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Behind the scenes with new OSBA Executive Director

Mary Amos Augsburger

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Ohio State Bar Association
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Letter to the Editor

I enjoyed Douglas C. Tifft's and Judge James C. Cissell's article "The case that will not close" in the July/August 2013 *Ohio Lawyer*. It is hard to believe there's still an open case from that long ago in an Ohio court! Charles Dickens would be impressed.

I noticed, however, that the authors mistakenly referred to William Howard Taft as "chief justice of the Supreme Court."

The correct title is actually "Chief Justice of the United States." This is largely due to the efforts of Salmon P. Chase, an Ohioan who was appointed Chief Justice by President Lincoln in 1864. Chase was somewhat egotistical and wanted a grander title than it had originally been, so he dubbed himself "Chief Justice of the United States" (and thus, not just of the Supreme Court itself). Congress went along shortly afterwards, and later Chief Justices have all borne the modified title. On the Supreme Court, the Chief Justice is primus inter pares, but he is not the boss. The current title emphasizes the Chief Justice's role as the leader of the judiciary, a co-equal branch of the Federal government.

For further information, I refer you to Robert J. Steamer's *Chief Justice: Leadership and the Supreme Court* (University of South Carolina Press, 1986); *The Office of the Chief Justice*, published by the White Burkett Miller Center of Public Affairs (University of Virginia, 1984), and to 28 U.S.C. Sec. 1.

Keep up the otherwise fine work! ■

Very truly yours,

William Vodrey
Cleveland

The changing landscape of the legal profession:

Bridging our differences and forging ahead

by Jonathan Hollingsworth

As the gavel is handed off to me and the Ohio State Bar Association embarks on another chapter in its storied history, the work ahead of us in the coming year is plentiful. However, the OSBA has never been more prepared to partner with its members to tackle the challenges, answer the questions and champion the causes of the day.

As the summer months pass by and our retail establishments turn their marketing efforts toward "back to school" purchases, my thoughts turn to the incoming first-year law school class. To the Class of 2016, welcome as you start your journey toward becoming a member of the legal profession; and to the Classes of 2014 and 2015, I offer my continued good wishes on your journey. As law school is just the beginning of the preparation for a life in the legal profession, the practicing bar is cognizant of the challenges of the current economic climate facing law students as they juggle family, debt and work to become competent practitioners.

Current reports show that law school applications are down, perhaps driven by the fact that job placement studies indicate that up to 20 percent of our nation's top law schools have graduates that are either unemployed or underemployed. While that all may be true, I still believe that those who commit to the law as their career are destined to find a rewarding place to ply their skills.

Those of us already in the profession have a role to play, indeed a duty to fulfill, to help newer practitioners find their way. In a profession that has always benefited from an apprentice-type environment by having its younger lawyers work alongside more experienced—and sometimes senior—lawyers, there has been a change in this experiential process. But why is that? There are certainly plenty of lawyers left in our profession to facilitate this. Are there really fewer opportunities for on-the-job training? What is taking place in our law firms and corporate legal departments

I still believe that those who commit to the law as their career are destined to find a rewarding place to ply their skills.

that is driving this trend? Have the salary demands outpaced what the clients are willing to pay, or is the work simply no longer there because of the competition driven by self-help programs? Is it a function of our law schools taking in more students than the market can absorb? Should the law schools be providing law students a legal education that is shaped by the needs and demands of today's society? What must be done so that newly minted law school graduates are better equipped to add to the firm's bottom line sooner? Should there be a specialty field of study in technology? These are good questions, but what are the answers?

It is time for us as practitioners to gather around the table and go beyond just having a candid discussion about what is taking place in the legal profession. The time for action is now. It is our responsibility not only to see that today's practitioners stay ready to handle client needs, but that we also secure a solid future for our profession and the practitioners who come after us.

Lawyers have a significant role to play in the life of the American society, and that begins with the preparation of our future lawyers. I contend that lawyers old and young can make this happen. Each may view the issues differently, and their solutions may not be the same, but, nonetheless, together they can build a legal profession that perseveres.

Let's start with a look at "the greatest generation," the one that Tom Brokaw identified as those who came of age during World War II. While many of the lawyers in this age group are retired, they would prove to be remarkable resources in support of newer practitioners. The key is connecting these two groups.

The greatest generation produced what we know today as the "baby boomers" (children born between 1945 and 1964)—my generation. Sixty million strong, we have for a number of years lived up to and, on occasion, some of us have actually exceeded expectations. However, we are slowly and assuredly heading toward the winter of life where we no longer will work as long, as hard and as energetically as we did in our youth. But we, too, still have much to offer our society and our

newer lawyers. Again, we need to identify ways for these two generations to connect.

Those born in the 1980s through 2000s—the "millennials"—are replacing the baby boomers. Believed to be 80 million, the millennials are the future, dependent on—if not driven by and, on occasion, seemingly too reliant on—technology. But as important as technology is to the modern day practice of law, the human element, even for this latest generation, cannot and should not be eliminated. The practice of law has at its core a very basic human element—the trust between the client and the lawyer. Technology is a tool for use in the practice of law, not a replacement for the personal relationship. Those of us from previous generations can help introduce that balance to the newest generation of lawyers.

In addition to coping with ever-changing technologies, lawyers also are faced with an information explosion and an expectation by clients of instant responses, often without the benefit of time for contemplation. Each generation of lawyers has to know how to access and sort this deluge of information and use it productively.

Several years ago, Steven Keeva wrote *The Joy of Not Knowing*. In it he said, "The amount of law the average lawyer is required to know ... seems to proliferate like some mutant culture spilling from legislative and judicial petri dishes." He posited that the new millennium imposed on the legal profession an era of potentially limitless access to information. Stating what appeared to be then and has been proven to be quite obvious, technology has brought legal research materials to the fingertips of not only attorneys, but also their clients.

Consequently, the need to be in the mainstream, to avoid overlooking the newest, the best, or the greatest bit of information has driven lawyers to cyberspace, a place we refer to today as "the cloud." Keeva described the expansiveness of information on the Web as intoxicating, but warned that with any "intoxicant, good sense in its use is important to the imbiber ... ." Today, we might call this intoxicant "social media."

Again, it is more about finding balance in this age of expanding technology and information than being afraid of it, and, working with our younger members, we can all learn about how best to access information at hyper-speed while maintaining our integrity and ability to provide sound counsel.

Lawyers of my generation who are still part of the practicing bar can, should and will lead the way toward leaving the profession better than we found it. One way for us to do that, beyond being the best lawyers we can be and by setting the best examples we can, is by working with our law schools and our young practitioners to ensure that the next generation of lawyers, smaller in number but mightier, is equipped to meet the demands of the people they serve. This, to me, is our best possible legacy: ensuring that those newly minted lawyers are prepared to lead this profession into the future. ■

Jonathan Hollingsworth is president of the Ohio State Bar Association.

In Brief

Compiled by Andrew Hartzell

Specialized dockets become first to receive final certification

Five specialized dockets became the first in the state to receive final certification from the Commission on Specialized Dockets. The specialized dockets include:

- Ashtabula County Common Pleas Drug Court;
- Clermont County Municipal OVI Court;
- Columbiana County Municipal Mental Health Court—STAR Program;
- Franklin County Family Drug Court; and
- Licking County Common Pleas Drug Court—CIA Program.

By Jan. 1, 2014, Ohio courts that operate specialized docket programs will be required to be initially certified by the Supreme Court.

The 22-member commission advises the Supreme Court and its staff regarding the promotion of statewide rules and uniform standards concerning specialized dockets in Ohio courts; the development and delivery of specialized docket services to Ohio courts; and the creation of training programs for judges and court personnel. The commission makes all decisions regarding final certification. ■

—www.courtnewsohio.gov

Employment down for law school class of 2012

According to the Employment Report and Salary Survey for the class of 2012 by the National Association for Law Placement (NALP), the overall employment rate for new law school graduates fell to 84.7 percent. Even though the overall number of jobs obtained by this class was higher than the number of jobs obtained by the previous class, the class of 2012 was also bigger. When coupled with fewer law-school funded positions, this resulted in the overall employment rate for the class of 2012 falling almost a full percentage point from the 85.6 percent measured for the prior year. The overall rate has now fallen for five years in a row since 2008.

Of those graduates for whom employment status was known, only 64.4 percent obtained a job for which bar passage is required. This figure has fallen more than 10 percentage points just since 2008—when it was 74.7 percent—and is the lowest percentage NALP has ever measured. ■

—www.nalp.org

U.S. companies see increase in litigation

More than half of U.S. companies have seen increases in litigation spending, according to a survey by AlixPartners. Thirty-six percent of respondents said that the number of commercial disputes their companies had been involved in has risen over the past 12 months. Contract disputes led the way, followed by intellectual property, product and class-action disputes. Of the companies reporting an increase in disputes, 83 percent said that their litigation costs rose during this period.

In the face of the growing threat of lawsuits, legal departments are trying to keep costs under control while establishing more predictability in their expenditures, mostly by pursuing out-of-court settlements and handling more work internally, says the survey. More than half (52 percent) of respondents said that retaining work in-house is important, while 27 percent reported an increase in the size of their legal departments in the previous 12 months. By the same token, companies are turning to alternative dispute resolution and alternative fee structures—59 percent and 55 percent, respectively, said they believe these techniques are important in reining in legal costs.

While companies may be closely managing their legal spending, they continue to lean heavily on outside law firms— 25 percent of respondents said their usage of outside firms had risen. In particular, companies are relying on law firms in specialized matters, such as M&A transactions and investigations, the survey found. ■

—www.alixpartners.com

Ohio courts' caseload hits 25-year low in 2012

The total number of new cases filed in Ohio courts decreased slightly in 2012, the lowest it has been since 1985, according to the annual Ohio Courts Statistical Summary released by the Supreme Court Ohio.

For 2012, the total number of new cases (2,707,618) decreased one-tenth of 1 percent compared to 2011.

Joining the overall statewide caseload at a 10-year low, the total new filings in appeals courts, domestic relations courts, juvenile courts, municipal and county courts, and criminal cases in general division common pleas courts all were at 10-year lows in 2012.

Information contained in the reports is provided to the Supreme Court of Ohio on a monthly basis by all courts except for appeals courts and probate courts, which provide statistics on a quarterly basis. ■

—www.courtnewsohio.gov

Behind the scenes with new OSBA Executive Director

Mary Amos Augsburger

From board meetings and business deals to mentoring and motherhood, *Ohio Lawyer* takes a candid look at the woman leading our Association into the future.

by John Hocter

As the newly minted executive director of the Ohio State Bar Association, Mary Amos Augsburger is fearless. Well, almost. "Are there heights involved?" she asks with a nervous laugh, referring to a proposed excursion at a recent planning meeting for guests at the Great Rivers Bar Leaders Conference, which Ohio is hosting later this year. The three OSBA staff members seated with her at the conference table—assistant executive director for administration Rick Bannister, meeting planner Jeanelle Harden and executive secretary Jennifer Moreland—have a combined 43 years of experience with the Association. Mary has been with the organization for just 18 months, but she runs a seemingly endless string of important meetings and performs her executive duties with the ease of someone on the job much longer.

Since being hired in July as only the fourth executive director in the 133-year history of the OSBA, Mary has been leading the daily operations of an organization that serves a membership of more than 28,000 Ohio lawyers, judges and legal professionals. Whether discussing meetings for conference attendees, working to expand and improve the scope of OSBA membership and its benefits, or negotiating big-time business deals to benefit the Association and its members, she is quick to listen, relying on the insights and experience of those around her before making final and definitive decisions. Her first major project centered around proSHARE—a professional digital network that works directly with Google to help bar associations across the country earn non-dues revenue from national advertisers—which coincides with the OSBA's history of entrepreneurialism and allows the Association to strengthen member benefits without increasing membership dues.

She goes about her work with a light demeanor and ever-present laugh, remaining at ease in the midst of tense situations, despite being thrown into the fire less than three short months ago. How she arrived at her current position—as the OSBA's first-ever female executive director and a leader within Ohio's legal profession—is a story that began in the early days of Mary's childhood.

A call to service

"I've wanted to be an attorney for as long as I can remember, going back to the second grade," Mary says. "I knew lawyers had a reputation for being community leaders and very smart people, and I wanted to be like that." Years after this realization, having graduated from The Ohio State University with a degree in political science, Mary continued to pursue her dream of becoming a lawyer at Capital University Law School, where she developed an interest in legislative and governmental affairs. "As a lawyer you learn to help others solve problems, and when you work for the public, you're not only helping individual clients, you're helping all Ohioans."

During law school, Mary spent her nights in the classroom and her days at the Ohio Statehouse, where she worked as a legislative aide for Jeff Jacobson in the Ohio House of Representatives and eventually the Ohio Senate. After graduating and passing the bar, she brought her legislative experience to her new role as chief legal counsel and policy advisor for the state majority caucus in the Ohio Senate in 2002, a role she assumed at just 30 years of age and fulfilled dutifully for the next five years.

"Something I'm most proud of is being involved in the Ohio Homebuyer's Protection Act," Mary says. "Many of the Senate members wanted to review Ohio's mortgage laws and make sure we had appropriate consumer protections in place given what was going on in the marketplace and the economy." That bill, designed to bring increased enforcement and regulation to mortgage lending practices and protect borrowers' rights, went on to be touted as a model for other state governments to follow and implement around the country.

Following her work as Senate legal counsel, Mary began private practice as an associate with Squire Sanders in Columbus before returning to her true passion of public service, working as an executive for the Ohio Department of Commerce as a divisional chief counsel and department policy advisor and for the Ohio Auditor of State's Office as the director of policy and public affairs until 2012, when she left to join the OSBA as legislative counsel.

> I've always approached my work as 'do your homework, expand your knowledge and communicate it well,' and everything else just takes care of itself. Earn respect, and you'll get it.

