozimor has been elevated to an Associate after working for the firm as a law clerk.

Benesch named former Ulmer & Berne LLP partner Joseph Castrodale as vice chairman. Castrodale now chairs the firm’s litigation department, the company’s largest group. He also brings with him three partners: Andrew Fiorella, Greg Phillips and Yelena Boxer.

Scott Ford is now with the Cleveland Eye Clinic, where he is General Counsel and HR Manager.

The law firm of Buckley King is pleased to welcome Nathaniel R. Sinn as an associate in its Cleveland office.

Reminger Co., LPA is proud to announce that they were selected as one of The Plain Dealer Top Workplaces for the fifth year in a row. This year, Reminger was named the #1 top workplace in Northeast Ohio among midsize companies.

Thacker Martinsek LPA is pleased to announce Mark I. Wallach has been named to the 2016 Edition of Best Lawyers®, making this the 21st consecutive year for this honor.

With the release of the “Best of the Best Midwest Real Estate Law Firms” rankings, real estate attorneys of Roetzel & Andress marked their eleventh consecutive appearance on the list of the Midwest’s premier real estate law firms.

Meyers Roman is pleased to announce that R. Russell O’Rourke was elected President of the Builders Exchange, Inc. by the Board of Directors on June 22nd.

Mazanec, Raskin & Ryder is pleased to announce that Todd M. Raskin has been admitted as a member of the invitation-only American Board of Trial Advocates.

The Cuyahoga County Juvenile Court will soon have a technology upgrade with a grant from the Ohio Supreme Court’s Ohio Courts Technology Initiative. The grant will be used to purchase computer hard drive storage and software.

Daniel K. Wright II and Joseph Koncelik of Tucker Ellis LLP recently spoke at the International Council of Shopping Centers Ohio, Kentucky, Indiana, Michigan & Pennsylvania Retail Development & Law Symposium in Columbus, Ohio. Mr. Wright and Mr. Koncelik discussed “Hot Topics in Environmental Law Impacting Shopping Center Developers, Owners, Managers and Tenants.”

Stephen E. Walters of Reminger Co., LPA was featured in the Cleveland edition of Attorney at Law Magazine as their “Attorney of the Month.” The article addressed Steve’s mentors, heroes, approach to client service and firm culture.

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