Welcome to the OSBA

Mary was not an unknown commodity when she arrived at OSBA Headquarters in January 2012. Her hard work for the Ohio Senate many years earlier caught the eye of OSBA Director of Legislative Affairs Bill Weisenberg, long-time OSBA veteran and venerated figure in Ohio's legal profession. In his corner office, littered with awards and accomplishments from his 35 years of service to the lawyers and citizens of Ohio, he lights up when discussing his earliest encounters with the young lawyer who would ultimately become his new boss. "I've known Mary for most of her professional career," says Weisenberg. "Probably our first contact was in her capacity in giving advice to the Senate Judiciary Committee, which she did in a highly professional and capable manner throughout. She was always easy to work with, well-prepared, and had great respect for the legislature as an institution and great respect for the law." He was instrumental in bringing Mary into the Association as legislative counsel, a position that required a strong knowledge of the internal workings of state government and the tenacity to push through bills and legislation on behalf of the OSBA membership. During her service in that role, Mary contributed to successful legislation efforts across many areas of the law through the work of OSBA committees and sections, something she says is extremely important to members and the Association as a whole. "Members participating in our committees and sections are constantly evaluating how the law is working for their clients, and when they see a problem they bring solutions. That's what our advocacy team takes to the General Assembly."

This track record of success, as well as her time spent learning the ins and outs of executive management and organizational relationship building, led to her becoming the next executive director of the OSBA. During the interview and hiring process for the position and in the time since her appointment, Mary has resolved to improve on the existing cadre of member services and benefits to retain the OSBA's reputation as one of the best voluntary bar associations in the nation.

Mentoring: Returning the favor

On a warm summer day in late July, Mary sits in a quiet midtown restaurant in Columbus across from Holly Nagle, a third-year law student who, much like Mary during her law school days, attends Capital University Law School by night and works as a legislative aide at the Ohio Statehouse by day. They casually chat about everything from law school classes and professors to internships, summer work opportunities and "ladies' night" at a popular local establishment, with Mary obviously taking great joy in counseling a young up-and-coming lawyer and Holly readily soaking up each bit of advice from a fellow female lawyer working at the peak of the profession.

Mentoring young law students and lawyers is something on which Mary places great importance as a leader in Ohio's legal profession. "One of the things we can always do better is training and professional development. So I've tried to be a mentor or someone who young people can talk to when they have questions as they're doing their job and developing their careers," she says. "Along the way I've done that for quite a few individuals, and now I'm at the point in my career when I can actively seek those people out, as well."

Mary believes she is simply returning the favor performed for her by many people in her professional past, from the former chief of staff of the Ohio Senate, Teri Geiger, whom Mary says led by example and from whom she learned much simply by working alongside her, to her relationships with accomplished lawmakers and lawyers such as Bill Weisenberg, whom she admired and learned from long before becoming executive director.

As lunch continues, the conversation turns to resume building and

how to stand out in a crowded career marketplace—a ubiquitous problem for new lawyers and soon-to-graduate law students—through paid internships, externships, clerkships, summer associate positions and other opportunities for gaining work experience. They discuss the importance of professional networking and the challenges of being a young woman and a lawyer working toward success in what some see as a male-dominated profession. As the first female executive director in the OSBA's century-spanning history, Mary is in a unique position to answer these sorts of questions. "I've heard that it's a good idea for female lawyers to learn how to golf. Do you golf?" asks Holly. "No," Mary says with a smile.

Motherhood and work-life balance

Working tirelessly in the boardroom, traveling around the state and helping Ohio lawyers with their practices as the new OSBA executive director is no doubt a labor of love for Mary, but her other recently acquired title—mother to a beautiful baby boy named Alex—is and always will be her main focus. "After work I try to get home and fulfill my primary role, which is 'Alex's Mom,'" Mary says, beaming. She and her husband Ryan spend quality time together in the evenings, discussing Alex's growth, coordinating schedules and catching up on personal and professional emails. Being a new mother while simultaneously assuming the role of OSBA executive director is definitely a challenge, but Mary doesn't necessarily believe that women are that much different from men when it comes to work-life balance. "I think men and women both struggle with work-life balance issues, whether it be balancing work and family or another issue someone is involved with, such as community service or other pursuits," says Mary.

As for any unique challenges of being a woman in Ohio's legal profession, Mary subscribes to the belief that the harder you work, the less impact bias—gender or otherwise—can have on one's career. "I've always approached my work as 'do your homework, expand your knowledge and communicate it well,' and everything else just takes care of itself. Earn respect, and you'll get it."

An open-door policy

Since assuming her place at the head of the OSBA earlier this year, Mary has spelled out her vision and mission for the Association strongly, succinctly and consistently. "We're working collaboratively with our members to make sure that they have the tools they need to serve their clients today and tomorrow." She plans to achieve this goal by engaging members through committee and section involvement, focus groups, member input, and what she refers to as her "open-door policy," encouraging Association staff and all OSBA members to call, email or visit her to discuss individual issues they face in their practices or with questions or comments about their membership. It is this inclusive and transparent policy and a dedication to upholding the reputation and integrity of the profession that makes one thing abundantly clear: As the leader and new executive director of this Association, no matter what challenges may lay ahead in the future, Mary Augsburger is not afraid to take the OSBA to exciting new heights. ■

Author bio

John Hocter is the publications editor at the Ohio State Bar Association.

Opposite page: Mary at the OSBA Council of Delegates meeting; on the floor of the Ohio General Assembly. This page: Mary with son Alex; at orientation for committee and section chairs.

Cautious optimism:

The Economics of Law Practice 2013

Our triennial study details the latest financial information such as billing rates, attorney incomes and other trends and attitudes regarding the economics of law practice in Ohio.

by Kalpana Yalamanchili

The recently completed triennial study of the economics of law practice may signal an optimistic outlook for Ohio lawyers.[1] Trends in attorney income, billing rates, time expended and compensated, economic sentiment and the degree of job satisfaction all seem to indicate that Ohio lawyers are more optimistic about the economics of the practice of law than they were at the time of the previous study in 2010. While many of the upward trends discussed below are very small and may have just kept up with the rate of inflation, they are nevertheless moving upward. It should also be noted that the respondents in the study are generally at the mid-level of their practice years. (See sidebar on the demographics of the respondents.)

The Ohio State Bar Association Solo, Small Firms and General Practice Section has sponsored the triennial study of the economics of law practice in Ohio since 1990. The OSBA retained an independent consultant, experienced in statistics, to conduct the survey and to analyze the data collected. (See sidebar on opposite page.) The study serves as a guide for Association members as they plan and manage their professional lives. The study is not intended for use in setting minimum, average or maximum attorney fees or salaries. It is intended for use as one of several resources in determining law office best practices and policies.

A comparison of the data from the 2013 study with previous studies determines certain trends.

Trends in income[2]

While the 2013 study divided the survey instrument among three categories of lawyers (private practitioners, government lawyers and house counsel), weighted averages are reported for net income. The median 2012 net income for respondents working full and part time is $95,872 (up from $84,000 reported in 2009, and $85,000 reported in 2006 for all respondents).

The median 2012 net income reported for respondents working full time is $96,173 (up from $90,000 in 2009). For male attorneys working full time, the median net income for 2012 was $114,520 (up from $100,000 in 2009 and in 2006). For female attorneys working full time, the median net income for 2012 was $78,841 (up from $74,000 in 2009 and $70,000 in 2006). (See figure 1 on page 12.)

Trends in billing rates

The reported median hourly billing rate for all respondents is $207 (up from $200 in 2010). The median hourly rate reported by male attorneys working full time in 2013 is $225 (compared to $200 in 2010, and $190 in 2007) while female attorneys working full time reported a median billing rate at $200 (compared to $195 in 2010, and $175 in 2007). (See figure 2 on page 12.)

Trends in time expended and compensated

The median number of hours of compensable or billable work time expected of all respondents working full time in 2013 is expected to be 35 hours per week (compared to 34 hours per week in 2010, and 35 hours/week in 2007). The median number of actual hours expected to be worked by all respondents working full

time in 2013 is expected to be 50 hours per week (compared to 50 hours per week in 2010 and in 2007). The median number of hours of compensable or billable time expected of male attorneys working full time in 2013 is 35 hours per week (unchanged from 2010 and 2007). The median number of work hours expected of male attorneys working full time in 2013 is 50 hours per week (unchanged from 2010 and 2007). The median number of hours of compensable or billable time expected of female attorneys working full time in 2013 is expected to be 34 hours per week (compared to 33 hours per week in 2010 and 35 hours per week in 2007). The median number of work hours expected of female attorneys working full time in 2013 is 48 hours per week (compared to 45 hours per week in 2010 and 50 hours per week in 2007). (See figure 3 on page 13.)

Trends in economic sentiment with the practice of law

Attorneys were asked about their perceived current economic status in 2013 compared with 2012. Approximately 46 percent of the respondents believed that their economic status will be the same as the previous year, while more than 24 percent believed that it will be better, and 23 percent thought it would be worse (compared to 2010 when 42 percent expected their economic status to remain the same as 2009, while 23 percent believed it would be better and 34 percent thought it would be worse).

Respondents were also asked about their perceptions of their economic status for the next two years. Approximately 40 percent expect things to remain the same while more than 38 percent thought their economic status would be better and a little more than 13 percent expected things to be worse (compared to 2010 when 35 percent expected things to remain the same, 42 percent expected to be better and 14 percent expected things to be worse). There was only a small difference in the percentage of respondents who were unsure (9 percent in 2010 and 8.7 percent in 2013). (See figure 4 on page 13.)

Trends in degree of job satisfaction

Respondents were asked about their degree of job satisfaction in terms of current levels as well as in the near future. A little less than half of lawyers in private practice, 48.6 percent, reported that they derived a great deal of satisfaction in their current job or practice area. For those in house counsel positions, this level of job satisfaction was reported by 49.3 percent of respondents. Government lawyers reported the highest degree of job satisfaction at 67.3 percent. (See figure 4 on page 13.)

When asked about the degree of job satisfaction in the near future, 59.7 percent of private practitioners expected to remain at their current level, while 15.5 percent expected to find their job more satisfying, and 17.6 percent thought it would be less satisfying. The great majority of house counsel (62.7 percent) responded that they expect to have the same level of job satisfaction, while 23.2 percent expected to find their job more satisfying and less than 1 percent thought it would be less satisfying. For government lawyers, 70.8 percent expect their job satisfaction level to remain the same, while 16.9 expect to be more satisfied, and 8.4 percent thought it would be less satisfying.

In 2010, the responses from all job classifications indicated that 50 percent of lawyers derived a great deal of job satisfaction, while 41 percent indicated some satisfaction and, 9 percent indicated very little satisfaction. When asked to predict their job satisfaction level for the near future, 64 percent of the respondents in the 2010 study thought that their degree of satisfaction would remain the same, while 17 percent hoped it would be more satisfying and 13 percent expected it to be less satisfying.

Additional findings

While the trends in the above noted categories may be cause for optimism, other findings indicate that the great recession's effect on the legal profession is still very much in evidence and will remain so for the near future.

Jobs and compensation

Respondents were asked about compensation and hiring plans or expansion of jobs in 2013. About 77 percent noted that new lawyer offers were unlikely (compared to 11 percent who thought they were likely or very likely), and 55 percent indicated that lawyer salary increases were unlikely (compared to 11 percent who thought they were likely or very likely). As to lawyer bonuses, 64 percent thought they were unlikely to be offered (compared to 15 percent who thought they were likely or very likely).

How the study was conducted

The Ohio State Bar Association Solo, Small Firms and General Practice Section retained Applied Statistics Laboratory (ASL), based in Michigan, to conduct a survey of Association members on economic factors related to the profession and to analyze the data collected. ASL has conducted these studies triennially since 1990.

The objectives of all of these studies were to obtain and report useful and usable information on:

- Changing patterns of attorney demographics;
- Attorney income by practice category/class, gender, field of law, office location, work status (full- versus part-time work), years in practice and firm/organization size;
- Associate, paralegal and legal secretary salaries by years of experience and office location;
- Prevailing hourly billing rates for attorneys by a variety of indicators, and legal assistants by years of experience, firm size and office location;
- Attorney time allocated to billable and non-billable professional activities;
- Revenues, expenses and overhead rates for private practitioners by office location and firm size;
- Law practice management trends over time; and
- Issues on economic sentiment and job satisfaction.

The data was collected through online surveys fielded during April and May 2013. This year, the survey was sent separately to private practitioners, house counsel and government lawyers. There were about 1,500 usable returns. Margin of error is 2 to 3 percent of the mean value, depending on the various categories.

The trend analysis provided in this article for selected portion of the study is based on median values (half the numbers are greater and half the numbers are lower than the median). ■

Law school debt
For the first time, the study sought information on law school and other educational debt of Ohio lawyers. For lawyers in practice for two years or less, the median accumulated law school debt was $100,000; for lawyers between three to five years of practice, it was $90,000; for those between six to 10 years of practice, it was $60,000. Those in practice more than 36 years (admitted prior to 1977) reported that debt to have been $7,000.

The current monthly payment for lawyers in practice for two years or less is a median of $643; for those in practice between three to five years, the median payment is $775; for those between six to 10 years of practice, it is $544. As to the number of years of payment remaining, the median reported was 18 years for those in practice for five years or less. Loan repayment terms ranged for 10 to 30 years. ■

FIGURE 1

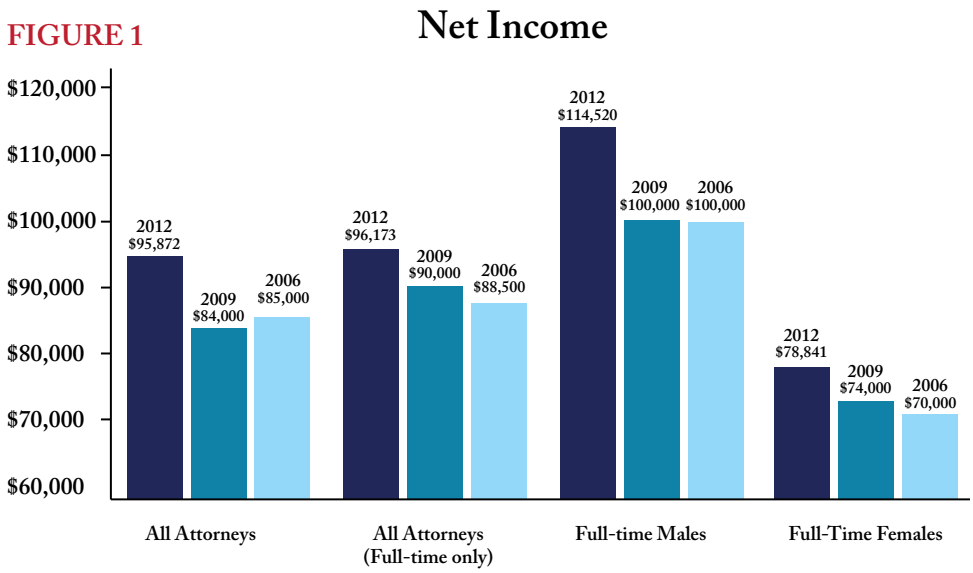
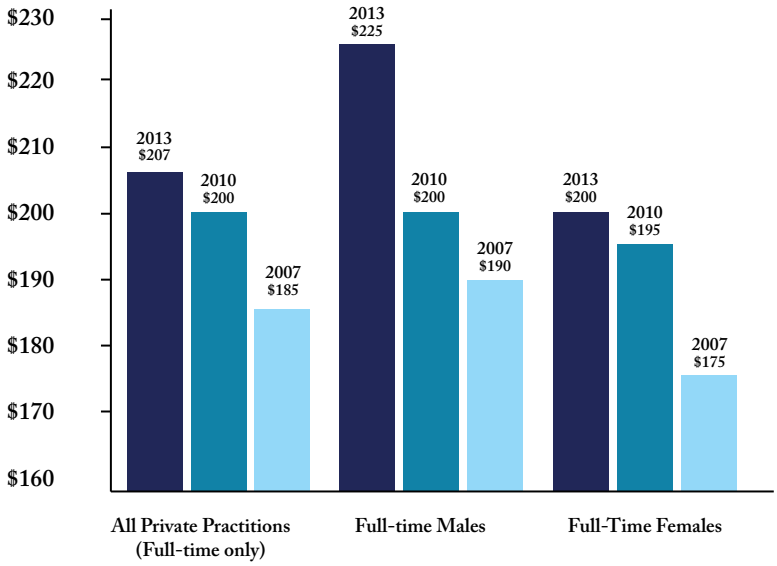


FIGURE 2



Author bio

Kalpana Yalamanchili is the OSBA director of bar services. She oversees the work of 42 committees and sections, the lawyer and paralegal certification programs, and OSBA special projects. She also serves as the primary liaison to metro/local bar/affinity bar associations.

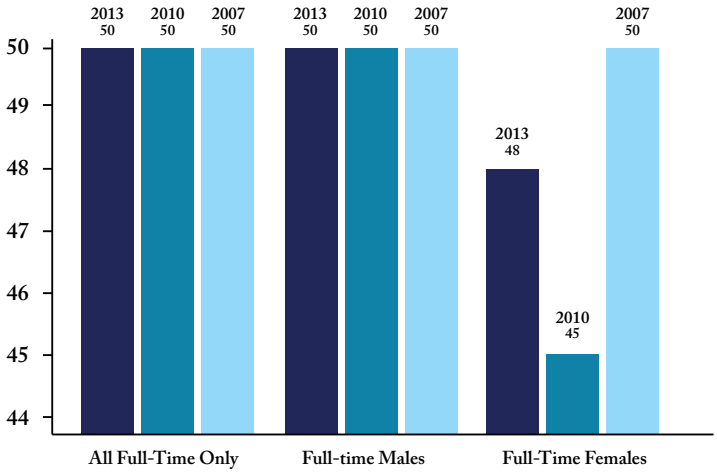
Endnotes

[1] The study is available to members of the Association at www.ohiobar.org/2013econstudy.

[2] Net income represents 2012 values and is defined as all personal income from legal work (after expenses) or salaries from the practice of law, before taxes. All other data represent 2013 values.

FIGURE 3

Total Hours Worked in Workweek



Total Hours Billed in Workweek

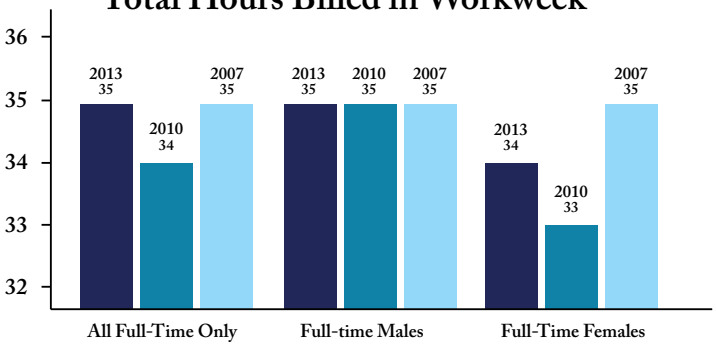


FIGURE 4

Economic Sentiment and Job Satisfaction

Current Conditions

Better	28.4	36.6	17.8
Worse	23	6.3	20
About the same	45.9	54.9	59.4
Don't Know	0.4	0.7	2.9
NA/New attorney	2.4	1.4	
Total	**100%**	**100%**	**100%**

Future Conditions

Better	38.4	37.1	15.8
Worse	13.4	9.8	16.1
About the same	39.5	46.9	59.2
Don't Know/No opinion	8.7	6.3	9
Total	**100%**	**100%**	**100%**

Current Satisfaction

A great deal	48.6	49.3	67.3
Some	43	45.1	29.2
Very little	8.4	5.6	3.5
Total	**100%**	**100%**	**100%**

Future Satisfaction

Being more satisfying	15.5	23.2	16.9
Remaining the same	59.7	62.7	70.8
Becoming less satisfying	17.6	10.6	8.4
Ready to change practice area	3.1	0.7	1.6
Unsatisfying enough to quit practicing	4.1	2.8	2.3
Total	**100%**	**100%**	**100%**

Demographics of respondents

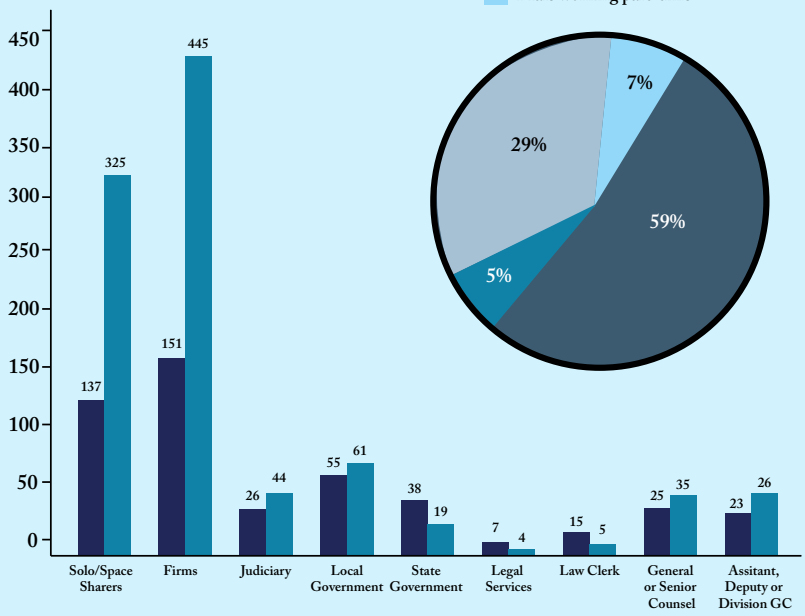
Work Status

Full-time females	15	17	12
Part-time females	17	21	24
All females	**15**	**17**	**13**
Full-time males	29	26	24
Part-time males	37	29	28
All males	**30**	**27**	**24**
All respondents	**26**	**21**	**18**

Office Location

Greater Cleveland	25	23	26
Greater Cincinnati	28	24	13
Greater Columbus	27	22	21
Greater Dayton	23	18	22
Northeast Region	24	22	19
Northwest Region	28	24	12
South/Southeast Region	27	20	20
All respondents	**26**	**21**	**18**

Practice Setting



Gender

Standing and same-sex marriage:
A review of *Windsor* and *Perry*

by Kelly Albin and Alana Jochum

On June 26, 2013, the U.S. Supreme Court issued two of the most highly anticipated decisions of the year: *United States v. Windsor* and *Hollingsworth v. Perry*. Both cases involve marriage equality—one of the most active political debates today—and key procedural issues important to lawyers, judges and the U.S. judicial system as a whole. Regardless of where an individual stands in the same-sex marriage debate, *Windsor* and *Perry*'s implications are far-reaching and will substantially affect how lawyers counsel clients, especially gay and lesbian clients, on a variety of issues in the near future.

The federal Defense of Marriage Act case: *United States v. Windsor*

In 2007, Edie Windsor married Thea Spyer, her partner of 42 years, in Canada. After suffering from multiple sclerosis and a heart condition for several years, Spyer passed away in February 2009, leaving Windsor as sole executor of her estate. Although their marriage was recognized by New York state law, the federal Defense of Marriage Act (DOMA) prevented Windsor from qualifying for the unlimited spousal deduction for federal estate taxes.[1] Section 3 of DOMA defines "marriage" as a "legal union between one man and one woman as husband and wife" and "spouse" as "a person of the opposite sex who is a husband or a wife."[2] As a result, Windsor was required to pay $363,053 in federal estate taxes. If federal law accorded their marriage the same status as opposite-sex marriages, Windsor would have paid no federal estate taxes on Spyer's estate.

In November 2010, Windsor filed suit in the U.S. District Court for the Southern District of New York seeking a full refund of the federal estate tax imposed on Spyer's estate and arguing that Section 3 of DOMA violated the Equal Protection Clause of the Fifth Amendment.[3] The government initially defended DOMA, but in February 2011, Attorney General Eric Holder announced that the Department of Justice (DOJ) would no longer defend its constitutionality.[4] Holder stated courts should apply a heightened standard of scrutiny to classifications based on sexual orientation and that Section 3 is unconstitutional under that standard. Despite asserting the law's unconstitutionality, Holder simultaneously explained that President Obama informed him "that Section 3 [would] continue to be enforced by the Executive Branch," thereby refusing to refund Windsor the taxes paid.[5] Shortly after Holder's announcement, the District Court permitted the Bipartisan Legal Advisory Group (BLAG) of the U.S. House of Representatives to intervene to defend the statute's constitutionality. In June 2012, the District Court granted summary judgment in Windsor's favor, holding that Section 3 of DOMA violated the Equal Protection Clause because no rational basis existed to support it.[6]

BLAG appealed to the U.S. Court of Appeals for the Second Circuit. The Second Circuit affirmed, concluding "homosexuals have been the target of significant and long-standing discrimination in public and private spheres[.]"[7] The court classified such individuals as part of a quasi-suspect class and stated that any law restricting their rights is subject to intermediate scrutiny.[8] Because DOMA's classification of same-sex spouses was not substantially related to an important government interest, the Second Circuit held that Section 3 of DOMA violated the equal protection clause and is unconstitutional.[9]

Both Windsor and the DOJ filed petitions for certiorari with the U.S. Supreme Court. In December 2012, the Supreme Court granted certiorari to determine whether Section 3 of DOMA violates the Fifth Amendment's equal protection clause; whether the Executive Branch's agreement with the lower court that DOMA is unconstitutional deprives the Supreme Court of jurisdiction to decide the case; and whether BLAG has Article III standing in the case. In February 2013, the Obama Administration formally endorsed same-sex marriage rights and encouraged the U.S. Supreme Court to hold Section 3 of DOMA as unconstitutional.[10]

The *Windsor* decision

The Supreme Court's highly anticipated decision was two-fold: the Court had jurisdiction to consider the merits of the case; and Section 3 of DOMA was unconstitutional as a deprivation of the equal liberty of same-sex couples that is protected by the Fifth Amendment.[11]

Standing

Justice Kennedy, writing for the 5-4 majority, focused the standing analysis on two principles: the jurisdictional requirements of Article III and the prudential limitations on its exercise. The executive branch's decision not to defend the constitutionality of Section 3 did not deprive the District Court of jurisdiction because the government continued to deny refunds and to enforce the law. Thus, Windsor's ongoing inability to obtain a refund allegedly required by law was a "concrete, persisting, and unredressed" Article III injury in fact.[12] But even when Article III requirements are satisfied, prudential considerations demand "concrete adverseness which sharpens the presentation of issues[.]"[13] One consideration is whether adversarial presentation of the issues is secured by "the participation of *amici curiae* prepared to defend with vigor the constitutionality of the legislative act."[14] Despite the government's agreement with Windsor's position, the Court determined it was not deprived of jurisdiction because BLAG's "sharp adversarial presentation of the issues satisfie[d] the prudential concerns[.]"[15]

It is difficult to foresee the implications of the standing analysis because, in permitting *Windsor* to be heard on the merits, the Court stated the case was "not routine" and presented "unusual and urgent circumstances" warranting review.[16] The Court reasoned *Windsor* was of immediate importance to the federal government and to hundreds of thousands of persons, and its dismissal would result in extensive litigation involving the more than 1,000 federal statutes and regulations under DOMA's control. The legal community may have to wait until future controversies present the Court with another opportunity to more clearly define what circumstances qualify as "unusual and urgent circumstances" when the adversarial nature of the parties is in question.

DOMA

Justice Kennedy cited *Loving v. Virginia* and *Sosna v. Iowa* in explaining that the definition and regulation of marriage has traditionally been within the authority and realm of the states.[17] As it pertained to Windsor and her wife, Thea Speyer, New York viewed the limitation of marriage to heterosexual couples to be an unjust exclusion. It began recognizing same-sex marriages in 2008 and formally amended its laws to permit same-sex marriage in 2011. The Court found such actions to be a proper exercise of New York's sovereign authority.

DOMA sought to impose restrictions and to disable the very class of persons that New York sought to protect. The Court noted DOMA's demonstrated purpose is "to ensure that if any State decides to recognize same-sex marriages, those unions

will be treated as second-class marriages for purposes of federal law."[18] It "writes inequality into the entire United States Code" and tells same-sex married couples "their otherwise valid marriages are unworthy of federal recognition."[19] The Court declared Section 3 of DOMA as unconstitutional and invalid because "[n]o legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws sought to protect in personhood and dignity.[20]

There are more than 1,000 federal laws and regulations that provide benefits to married couples. And now, same-sex couples who are married in states that permit or recognize same-sex marriage may receive all of these federal benefits.

Despite the Supreme Court's favorable ruling for same-sex couples in states where marriage is currently recognized, same-sex couples who live in states like Ohio—that neither permit nor recognize same-sex marriage, domestic partnerships, and civil unions—will continue to face unequal treatment and experience substantial legal headaches. Section 2 of DOMA still stands in the wake of *Windsor,* and that section allows states and other U.S. territories to deny recognition of same-sex marriages that originated in other states or territories. Thus, if a same-sex couple decides to marry in Vermont but live in Ohio, the couple may only qualify for very limited federal benefits.

The federal government typically defers to the states in determining whether a couple's marriage is valid; there is no universal rule across all federal agencies. Some agencies, such as the Internal Revenue Service, Social Security Administration, and Veterans Affairs, follow the "place of domicile" standard and look to the laws of the state where a couple lives.[21] Other agencies, including Citizenship and Immigration Services and the Department of Defense, follow a "place of celebration" standard and look to the state where a couple lawfully married. It is clear the State of Domicile standard will result in federal agencies denying crucial benefits to married same-sex couples living in Ohio. But if federal agencies adopt the State of Celebration standard, same-sex married couples would be eligible for all federal benefits regardless of where they reside. Marriage equality advocacy groups are already pushing for agencies to adopt the State of Celebration standard to provide clarity and stability to same-sex couples, employers, agencies and others. Assuring same-sex couples have fair access to federal marital protections will likely require Congressional action and/or formal rule-making by federal agencies.

The California marriage case: *Hollingsworth v. Perry*

In November 2000, California voters passed Proposition 22, which amended the state's Family Code by defining "marriage" as a union between one man and one woman.[22] In May 2008, the California Supreme Court invalidated Proposition 22, holding that it violated the due process and equal protection guarantees of the state constitution.[23] Following the court's decision, five California voters collected signatures for a referendum, Proposition 8 ("Prop 8"), to amend the California Constitution to provide "only marriage between a man and a woman is valid or recognized by California."[24] After a contentious campaign, 52.3 percent of California voters approved the amendment in the November 2008 election.

Although the Court's decisions in Windsor *and* Perry *are not as far-reaching as many same-sex marriage advocates had hoped, the decisions still represent an enormous victory for LGBT individuals nationwide, as well as an addition to the Court's jurisprudence preserving procedural principles.*

In May 2009, two same-sex couples—Kristin Perry and Sandra Stier, and Jeffrey Zarillo and Paul Katami—filed suit under 42 U.S.C. §1983 in the U.S. District Court for the Northern District of California after being denied marriage licenses.[25] The couples named California officials responsible for enforcing state marriage laws as defendants and alleged Prop 8 violated the Fourteenth Amendment. Because California officials originally named in the suit refused to defend Prop 8, the District Court permitted the original proponents of Prop 8—Protectmarriage.com and other individually-named proponents—to intervene under Federal Rule of Civil Procedure 24(a) to defend the action. In August 2010, the District Court held that Prop 8 violated the due process and equal protection clauses of the Fourteenth Amendment and permanently enjoined its enforcement.[26]

The proponents appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit stayed the District Court's injunction pending appeal and certified a question of standing to the California Supreme Court. It asked the state court to determine whether the proponents had "a particularized interest in the initiative's validity or the authority to assert the state's interest in the initiative's validity," which would permit them to defend the law when state officials refuse to do so.[27] The California Supreme Court ruled the proponents had standing to defend Prop 8. It reasoned that when public officials decline to defend a ballot initiative, "the official proponents of a voter-approved initiative measure are authorized to appear and assert the state's interest in the initiative's validity[.]"[28]

In February 2012, the Ninth Circuit affirmed the lower court's decision, ruling Prop 8 violated the Fourteenth Amendment's Equal Protection Clause.

After the Ninth Circuit denied rehearing and temporarily stayed its ruling to allow an appeal to the U.S. Supreme Court, the proponents filed their petition of certiorari. In December 2012, the Supreme Court granted certiorari to determine whether the proponents have standing under Article III, §2 of the U.S. Constitution; and whether Prop 8 violates the Fourteenth Amendment's Equal Protection Clause.

The *Perry* Decision

Unlike *Windsor*, *Perry* did not pass jurisdictional muster. The Supreme Court held the proponents lacked standing; therefore, neither the Supreme Court nor the Ninth Circuit had jurisdiction to decide the case on the merits.[29] Chief Justice Roberts, writing for the 5-4 majority, delivered the Court's analysis in three parts.

First, the Court held that the proponents' general interest in vindicating the constitutional validity of a state law was insufficient to satisfy Article III's case or controversy requirement. To have standing, a party "must seek relief for an injury that

affects him in a 'personal and individual way.'"[30] The Court acknowledged the California constitution and its election laws gave the proponents a "unique, special, and distinct role in the initiative process," but once voters approved Prop 8, the initiative became "a duly enacted constitutional amendment."[31] The proponents have no role in Prop 8's enforcement, and thus, they cannot have a personal stake in defending it.

Second, the Court looked to basic agency principles. The proponents argued the California Supreme Court's decision authorized them to act "as agents of the people of California."[32] But the Court emphasized that the California Supreme Court's ruling only stands for the proposition that, as far as California is concerned, the proponents may defend Prop 8. The proponents are not agents of the state, are not public officials, and owe no duty to the people of California. "They are free to pursue a purely ideological commitment to the law's constitutionality" without reference to considerations such as changes in public opinion.[33]

Third, the Court emphasized the question of standing in federal court "is a question of federal law, not state law."[34] A state cannot override settled federal law merely because it believes a private party has standing "to seek relief for a generalized grievance[.]"[35]

Because the Supreme Court determined the Ninth Circuit lacked jurisdiction to hear the case, and because California officials only defended Prop 8 at the trial level, the District Court's decision striking down Prop 8 was restored. But it was possible the *Perry* decision and the resulting restoration of same-sex marriage would be limited to the plaintiffs named in the suit or to the county where the suit was brought. Immediately following the decision, however, California Attorney General Kamala Harris urged the Ninth Circuit for prompt action and promised California residents she would make certain all California counties were prepared to issue licenses to same-sex couples. Two days after the Supreme Court released its decision, the Ninth Circuit reinstated same-sex marriage in California for the first time since 2008. The *Perry* plaintiffs were among the first same-sex couples to marry that same day.

Although *Perry* may be widely recognized by laypersons as the "gay marriage case," it is likely that the legal community will more commonly cite to it as a standing case. The Article III case or controversy requirement is a fundamental legal principle, serving a crucial role in litigation by requiring federal courts to only hear cases in which the parties have a sufficiently personal stake in its outcome. *Perry* serves as a reminder to Ohio practitioners that even if the Ohio Supreme Court determines a party has standing in a given case, federal courts need not, and likely will not, defer to the state court's decision when evaluating standing or jurisdictional issues in federal court.

The future of same-sex marriage

Although the Court's decisions in *Windsor* and *Perry* are not as far-reaching as many same-sex marriage advocates had hoped, the decisions still represent an enormous victory for LGBT individuals nationwide, as well as an addition to the Court's jurisprudence preserving procedural principles. For those in favor of same-sex marriage, the next step is challenging state laws that currently prohibit same-sex marriage—such as provisions of the Ohio Constitution and R.C. 3101—and that deny marriage equality to Ohio's same-sex couples. As Justice Scalia acknowledged in his dissent in *Windsor*, it is only a matter of time before such state laws are declared unconstitutional.[36] ■

Author bio

Kelly Albin serves as Associate General Counsel for Explorys. Her practice focuses on regulatory compliance, employment issues, and administrative policy. Explorys is a value-based healthcare network and data analytics company that was recently recognized as an enterprise analytics market leader in the KLAS Business Intelligence Perception 2013 Report.

Alana Jochum is an associate attorney at Squire Sanders (US) LLP. Her practice focuses on complex civil litigation, including product liability and commercial disputes. Since 2009, Squire Sanders has proudly achieved a 100 percent rating in the Corporate Equality Index, published annually by the Human Rights Campaign, which advocates for workplace equality for LGBT employees.

Endnotes

1 Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).
2 Id. at §3.
3 *Windsor v. United States*, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012).
4 Letter from Eric H. Holder Jr., Attorney General, to John A. Boehner, Speaker, U.S. House of Rep., at 5 (Feb. 23, 2011).
5 Id.
6 *Windsor*, 833 F. Supp. 2d at 402.
7 *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012).
8 Id.
9 Id. at 188.
10 See Pet'r's Br. 12-307, Feb. 2013.
11 *United States v. Windsor*, No. 12-307, slip op. at 13, 26 (U.S. June 26, 2013).
12 Id. at 6.
13 Id. at 10.
14 Id.
15 Id. at 11.
16 Id. at 12-13.
17 388 U.S. 1 (1967) (invalidating laws prohibiting interracial marriage); 419 U.S. 393 (1975) (noting domestic relations is "regarded as a virtually exclusive province of the States").
18 *Windsor*, No. 12-307 at 22.
19 Id. at 23.
20 Id. at 26.
21 It is important to note that although the IRS generally follows the State of Domicile standard, there is no statute or regulation requiring this approach. The IRS has recognized common law marriages for tax purposes so long as the marriage is valid in the "state of celebration." See Am. Civil Liberties Union, et al., "Federal Taxes, LGBT Organizations Fact Sheet Series: After DOMA What It Means for You" (2013).
22 California Family Code §308.5.
23 See *In re Marriage Cases*, 183 P.3d 384 (2009).
24 Cal. Const. art. I, §7.5 [or Official Voter Information Guide, Cal. General Election, at 54 (Nov. 4, 2008)].
25 *Perry v. Schwarzennegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010).
26 Id. at 1004.
27 *Perry v. Brown*, 671 F.3d 1052, 1070 (9th Cir. 2012).
28 *Perry v. Brown*, 52 Cal. 4th 1116, 1127, 265 P.3d 1002 (2011).
29 *Hollingsworth v. Perry*, No. 12-144, slip op. at 2 (U.S. June 26, 2013).
30 Id. at 7 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n. 1 (1992)).
31 Id. at 8.
32 Id. at 14.
33 Id. at 16.
34 Id.
35 Id. at 17.
36 *Windsor*, No. 12-307 at 24 (Scalia, J., dissenting).

The scope of Ohio's Apology Statute

by Greg Laux

Earlier this year, the Ohio Supreme Court decided the case of *Estate of Johnson v. Smith*.[1] At issue in *Smith* was whether Ohio's Apology Statute, R.C. 2317.43, applies retroactively to statements of apology, sympathy and compassion made by physicians in the wake of an unfortunate medical outcome, and whether the statute was intended to exclude statements of fault within the scope of its protection. In the decision, a divided Eleventh Appellate District held that the statute did not apply retroactively to exclude the statement, "I take full responsibility," made by a physician for causing post-surgical medical complications to a patient.[2]

The appeals court also held the physician's statement was admissible as a party admission, an admission against interest, and that its probative value outweighed any danger of unfair prejudice under the Ohio Rules of Evidence.[3] The doctor appealed the decision to the Ohio Supreme Court, which granted discretionary review on May 9, 2012, and heard oral arguments on Feb. 5, 2013.[4] The Court issued a decision on the merits on April 23, 2013, holding that R.C. 2317.43 applies to any cause of action filed after Sept. 13, 2004.[5]

Background: Ohio Apology Statute

The Ohio General Assembly enacted R.C. 2317.43 in September 2004. According to its stated intent, the purpose of the Apology Statute is to prohibit the use of a physician's statement of sympathy as evidence in a medical malpractice action.[6] The statute provides that all "statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence" made by a medical provider to a patient or a patient's relative or representative as a result of an unanticipated adverse outcome are "inadmissible as evidence of an admission of liability or as evidence of an admission against interest."[7] Similar to Ohio Evidence Rule 409, which addresses offers to pay medical expenses, the language of the Apology Statute does not draw a clear distinction as to whether an admission of fault is admissible as a party admission or admission against interest in subsequent litigation.[8] Ohio is one of only six states that have enacted apology statutes that fail to clearly distinguish between the admissibility of a physician's statement of sympathy and one acknowledging fault.[9]

Among the 36 states that have adopted physician apology statutes, the majority of them explicitly distinguish between statements of sympathy and admissions of fault. On the one hand, 17 of the states that have explicitly distinguished between expressions of compassion and admissions of fault have elected to admit statements of fault while excluding expressions of sympathy.[10] A good example is California's Apology Statute, which provides that only "the portions of statements or benevolent gestures expressing sympathy" are inadmissible against a treating physician in a later malpractice action.[11] On the other hand, eight of the states that have explicitly drawn the same distinction have chosen to exclude both types of statements from admission into evidence.[12] A good example is Colorado's Apology Statute, which provides that "any and all statements expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence are inadmissible as evidence of a party admission or admission against interest.[13]

Ohio cases addressing the Apology Statute

Only two reported cases in Ohio have addressed R.C. 2317.43. In *Davis v. Wooster Orthopaedics & Sports Medicine, Inc*, Barbara Davis was 49 years old when she died following back surgery on July 23, 2004.[14] Her husband filed a wrongful death action against her orthopaedic surgeon, Dr. Michael Knapic, and his practice group. Mr. Davis alleged medical malpractice against Dr. Knapic for negligently performing a lumbar microdisectomy by completely severing his wife's common iliac artery, lacerating her iliac vein, and failing to timely diagnose the medical condition that his wife developed after the procedure.[15] At trial, Mr. Davis testified that after the surgery, Dr. Knapic said "as far as the back surgery, everything went fine," but that when Mrs. Davis was rolled over on her stomach, her blood pressure started to drop, and an ultrasound was performed that revealed bleeding, indicating that at some point an artery was nicked. Mr. Davis then testified that Dr. Knapic said, "It's my fault. I take full responsibility."[16]

Mr. Davis argued that while R.C. 2317.43 may exclude the admission of statements of sympathy, a direct admission of responsibility should be admissible under the plain and unambiguous language of the statute. Dr. Knapic argued that drawing a distinction between an acknowledgment of fault and an expression of sympathy violated the statutory intent behind R.C. 2317.43, which was to avoid the obvious detriment to the doctor-patient relationship that can follow an adverse medical outcome, particularly if the doctor refuses to speak to the patient or the family and feels uncomfortable expressing any compassion and regret. Dr. Knapic also argued that the nature of the word "apology" inherently incorporates an expression of fault or admission of error, and thus that statements like "I take full responsibility" fell clearly within the ambit of the statute's protection.

The Ninth Appellate District concluded that the intent behind the Apology Statute was to protect pure expressions of sympathy but not admissions of fault.[17] The court held that Dr. Knapic's statements constituted an admission of liability and could be admitted into evidence. The court noted that this interpretation was consistent with the public policy espoused by the majority of states that have adopted apology laws, with an explicit distinction between sympathy and fault. Further, the court reasoned that a rule protecting a health care provider's expression of sympathy from use at trial, but not an admission of fault, would advance the goal of diminishing the obvious damage to the physician-patient relationship following a negative medical outcome.[18]

In the second case, *Johnson v. Randall Smith, Inc.*, the facts are similarly straightforward.[19] In April 2001, Dr. Randall Smith performed a laparoscopic surgical procedure on Jeanette Johnson's gall bladder. Complications arose during the course of the operation, and Johnson experienced a condition in which the opening of the common duct in her gall bladder narrowed in size. Although she was released from the hospital soon after the procedure, Johnson had to be readmitted within three weeks for jaundice and obstruction of a bile duct. After Dr. Smith informed Johnson that she would have to undergo additional surgery at a different hospital to address her post-surgical complications, she became very emotional. Dr. Smith took her hand and stated before several witnesses, "I take full responsibility for this."[20] Johnson subsequently underwent five additional procedures to repair the damage she suffered during the 2001 surgery. Within a year and a half of the initial procedure, Johnson and her husband filed a medical malpractice claim against Dr. Smith and his medical corporation.[21]

In September 2004, while Johnson's suit was pending, the Ohio General Assembly enacted R.C. 2317.43. After a long delay in the proceedings in her case, during which Johnson dismissed her original complaint in 2006 and filed a new one in 2007, the case was set for a jury trial in 2010. During pretrial proceedings, Dr. Smith's attorneys filed a motion in limine to exclude any reference to Smith's statement that he "took full responsibility" for Johnson's post-surgical condition, citing R.C. 2317.43. The trial court granted the motion. After a two-day trial during which no evidence regarding Dr. Smith's statement was considered, the jury returned a defense verdict.[22]

Johnson appealed, arguing that the exclusion of Dr. Smith's 2001 statement was an unconstitutional retroactive application of the 2004 Apology Statute that deprived her of a fair trial. The Eleventh Appellate District agreed, and in a 2-1 decision, reversed the trial court's pretrial ruling excluding Dr. Smith's statement from evidence.[23] The court reasoned that because the General Assembly did not include specific language in the Apology Statute expressly indicating an intent to apply the law retroactively, the trial court erred by barring testimony regarding Dr. Smith's 2001 statement.[24] The court remanded the case for a new trial.

Dr. Smith sought and was granted discretionary review on appeal to the Ohio Supreme Court. Dr. Smith's attorneys argued that applying the Apology Statute to bar testimony about his statement during Johnson's 2010 trial was not a retroactive application of the law because R.C. 2317.43 bars such testimony "in any civil action brought" after the statute's September 2004 effective date.[25] They argued, and the dissenting appeals court judge agreed, that because Johnson's malpractice complaint was refiled in 2007, applying R.C. 2317.43 to bar testimony about Smith's statement in her case was a prospective application of the law to a lawsuit that was not actually "brought" until nearly three years after the new law took effect.[26]

In response, Johnson's attorneys argued that her injuries and the events leading up to them were established in 2001. Because the statement made by Dr. Smith admitting "responsibility" for her post-surgical complications was made three years before the enactment of the Apology Statute, they argued that the appeals court correctly held that applying the statute to prevent Johnson from presenting evidence of Dr. Smith's 2001 admission of liability to the jury would be an unconstitutional retroactive application of R.C. 2317.43.[27] They also contended that, even if the application of the Apology Statute to Johnson's refiled complaint was held to be prospective, the trial court still erred in excluding Dr. Smith's statement, "I accept full responsibility for this," which was in substance neither an apology nor an expression of "sympathy" or "condolence" under R.C. 2317.43.

What is a protected statement?

Unfortunately, neither the *Davis nor Johnson* decisions provided much guidance on what would constitute a protected statement under Ohio's Apology Statute. The Davis court did observe in dicta that it is common etiquette to say "I'm sorry" upon hearing that an individual's relative has died, and that no reasonable person would construe such a statement as a confession of having caused a death.[28] Presumably, such a statement would be protected by the Apology Statute, but the use of the word "apology" in the statute creates some ambiguity. The public policy arguments for admitting or excluding statements of fault cut both ways. On the one hand, physicians contend that statements of sympathy and fault following an unfortunate medical outcome should be excluded entirely from evidence, as it is desirable to promote candor and frankness in the doctor-patient relationship, and admitting such statements into evidence could have a "chilling effect" on communication between a physician and a patient. In that same vein, a colorable argument can be made that the word "apology" in R.C. 2317.43 reasonably includes an expression of fault, admission of error or at least an implication of guilt for an offense. On the other hand, patient advocates argue that if the word "apology" is read in context with the list of other sentiments that are excluded under R.C. 2317.43, the statutory language clearly

does not include statements of fault or admissions of responsibility within the scope of protection. Plaintiffs' attorneys stress that if the Ohio General Assembly had intended to prohibit the admission of all statements of fault uttered by medical professionals to injured patients or their families, it could have done so by including language excluding all "admissions of liability" or "statements against interest," rather than limiting its description of the prohibited statements to those "expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence."[29] In addition, the argument goes, under our adversarial system of justice, there is no reason to believe a doctor would say something against his or her interest if it were not true. Thus, a statement of fault or admission of responsibility should be deemed admissible against the doctor who made it.

An additional complication is a situation in which a doctor's sentiment includes both an expression of sympathy and an admission of fault in the same statement. Under the Apology Statute, the statement of sympathy would be excluded as inadmissible, but the statement of fault would be admissible against the physician. From a public policy perspective, it seems perverse to exclude a doctor's expression of compassion to a patient or a patient's family, but then admit the doctor's admission of responsibility, particularly when both communications are made in the course of the same statement. The Ohio Rules of Evidence include a "doctrine of completeness" that would hopefully preclude such a predicament, as such a construction would surely subvert the legislative intent of the statute.[30] But until the Ohio Supreme Court gives us some clear guidance on the full scope of R.C. 2317.43, that possibility is real. Unfortunately, the Court's decision in *Estate of Johnson* did not provide clear guidance on whether the Ohio Apology Statute excludes admissions of fault, as it merely held that Dr. Smith's statement "I take full responsibility" was "precisely the type of evidence that R.C. 2317.43 was designed to exclude as evidence of liability in a medical-malpractice case."[31]

In the wake of *Estate of Johnson*, health care providers should remain cautious when speaking with a patient or family members following an adverse medical outcome to ensure that any statements they make comply with the Apology Statute and are not later deemed an admission of liability or a statement against interest. Defense attorneys representing health care providers in medical malpractice cases should advise doctors to have impartial witnesses present during any meeting with an injured patient or aggrieved family member after an adverse medical outcome, especially given how easily time and emotion can affect how a patient or family members feel about a doctor's well-intentioned statement made in the immediate wake of a patient's injury or death. Plaintiffs' attorneys in medical malpractice actions should keep in mind that admissions of fault by health care providers may still be admissible in the aftermath of *Estate of Johnson*, even if statements of responsibility are not. Until the Ohio Supreme Court settles the uncertainty surrounding the admissibility of statements of fault under R.C. 2317.43, the full scope of the Apology Statute remains unclear. ■

Author bio

Greg Laux is an associate at Wood & Lamping in Cincinnati. He is a graduate of the University of Cincinnati College of Law. Laux focuses his practice on municipal law, land use and zoning regulation, and civil litigation. He has a particular interest in medical malpractice.

Endnotes

1 *Estate of Johnson v. Randall Smith, Inc.*, 131 Ohio St.3d 1543, 966 N.E.2d 896, 2012-Ohio-2025, discretionary appeal allowed (May 9, 2012).

2 *Johnson v. Randall Smith, Inc.*, 196 Ohio App.3d 722, 727, 965 N.E.2d 344, 449, 2011-Ohio-6000, at ¶22 (11th Dist. 2011).

3 Id., 196 Ohio App.3d at 729, 965 N.E.2d at 350, 2011-Ohio-6000, at ¶28-29; see also Ohio Evid.R. 801(D) (2)(a) (admission by a party), Ohio Evid.R. 804(B)(3) (statement against interest), and Ohio Evid.R. 403(A) (probative value versus danger of unfair prejudice).

4 *Estate of Johnson*, supra.

5 *Estate of Johnson v. Randall Smith, Inc.*, Slip Opinion No. 2013-Ohio-1507, syllabus.

6 See Sub. H.B. No. 215, 150 Ohio Laws, Part III, 4146 (H.B. 215).

7 See R.C. 2317.43 (West 2013).

8 See Ohio Evid. R. 409, which provides that "[e]vidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." Rule 409 does not exclude statements of responsibility or admissions of fault from admissibility.

9 See R.C. 2317.43 (West 2013); Mont. Code Ann. 26-1-814 (2009); N.D. Cent. Code 31-04-12 (2009); Okla. Stat. Ann. Title 63, 1-1708.1H (West 2013); W.Va. Code Ann. 55-7-11a (West 2013); Wyo. Stat. Ann. 1-1-130 (2013).

10 See La. Rev. Stat. Ann. 13:3715.5 (2013); Cal. Evid. Code 1160(a) (West 2013); Del. Code Ann. Title 10, Section 4318 (2011); Fla. Stat. Ann. 90.4026 (West 2013); Haw. Rev. Stat. Ann. 626-1, Rule 409.5 (West 2013); Idaho Code Ann. 9-207 (2013); Ind. Code Ann. 34-43.5-1-4 and 34-43.5-1-5 (West 2013); Me. Rev. Stat. Ann. Title 24, Section 2907 (2013); Md. Code Ann., Cts. & Jud. Proc. Section 10-920 (West 2013); Mass. Gen. Laws Ann. Ch. 233, 23D (West 2013); Mich. Comp. Laws Ann. 600.2155 (West 2013); Mo. Ann. Stat. 538.229 (West 2013); Neb. Rev. Stat. Ann. 27-1201 (West 2013); N.H. Rev. Stat. Ann. 507-E:4 (2013); Tenn. R. Evid. 409.1 (2013); Tex. Civ. Prac. & Rem. Code Ann. 18.061 (Vernon 2013); Va. Code Ann. 8.01-52.1 (2013). The Hawaii legislature explained its intent by commenting that its rule excluding expressions of sympathy while permitting the use of expressions of fault "favors expressions of sympathy as embodying desirable social interactions and contributing to civil settlements." See Haw. Rev. Stat. Ann. 626-1 (West 2013), Commentary to Rule 409.5.

11 See Cal. Evid. Code 1160(a) (West 2013).

12 See Ariz. Rev. Stat. Ann. 12-2605 (2013); Colo. Rev. Stat. Ann. 13-25-135 (West 2013); Conn. Gen. Stat. Ann. 52-184d (West 2013); Ga. Code Ann. 24-3-7.1 (West 2013); S.C. Code Ann. 19-1-190 (2013); Utah Code Ann. 78B-3-422 (West 2013) (excluding from evidence the sequence and significance of events relating to the unanticipated outcome of medical care); Vt. Stat. Ann. Title. 12, 1912 (2013); and Wash. Rev. Code Ann. 5.64.010 (2013).

13 See Colo. Rev. Stat. Ann. 13-25-135 (West 2013).

14 See 193 Ohio App.3d 581, 952 N.E.2d 1216, 2011-Ohio-3199 (9th Dist. 2011).

15 Id., 2011-Ohio-3199, at ¶1.

16 Id., at ¶14.

17 Id., at ¶31.

18 Id., at ¶13.

19 See 196 Ohio App.3d 722, 965 N.E.2d 344, 2011-Ohio-6000 (11th Dist. 2011).

20 Id., 2011-Ohio-6000, at ¶4.

21 Id., at ¶5.

22 Id., at ¶¶8-9.

23 Id., at ¶29.

24 Id., at ¶20.

25 Id., at ¶15.

26 Id., at ¶31 (Cannon, J., dissenting).

27 Id., at ¶12.

28 *Davis*, 2011-Ohio-3199, at ¶10.

29 See R.C. 2317.43 (West 2013).

30 See Ohio Evid. R. 106; see also Staff Note to Ohio Evid. R. 410 (July 1, 1991 Amendment).

31 *Estate of Johnson*, Slip Opinion No. 2013-Ohio-1507, at ¶23.

Two members announce candidacy for OSBA president-elect

Melissa Graham-Hurd, Akron, and John D. Holschuh Jr., Cincinnati, have announced their candidacies for 2014 OSBA president-elect. The election will take place at the Association's Annual Convention in Cleveland in May 2014.

Melissa Graham-Hurd

Melissa Graham-Hurd obtained her law degree from the University of Akron School of Law after graduating from the University of Akron, earning two Bachelor of Arts degrees, in English and French, and a certificate in Peace Studies (Conflict Management).

Melissa has been an active and contributing member of the OSBA, most recently on its Board of Governors, where she served as vice chair of the Budget and Headquarters Committee. She has served on the Council of Delegates since 2001, co-chaired the Special Committee to Review the Gender Fairness Task Force Report, 2009 to 2012, participated in the 2010 OSBA Commission on Judicial Candidates, and was the OSBA representative to the Ohio Supreme Court's Advisory Committee on Children, Families, and the Courts for five years.

Melissa Graham-Hurd has served on the OSBA Family Relations Specialty Board since 2005, and has actively served the OSBA Family Law Committee since 1987, including terms as its secretary, vice chair and chair.

Melissa served on OSBA's certified grievance committee, is a member of the Professionalism Committee, Juvenile Committee, Solo, Small Firms and General Practice Section, and the Women in the Profession Section. Melissa is a life fellow of the Ohio State Bar Foundation, and has been a member of the Ohio Bar College since 1987.

Melissa is a member of the Akron Bar Association, serving on several committees, and chaired its Family Law Section, the Stark County Bar Association, the Ohio Women's Bar Association, and the American Bar Association. Melissa offers volunteer service to her community through Community Legal Aid of Akron and by serving the Stark County Board of Elections. She is primarily a family law attorney, helping people through the hardest parts of their lives, occasionally accepts federal civil rights cases, and is a certified mediator. She and her husband, Dan, have been married more than 30 years.

"As the profession changes to meet the needs of clients, the OSBA is changing to meet the needs of the lawyers of Ohio. Transformation presents challenges, but also offers opportunities to better serve more efficiently, reaching out to others to work with us on our common goals, and broadening diversity of every kind. Membership in the OSBA remains indispensable to any lawyer practicing in Ohio, whether in small or large firm, business, government, or any other place people are using their law degrees. Together, we can do so much more for the people we serve and for each other. As your president-elect I will continue to serve, to collaborate with lawyers, law students, and their professors, new lawyers and retiring lawyers, in big cities and small towns, bringing us together in keeping the OSBA the best bar association in the land!" ■

John D. Holschuh Jr.

John D. Holschuh Jr. graduated from Miami University and obtained his law degree from the University of Cincinnati College of Law in 1980. At the College of Law, Holschuh was director of the Moot Court Program.

Holschuh then joined the firm of Santen, Santen & Hughes where he has remained to the present. He is head of the firm's litigation practice and is one of the three managing partners of the firm. Holschuh has focused on personal injury and medical malpractice litigation and has tried numerous jury trials to verdict throughout Ohio and Kentucky.

Holschuh was inducted as a Fellow into the American College of Trial Lawyers in 2005. He is also a Fellow in the American Board of Trial Advocates as well as the International Society of Barristers. He is a life member of the Sixth Circuit Judicial Conference. Holschuh has been very active in bar activity. He was president of the Cincinnati Bar Association from 2002-2003 and was president of the Cincinnati Bar Foundation from 2008-2010. He has served on the OSBA Council of Delegates from 2009-present and is currently the District 1 governor for the OSBA. He is a Fellow of the Ohio State Bar Foundation.

Holschuh has been on the faculty of the National Institute of Trial Advocacy in 1990, 1996, 2008 and 2010. He has been recognized in the Best Lawyers in America in personal injury litigation from 1996 to present as well as Ohio Super Lawyers for personal injury and medical malpractice from 2004 to present.

John and his wife, Wendy, have been married for 29 years and have three children: Heather, who is married and living in Boulder, Colo.; John III, who is currently in his third year at the University of Cincinnati College of Law and is studying human rights in Bangkok, Thailand, for six months; and Jacob, who is a junior at the Rocky Mountain College of Art & Design studying photography.

"As a delegate and governor for the Ohio State Bar Association, I have been privileged to see the tremendous work accomplished by the Ohio State Bar Association for the benefit of its members. At the same time, it has become clear there are continuing issues facing the Ohio State Bar Association. With the new millennial generation we need to continue to strive to make ourselves relevant and indispensable to our young lawyers. We need to continue and develop ways to promote the tremendous benefits offered by the Ohio State Bar Association. The Ohio State Bar Association has a tremendous reputation throughout the United States and we must strive to continue the excellence that has made the OSBA the number one bar association in the country!" ■

Fall district meeting schedule

Ohio State Bar Association district meetings are held once a year in each OSBA district, and all members are invited to attend. Come have lunch, hear an update from the OSBA president, participate in elections for your district's Board of Governors and Council of Delegates representatives, and help us honor those attorneys in your area who have been in practice for 50 and 65 years. Many district meetings offer morning or afternoon CLE as well.

Watch for more information in the mail and on the OSBA website, or call the OSBA Member Service Center at (800) 282-6556 or (614) 487-8585.

District 3
Wednesday, Oct. 16, 2013
Willow Bend Country Club, Van Wert

District 4
Tuesday, Oct. 15, 2013
Best Western Grand Plaza Hotel, Toledo

District 5
Monday, Oct. 14, 2013
Location to be determined,
Delaware County

District 6
Thursday, Oct. 10, 2013
Courtyard by Marriott, Springfield

District 8
Tuesday, Oct. 22, 2013
Chillicothe Country Club, Chillicothe

District 13
Tuesday, Oct. 8, 2013
Youngstown Country Club, Youngstown

District 14
Monday, Oct. 7, 2013
The Canton Club, Canton

District 16
Thursday, Oct. 17, 2013
Romer's Catering/Banquet Hall, Celina

District 18
Wednesday, Oct. 9, 2013
The Lodge at Geneva State Park,
Geneva-on-the-Lake ■

OSBA announces 2013 fall committee and section meeting schedule

Ohio State Bar Association members are invited to attend their 2013 fall committee and section meetings. Meetings are held at the OSBA in Columbus unless otherwise indicated. For more information, please contact OSBA Committee and Section Manager Jessica Tobias, Esq., at jtobias@ohiobar.org or (614) 487-4401.

Thursday, Sept. 19
Administrative Law Committee: 3:30 p.m.
Corporate Counsel Section Council: Noon
Criminal Law Committee: 1 p.m.
Elder and Special Needs Law Committee: 10 a.m.
Health Care Law Committee: Noon
Insurance Law Committee: 1 p.m.
Insurance Staff Counsel Committee: 11 a.m.
Media Law Committee: 10 a.m.
Negligence Law Committee: 3 p.m.
Professionalism Committee: 1 p.m.
Women in the Profession Section Council: 1 p.m.

Friday, Sept. 20
Estate Planning, Trust and Probate Law Section Council (Polaris Hilton): 8 p.m.
Family Law Committee: 1 p.m.
Federal Courts and Practice: 2 p.m.
Real Property Law Section Council (Polaris Hilton): 7 p.m.
Public Utilities Committee: 3:15 p.m.
Traffic Law Committee: 3:15 p.m.
Young Lawyers Section Council: 2 p.m.

Saturday, Sept. 21
Banking, Commercial and Bankruptcy Law Committee (Polaris Hilton): 9 a.m.
Corporation Law Committee: 9:30 a.m.
Estate Planning, Trust and Probate Law Section Council (Polaris Hilton): 9 a.m.
Intellectual Property Law Section Council: 10 a.m.
Labor and Employment Law Section Council: 10 a.m.
Paralegals Committee: 10 a.m.

Thursday, Sept. 26
Taxation Law Committee (Location TBD): 3 p.m.

Friday, Sept. 27
Access to Justice Committee: 10 a.m.
Agricultural Law Committee (Hyatt Place): 10 a.m.
Animal Law Committee: 1 p.m.
Aviation Law Committee: 3:15 p.m.
Construction Law Committee: 3:15 p.m.
Education Law Committee: 12:15 p.m.
Environmental Law Committee (Hyatt Place): 3 p.m.
Judicial Administration and Legal Reform (Hyatt Place): 3 p.m.
Juvenile Law Committee: 10 a.m.
Litigation Section Council: Noon
Military and Veterans' Affairs Committee: 3:15 p.m.
Natural Resources Law Committee (Hyatt Place): 1 p.m.
Senior Lawyers Section Council (Hyatt Place): Noon
Solo, Small Firms and General Practice Section Council: 1 p.m.
Workers' Compensation Law Committee: 10 a.m.

Thursday, Oct. 24
Federal Courts and Practice Committee (Sheraton Hotel on Capitol Square): 1:30 p.m.

Thursday, Nov. 7
Antitrust Law Section: 5 p.m. ■

OSBA certifies 25 paralegals

The Ohio State Bar Association recently administered its credentialing program for paralegals, allowing them to be designated as an "OSBA Certified Paralegal." The OSBA announced the certification of 25 paralegals who have met the requirements to earn this designation. For more information on OSBA Certification and for a list of the most recent certified paralegals, visit www.ohiobar.org/specialization. ■

Help students bring citizenship to life: Mock Trial and Moot Court programs

This year, the Ohio Center for Law-Related Education is celebrating its 30th anniversary. OCLRE is proud of its history and commitment to providing programs and opportunities for students to learn about government, the justice system and the importance of being an informed, active citizen.

Known for its flagship program, Mock Trial, OCLRE has grown to include six programs for middle and high school students. The newest of these programs is Moot Court, which will allow students to learn the appellate court process, specifically focusing on writing legal briefs and participating in simulated oral arguments.

Want to get involved? Serve as a team legal advisor or volunteer to judge a competition. Learn more at www.oclre.org or contact Todd Burch at tburch@oclre.org. ■

Attend the 2013 OSBA Law and Media Conference

It has been 25 years since a Supreme Court decision limited student press freedom, but this decision has had a lasting impact. In the opening plenary session of this year's OSBA Law and Media Conference, titled "Student Press Struggles Extend Beyond Campus," a panel of experts led by Prof. Mark Goodman of Kent State University will explore digital age free-press battles in schools, uses and abuses of FERPA, and other news-gathering challenges for student journalists and others covering educational issues.

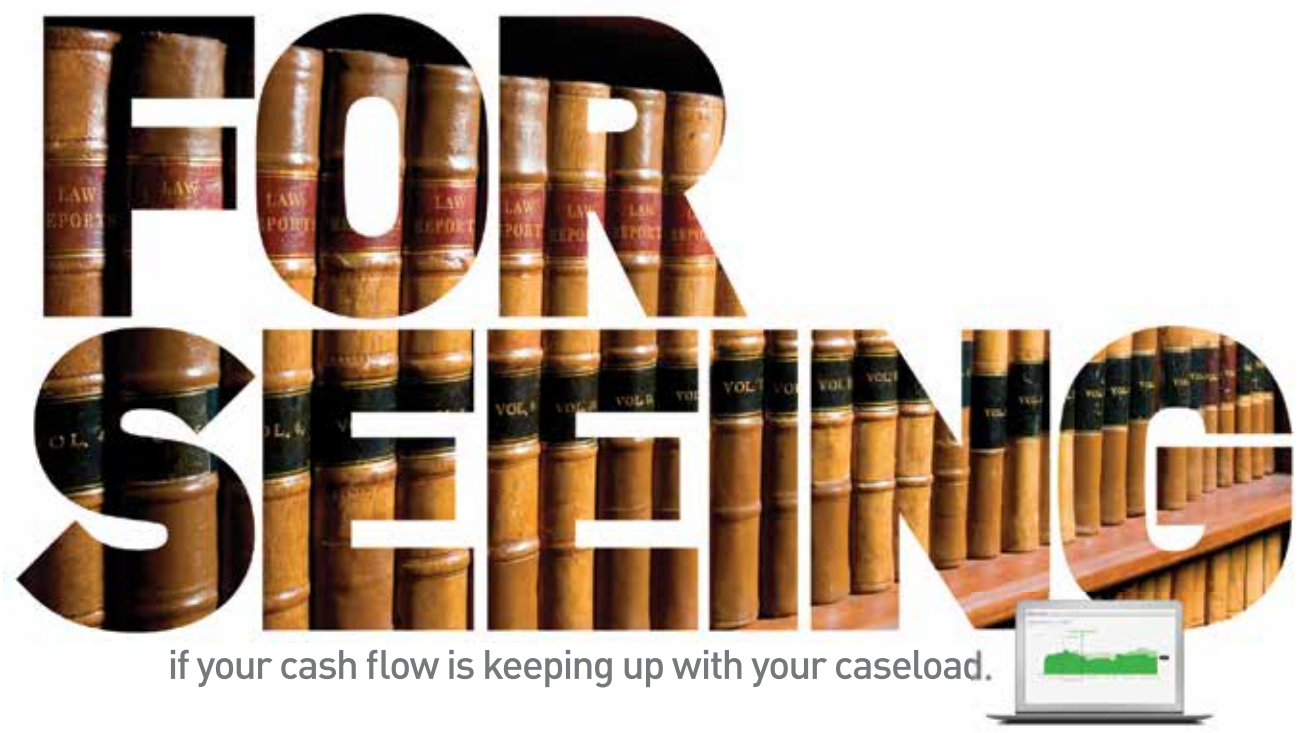
The conference will be held at OSBA Headquarters in Columbus on Friday, Oct. 4, 2013. It will bring together journalists, lawyers, academics and students for a day of stimulating discussions about hot media law topics.

"When the Subject is Children and Crime" tackles news coverage of school shootings and juvenile crime. "Public Records: Problems and Opportunities" presents the current state of public records law in Ohio. "Libel and Privacy in the Internet Age" asks: Who is a public figure in the digital age? What is a "journalist"? What happens to digital rights to privacy when everyone can be a publisher or broadcaster? Are current eavesdropping laws sufficient?

A panel explores the public's right to access gun permits, mental health records and other personal information in a session titled "So You Want My Public Records?" Another session focuses on the Internet's effect on journalism, including competition, intellectual property and the impact of social media on news delivery.

"Scraps of Paper in a Digital World" considers the practice of journalism in a changing environment, and First Amendment rights is a focus of a basic session titled "Media Law 101." Finally, communications between lawyers and journalists is the focus of "Five Things Lawyers Hate about Journalists and Five Things Journalists Hate about Lawyers."

For details and registration information as it becomes available, visit the OSBA website at www.ohiobar.org/lawandmedia. ■



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The importance of legislative history in Supreme Court decisions

by Kathleen M. Trafford

One of the most important rules of law the Supreme Court of Ohio often repeats is that, when the Court is called on to interpret a statute, its role is to give meaning to the legislative intent. Performing this role is relatively easy when the General Assembly speaks plainly, but not all statutes are written in plain-speak. When a statute is ambiguous, the Court's task is more challenging, and the Court must reach into the General Assembly's toolbox for the right tools to help it divine the legislative intent.[1] One important tool in that box is the statute's legislative history.[2] But for many years both the Court and the General Assembly appeared reluctant to use this tool to its full potential.

The General Assembly, unlike its federal counterpart, was stingy in expressing its intent. Supreme Court Justice Pfeifer, who was a member of the General Assembly before joining the Court in 1992, recently shared his insight that for some period of time it was a "cardinal sin to insert legislative intent into a bill, and that policy was strictly enforced by legislative leadership and by the Legislative Service Commission."[3] For quite some time, the Supreme Court embraced only certain limited sources of legislative intent, such as legislative journals, comparisons of statutes to earlier versions of the same statute, or recorded statements of legislative intent in the statute or uncodified law.[4] For a long time it was reluctant to embrace other available sources of legislative history, such as statements by bill sponsors or bill analyses prepared by the Legislative Services Commission (LSC) even though such testimony and reports are routinely relied on by federal courts in interpreting ambiguous federal statutes.[5]

In 1970, the Court had this to say about reliance on LSC reports:

> [N]otwithstanding the fact that the Legislative Service Commission, composed of seven members from each house of the General Assembly, is created and its duties prescribed by Sections 103.11 to 103.13, Revised Code, we find nothing in those statutes to indicate that, in determining what the General Assembly intends by language which it uses in the enactment of a bill, any weight should be given to what the commission stated in its report to the General Assembly with regard to that bill.[6]

The Court adopted this dismissive view of the value of LSC reports, notwithstanding its understanding that the report at issue was distributed to the legislators, the press and others interested in the bill, because "it was not made a part of the record of the General Assembly and has not otherwise been published and is not generally available even in the best of the law libraries in this state."[7] Two years later, the General Assembly enacted R.C. 1.49 and expressly encouraged the Court to consider "legislative history" in determining the meaning of ambiguous statutes. The Court responded by softening its position on the weight to be given to LSC reports, stating in *Meeks v. Papadopulos*, that although it did not consider itself bound by LSC analyses, it would refer to them if it found them "helpful and objective."[8]

More recently, however, both the General Assembly and the Court have become more comfortable dealing with legislative intent. The General Assembly is now more open to publicly proclaiming its intent in the law. It does so, for example, by actually embedding the purpose of the law within the statute itself.[9] It also may set out its intent within the uncodified law. For example, in a recently enacted law requiring claimants in asbestos tort actions to make certain disclosures pertaining to asbestos trust claims that have been submitted to asbestos trust entities for the purpose of compensating the claimant for asbestos exposure, the General Assembly set out very detailed "statements of findings and intent."[10] It did the same last year in enacting the Lupus Education and Awareness Program, codified in R.C. 3701.77, et seq.[11]

At the same time the General Assembly has become more obliging in stating its intent, the Court has become more receptive to considering alternative sources of legislative intent. Subsequent to the enactment of R. C. 1.49 and its decision in *Meeks v. Papadopulos*, the Court has consulted LSC reports as part of the legislative history to be considered in interpreting ambiguous statutes in 113 cases.[12] In *Griffith v. City of Cleveland*, for example, the Court reviewed the various reports on 2003 Sub. S.B. 149 as it worked its way toward passage to confirm that the General Assembly did not intend to alter the two-step process that requires a wrongful imprisonment claimant to first seek an adjudication of wrongful imprisonment from a court of common pleas before seeking damages in the Ohio Court of Claims.[13] The Court found that the reports showed "a clear indication that the General Assembly understood that the statutory scheme contemplated a two-step process."[14] In *Mandelbaum v. Mandelbaum,* the Court relied on a Senate Judiciary Report, reporting on testimony before the House Civil and Commercial Law Committee, to conclude that the General Assembly's intent in amending a statute to give courts limited power to award and modify spousal support was to supersede prior judicial precedent holding that courts had continuing jurisdiction over alimony agreed to in a dissolution of marriage case.[15]

In a few cases, the Court has gone even further and looked to proponent or sponsor testimony as an aid in statutory

construction, when that testimony further supported the Court's interpretation of a statute. For example, in interpreting Ohio's Corrupt Practices Act for the first time, the Court relied on the Senate sponsor's description of the new law as "the toughest and most comprehensive RICO Act in the nation" and "state-of-the art legislation" to glean the legislative intent to impose strict liability for violations of the Ohio act.[16] Occasionally this testimony is documented in some legislative report, but the Court has shown a willingness to look even to external sources, such as news services and other media outlets.[17]

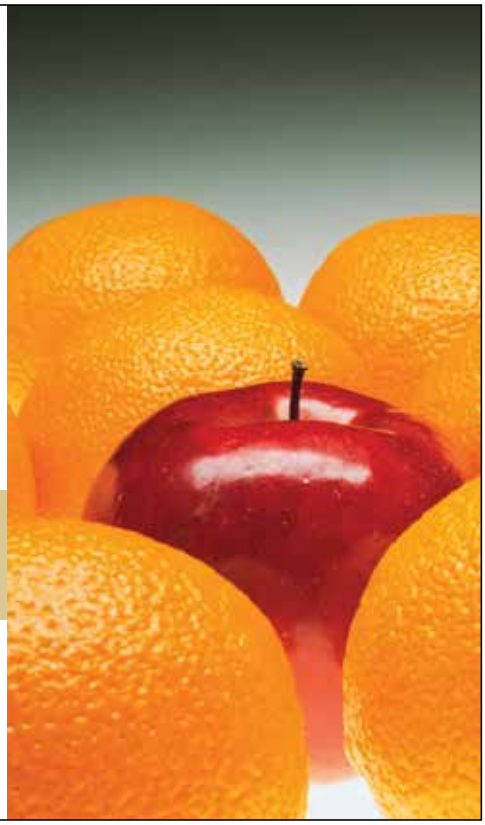
The Supreme Court's openness to more broadly consider "legislative history" as an aid in interpreting ambiguous statutes puts it in better sync with modern technology. Unlike four decades ago when the official legislative reports were not generally available even in the best law libraries, LSC reports, sponsor statements, committee hearing reports and testimony, and floor debates can now be found with a click of the mouse, making legislative history an even more powerful tool in the R.C. 1.49 toolbox.[18] A word of caution, however, before handing this tool to the Court. Although a wealth of legislative history is now accessible, it should not be used indiscriminately. No amount of legislative history will persuade the Court to interpret an unambiguous statute contrary to its plain meaning.[19] And, sometimes legislative history itself can mean different things to different justices. For example, in *State v. Lowe* both the majority opinion and the dissent looked to the comments prepared by LSC at the time the statute was enacted to determine whether Ohio's incest statute applies to the consensual sexual conduct between a step-parent and adult stepchild.[20] The majority read the LSC comments as supporting its conclusion that the statute protects "the family unit more broadly," and not just minors, while the dissent read the LSC summary to support the conclusion that the intent was to "protect children against a broader class of person who can exert a parental role."[21] Ambiguous legislative history cannot pound home a point. ■

Author bio

Kathleen Trafford is an attorney with Porter Wright in Columbus, where she concentrates her practice in the area of governmental and regulatory litigation and constitutional law. Trafford represents private parties in disputes with governmental agencies and also serves as special counsel to a number of state and local government agencies.

Endnotes

1 The toolbox is R.C. 1.49, which enumerates six factors the Court may consider in determining legislative intent.
2 R.C. 1.49(C).
3 *Sheet Metal Workers International Assn., Local Union No.33 v. Gene's Refrigeration, Heating & Air Conditioning*, 122 Ohio St.3d 248, 2009-Ohio-2747, 910 N.E.2d 444, ¶51.
4 See *Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 588, 113 N.E.2d 14 (1953); See e.g., *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, ¶24 (noting



that the General Assembly amended a statute without inserting language to supersede prior judicial precedent allowing for retrospective application and finding such fact "significant"); *State ex rel. Ohio Attorney General v. Shelly Holding Co.*, 135 Ohio St.3d 65 2012-Ohio-5700, 984 N.E.2d 996 ¶17 (relying on the statement that Ohio's Air Pollution Control Act is to be construed to be consistent with the federal Clean Air Act to determine how penalties for violations of the Act are to be calculated); *State v. Consilio*, 114 Ohio St.3d 295, 300, 2007-Ohio-4163, 871 N.E.2d 1167 (relying on uncodified law to determine whether statute applies retroactively).

[5] *Beach v. Mizner*, 131 Ohio St. 481, 485, 3 N.E.2d 417 (1936) (stating that the legislative sponsor's "intention cannot be regarded as conclusive nor even persuasive unless subsequently embodied in the language of the Legislature").

[6] *Cleveland Trust Co. v. Eaton*, 21 Ohio St.2d 129, 139, 256 N.E.2d 198 (1970).

[7] Id.

[8] 62 Ohio St.2d 187, 191, 404 N.E.2d 159 (1980).

[9] See, e.g., R.C. 3704.02(B), stating the purpose of the Ohio Air Pollution Control Act and that it is to be construed to be consistent with the federal Clean Air Act.

[10] Am. Sub. H.B. 380, 129th Gen. A., (eff. March 27, 2013), Sec. 4. See also H.B. 59, 130th Gen. A., Sec. 733.20 ("The General Assembly hereby declares its intent, in enacting section 3319.031 of the Revised Code, to supersede any effect of the decision of the Court of Appeals of the Eighth Appellate District in *OAPSE/AFSCME Local 4 v. Berdine*, 174 Ohio App.3d 46 (Cuyahoga County, 2007 ...)").

[11] See Am. Sub. H.B. 487, 129th Gen. A. (eff. Sept. 10, 2012), Sec. 737.60.

[12] A Lexis© search for "LSC" or "legislative service commission" resulted in references to LSC reports in 113 Ohio Supreme Court cases decided after 1980: 15 in the 1980s; 43 in the 1990s; 40 in the 2000s; and,15 since 2010.

[13] 128 Ohio St.3d 35, 2010-Ohio-4905, 941 N.E.2d 1157, ¶20-21.

[14] Id. at ¶20.

[15] 121 Ohio St.3d 433, 2009-Ohio-1222, 905 N.E.2d 172, ¶24, citing *Mandelbaum v. Mandelbaum*, 2nd Dist. No. 21817, 2007-Ohio-6138, ¶58.

[16] *State v. Schlosser*, 79 Ohio St.3d, 329, 333, 681 N.E.2d 911 (1997).

[17] Id., see also, *State v. Roberts*, 134 Ohio St.3d 459, 2012-Ohio-5684, 983 N.E.2d 334, ¶19; *In re G.V.*, 126 Ohio St.3d 249, 258, 2010-Ohio-3349, 933 N.E.2d 245, ¶37-38 (J. Cupp, dissenting); *Pack v. Osborn*, 117 Ohio St.3d 14, 18, 2008-Ohio-90, 881 N.E.2d 237, ¶13.

[18] Bills and LSC bill analyses can be found on the Ohio General Assembly's website, www.legislature.state.oh.us, going back as far as the 122nd (1997-1998) General Assembly. The Ohio Channel offers video stream of floor sessions of the Ohio House and Senate, available at www.ohiochannel.org, and its video archive goes back to the 122nd General Assembly. David M. Gold, an LSC attorney, prepared an excellent guide to the various types of legislative history available. *A Guide to Legislative History in Ohio* (Jan. 26, 2010) can be accessed at www.lsc.state.oh.us/membersonly/128legislativehistory.pdf. The Ohio Supreme Court Law Library (Information Services) also offers a helpful pamphlet, Ohio Legislative History, which is available at www.supremecourt.ohio.gov/Publications/lib_series/4.pdf.

[19] *Hough v. Dayton Mfg. Co.*, 66 Ohio St. 427, 437, 64 N.E. 521 (1902) ("We are satisfied, by considerations outside of the language, that the legislature intended to enact something very different from what it did enact. But it did not carry out its intention, and we cannot take the will for the deed.") (quoting *Woodbury & Co. v. Berry*, 18 Ohio St. 456 (1869).

[20] 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512.

[21] Id. at ¶10-13; Id. at ¶31.

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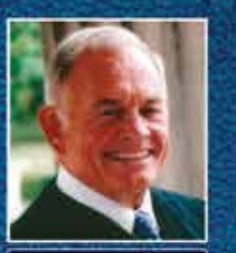

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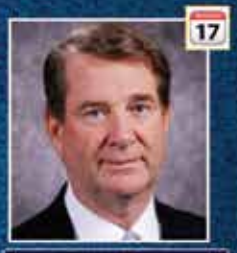

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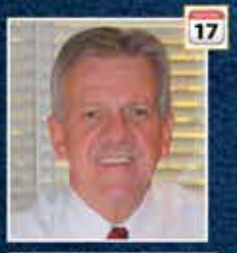

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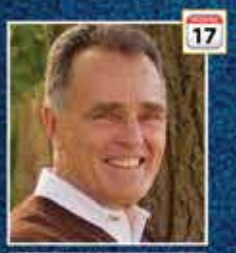

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Preparing for the inevitable

by Eugene P. Whetzel

The question of appointing a surrogate attorney essentially to wind up a law practice is of interest primarily to sole practitioners. In fact, some malpractice insurance companies require applicants to list a "surrogate" lawyer on their applications. Although this could be a good practice, it is far from sufficient. It at least causes a lawyer to consider the issue of what will happen to the practice if certain events occur unexpectedly. As time passes, however, the designated "surrogate" may not be the best choice, either because areas of practice diverge, the surrogate becomes a judge/magistrate, retires, or otherwise is not available. Thus, it is incumbent on lawyers to make good first decisions, memorialize those decisions, monitor them and change them as needed.

Why have a surrogate?
The surrogate will play two vital roles—first and foremost, to protect the interests of the clients; and second, insofar as consistent with the first, to protect the interests of the lawyer's family.

Decisions to be made
The lawyer must first decide who will be the surrogate. This decision can be challenging for several reasons: first, finding someone who is willing to be a surrogate may be difficult; second, the surrogate should be a younger lawyer and someone, obviously, who is trusted; and third, the surrogate should be someone who practices in the field or someone who understands the area of law and can consult other experienced practitioners for specific guidance.

After the decision
Once the decision on a surrogate is made, then the terms of the relationship must be set forth in a clearly written agreement.[1] The following are some areas that the agreement should cover.

1. When does the agreement take effect? For example, how long must the attorney be unavailable or incapacitated and must the condition be permanent?

2. The most significant part of the agreement will outline the duties of the surrogate attorney. The agreement should include provisions addressing at least the following topics:

   - Inventory/list of all open client matters;
   - Inventory "closed" client files;
   - Take reasonable steps to protect client files/property;
   - Notify clients with open files and ones with closed files that may be reopened at a future date;
   - Notify clients of the need for substitute counsel;[2]
   - Act as interim counsel when appropriate;
   - Deliver files/property to any client so requesting, after making a copy of the file and protecting any liens that may lawfully be assessed;
   - Arrange for collection of accounts receivable, usually in conjunction with the lawyer's staff;
   - Access and inventory safety deposit or other depository of client property, e.g., wills, and deliver to clients or their designee;
   - Resolve fee/expense disputes;
   - Deal with Interest on Lawyers Trust Accounts and other trust, escrow, or other accounts;[3] and
   - A requirement to maintain confidentiality and to conduct conflict checks and to avoid conflicts.

The agreement should also include the surrogate's compensation.

Other issues
Ancillary issues may arise in the context of the surrogate arrangement, e.g., must the client be advised of the surrogate arrangement? Must the client consent to surrogate's review of files?

Act now
As a doctor friend once told me, the time to discuss and deal with health care and other end-of-life matters is now, when I can make informed, rational decisions. So too, for lawyers, the time to address the issue of selecting and entering into an agreement with a surrogate is now. Failure to do so does not make the issue go away, it simply foists the problems onto clients, family, and ultimately, disciplinary authorities. ■

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

Endnotes

[1] A comprehensive discussion of the issues and solutions may be found in *Being Prepared: A Lawyer's Guide for Dealing with Disability or Unexpected Events*, by Lloyd Cohen & Debra Hart Cohen, available from the OSBA CLE Department. Also, a form of "Agreement to Close Law Practice in the Future" may be found on the California Bar website at http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=XXS5WmllxYA%3D&tabid=2795. While not all of these provisions will be applicable to an Ohio practice, the form provides a reasonable starting point. In addition, a lawyer's own malpractice carrier may have a template that could be useful.

[2] Unless the lawyer is purchasing the practice, then compliance with Prof. Con. R. 1.17 is required.

[3] Where the lawyer is deceased, probate court orders are likely necessary to affect some of these actions, especially to access and resolve IOLTA matters. If other issues involve claims, a court order may also be required.

An interview with OSBF Fellows

As a Fellow with the Ohio State Bar Foundation, members exude excellence, public understanding, and philanthropic effort throughout Ohio's legal system and communities. While dedicating themselves to their legal professions in the highest capacity, they also find time to give back to their communities. Listen to Judge David M. Gormley, Margaret W. Wong, and Sandra L. Lynskey talk about what the Foundation means to them.

By Nina Lopez, OSBF intern

Judge David M. Gormley
Delaware Municipal Court
2011 Class Fellow
Fellow

Ms. Margaret W. Wong, Esq.
Margaret W. Wong & Assoc. Co., LPA
2000 Class Fellow
Distinguished Life Fellow Associate

Ms. Sandra L. Lynskey, Esq.
Ohio Attorney General's Office
2012 Class Fellow

Why did you join the Ohio State Bar Foundation?
Judge Gormley: I joined the OSBF because I was impressed both by the caliber of the folks who became Foundation Fellows before me and by the kinds of projects that the Foundation supports. The idea of working with talented and public-spirited attorneys from around the state to do some good in the world appealed to me, and I haven't been disappointed.

Ms. Wong: Why did I join the Ohio State Bar Foundation? Do you want the correct answer or the real answer? Let me tell you both answers. The correct answer is because I have always been impressed with the way the Ohio State Bar Foundation operates. The real answer is because I saw the names of many big lawyers involved with the Foundation. I thought it would be exciting to see and meet all of these great lawyers. I have had no regrets since!

Ms. Lynskey: Actually, joining the Foundation is something I have wanted to do for a while. Beth Gillespie (OSBF Program and Event Manager) has had me on her radar for several years. When a friend of mine, Pam Vest Boratyn, asked me to join last year, I decided it was time.

How does the Ohio State Bar Foundation help you fulfill your philanthropic goals?
Judge Gormley: Based on the OSBF's 40-year track record of supporting worthy projects that promote public understanding of the law, I am confident that the Foundation's trustees and Fellows will continue to make good judgments in the future about new projects and causes that educate the public and improve the justice system. I enjoy working with other attorneys on our common goal of improving the public's knowledge about what lawyers do, and ensuring that more people benefit from the good things that flow from a healthy and accessible legal system.

Ms. Wong: The Ohio State Bar Foundation helped me fulfill my philanthropic goals by providing me with an abundance of opportunities to give back to my community near my Cleveland and Columbus offices. I felt that it was important to have presence in Columbus and be able to meet, network and learn from different lawyers from around the state. Most attorneys involved have become philanthropic throughout the years—that is very neat!

Ms. Lynskey: I have always worked in public service. I was a school teacher and now I am a government attorney. I feel rewarded when I am able to help others. The Foundation provides many service opportunities and the schedule flexibility that allows me to touch many people's lives.

What Foundation project/s have you been a part of and what was the impact?
Judge Gormley: My Fellows Class project is in the home stretch. We are producing three short videos targeted toward all young people, but particularly those with disabilities. The videos will provide basic information about juvenile courts and appropriate courtroom behavior. I'm hopeful that the videos will lessen some of the anxiety that young people feel when they must face delinquency charges in juvenile court, and I think that the tips presented in the videos can help the viewers to achieve better outcomes from their courtroom experiences. It's been a fun project, and I've enjoyed working on it with my other Fellows and with the Foundation's delightful staff.

Ms. Wong: I have been part of many Foundation projects. I try to stay active to help develop relations and talk to other lawyers. I have nominated many lawyers to receive

awards. I feel that it is great to be able to help support other attorneys at a state level and not just at a local level.

Ms. Lynskey: I have been a part of the Foster Care Suits for Success Program and the B4USend High School Educational Program. Both of these projects allowed me to participate as my schedule permitted. Being a former teacher, I automatically migrate toward helping the youth. Many foster youth benefitted from our clothing drive and the Foundation's B4USend Program is invaluable and beneficial in helping high school students become aware of the legal consequences they may face in sending inappropriate texts or posts on their social media page. Bev Graves (Consulting Program Coordinator) does a great job with the program and I hope to continue participation.

Why is it important to promote public understanding of the rule of law and to make improvements in the justice system?
Judge Gormley: Too many people view our legal system in a negative light, and their cynicism and skepticism makes more challenging the difficult work that police officers, judges and lawyers do every day. When lawyers work together on the kinds of goals that the Foundation supports, not only can we make the world a slightly better place but also we can perhaps help some frustrated and angry people to see our profession and our legal system in a new and more positive light. When more people come to believe that our courts and our government as a whole can work for them and can operate fairly and effectively, those public institutions and the public servants who staff them are in fact better able to do their jobs and to do them in ways that benefit more people.

Ms. Wong: It is extremely important to promote the public understanding of the rule of law and to make improvements on the justice system. Many people from different cultures believe that money can influence the government, but that is not the case in America. These cultures do not realize that the United States is one of the only countries in the world that really respects the use of law, regulations, and the three branches of government.

Ms. Lynskey: The B4USend Program is the perfect example of why it is important to promote public understanding of the law. Many teenagers are not aware of the potential criminal violations they may be committing in recording or sending inappropriate messages via phone text or social media, as well as the emotional impact it may have on others. If practicing attorneys are not committed to making improvements within the justice system via community service, then who is? ■

About the Ohio State Bar Foundation

As the charitable arm of the Ohio State Bar Association, the Foundation advances the philanthropic interest of the Ohio's lawyers to recognize excellence, improve the justice system and enhance public understanding of the rule of law. For more information about the Ohio State Bar Foundation, please visit www.osbf.net.

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Did You Know?

Can you "DIG" it? The dismissal of appeals as improvidently granted

by L. Bradfield Hughes

Courts of last resort are accustomed to deciding hot-button appeals while under close scrutiny from the parties, the public and the press. Copious amounts of money and time can be spent convincing the nation's highest courts to accept discretionary review of these key cases—the outcomes of which may reshape the law and guide judicial decisionmaking for years to follow. After these appeals first make it past the courthouse doors, still more money and time is spent briefing their merits and preparing to engage with the opposition and a hot bench at oral argument. And nonparty amici curiae often join the fray, calculating that having their voices heard by judges in courts of last resort can be every bit as meaningful to their organizations as lobbying to be heard in the legislature.

Sometimes, though, all of this blood and treasure gets spent without the benefit of any opinion on the merits. On relatively rare occasions, a high court in the business of deciding weighty cases may ultimately choose not to decide a given appeal, even after having deliberately chosen to accept it in the first place. In these circumstances, after taking a hard, second look at the record and the briefs, the reviewing court concludes that a case that may have once seemed compelling at the discretionary review stage suddenly seems less so at the merits stage, and the court decides to "DIG" the appeal; that is, to dismiss it as having been improvidently granted. A DIG can happen for procedural reasons, such as when the court determines that the appellant waived one or more of the key issues for which discretionary review had been granted. A DIG can also occur for more substantive reasons, such as when the reviewing court identifies a critical policy determination that may best be left for the political branches, rather than a court, to decide.

When a court DIGs a case, it can sometimes come as a big surprise—and a disappointment—to the parties and lawyers who have devoted such time and effort to getting their appeal accepted for review, briefing the case, and honing their oral presentations. It can also come as a disappointment to judges on the panel who disagree with the decision to DIG, who may then pen a dissenting opinion expressing frustration at a lost opportunity to resolve a long-simmering debate or a compelling issue of first impression.[1] To those eagerly awaiting a meaningful decision on the merits, a DIG can take their tale "full of sound and fury" and reduce it all to a one-line entry, "signifying nothing."[2]

Adam Liptak, U.S. Supreme Court correspondent for the *New York Times*, examined this phenomenon in a series of articles that he wrote after observing oral arguments in the case arising from California's ban on same-sex marriages, Proposition 8. In a March 26, 2013 article, "Justices Say Time May Be Wrong For Gay Marriage Case," published just days after the oral arguments, Liptak noted that, "As the Supreme Court … weighed the momentous question of whether gay and lesbian couples have a constitutional right to marry, six justices questioned whether the case, arising from a California ban on same-sex marriages, was properly before the court and indicated that they might vote to dismiss it."[3] A few days later, Liptak published a second piece on the case, leading off with the provocative question, "Why did the Supreme Court agree in December to hear a major same-sex marriage case and then seem to think it had made a terrible mistake … when it came time for arguments?"[4]

In connection with his second article, Liptak interviewed Capital University Law Professor Margaret Cordray and University of Chicago Law Professor Dennis Hutchinson about the secretive procedures that the U.S. Supreme Court follows when deciding whether to DIG an appeal.[5] Professor Hutchinson noted that the U.S. Supreme Court DIGs cases only a few times each term, and he predicted that such an outcome seemed unlikely here, saying, "If they DIG it now, after all of the fanfare and all of the attention and all of the amicus briefs … it will look like they didn't know what they were doing at the outset."[6] As we now know, Professor Hutchinson's prediction was correct, insofar as the Supreme Court did not DIG the Proposition 8 case. Instead, on June 26, 2013, the Supreme Court avoided reaching the thorny merits by holding that the petitioners—official proponents of Proposition 8—lacked Article III standing to appeal the district court's decision declaring the ballot initiative unconstitutional.[7]

Putting aside the outcome of the Proposition 8 case, it is important to remember that the U.S. Supreme Court is not alone in DIG-ing cases from time to time. In fact, the phenomenon was on recent display in Ohio, when the Ohio Supreme Court dismissed *CSAHS/UHHS-Canton, Inc. d/b/a Mercy Medical Center v. Aultman Health Foundation et al.*—a high-stakes battle between two competing hospital systems—on the grounds that the appeal was improvidently allowed.

In *Mercy*, a Stark County jury found that Aultman Health Foundation violated Ohio's Pattern of Corrupt Activities Act (OPCA), R.C. 2923.32, by paying independent insurance brokers undisclosed bonuses to convert their clients to Aultman's network and away from health plans where Mercy was an in-network provider. Aultman appealed the jury's multi-million dollar jury verdict, but the Stark County Court of Appeals affirmed.[8] So, Aultman sought discretionary review in the Ohio Supreme Court, which is always an uphill climb.

In its Propositions of Law, Aultman asserted that several aspects of the verdict were inconsistent with the plain language and intent of OPCA and posited that, because the Ohio Department of Insurance had signed off on the broker incentive program, it could not be "corrupt activity" under OPCA.[9] Nearly half a dozen amici

curiae, including the Ohio Chamber of Commerce, deemed Aultman's appeal significant enough that they chimed in at the threshold jurisdictional stage, urging the Ohio Supreme Court to take Aultman's case. And so it did, by a narrow vote of 4-3, in July 2012. By the end of 2012, more than 550 pages of merit briefing signed by more than 30 lawyers, including merit briefs from nearly a dozen amici curiae supporting one side or the other, had been submitted to the Supreme Court concerning the six Propositions of Law that the Court had previously agreed to hear and decide.[10]

Shortly after the Court set the case for oral argument, though, Mercy filed a nine-page motion to dismiss Aultman's appeal as improvidently granted, arguing that "Aultman's appeal consists of challenges to the sufficiency of the evidence, and an assortment of legal arguments that Aultman has waived by failing to raise them—or, in some instances, by taking exactly the opposite position—below."[11] Addressing Aultman's Propositions of Law in turn, Mercy identified certain defects in the propositions that the Court had agreed to resolve, and that the parties had already fully briefed. For example, with respect to Aultman's contention that the Ohio Department of Insurance had primary jurisdiction to assess the legality of Aultman's conduct, Mercy argued that Aultman had failed to preserve this argument before the court of appeals.[12] Although Aultman and five of its amici curiae vigorously opposed Mercy's motion to dismiss, the Supreme Court unanimously granted the motion two months after it was filed, about a month before oral argument was scheduled to take place. Notably, three of the justices who had originally voted to take the case in 2012 (Justices Lundberg-Stratton, Cupp, and McGee-Brown) were no longer on the bench when this decision to DIG the Mercy case was made.

Mercy's appearance on (and disappearance from) the Ohio Supreme Court's docket without an opinion on the merits carries some helpful lessons for Ohio appellate practitioners. At one level, the case shows how the participation of amici curiae at the jurisdictional stage may enhance prospects for discretionary review. At another level, though, it illustrates that even a big-dollar case and a big group of "friends of the court" cannot resolve fundamental procedural defects, such as waiver, which may lead the Court to think twice about reaching the merits of a given appeal. *Mercy* also suggests that appellate counsel should remain aware of any changes on the bench that might present new strategic opportunities. And the case may prompt potential amici curiae to more closely scrutinize the procedural posture of the cases that they seek to participate in, to avoid investing resources on amicus briefs that could come to naught if the Court never reaches the merits of the dispute that interested them.

Even though the Supreme Court's entry in *Mercy* does not reveal specific reasons for the Court's decision to dismiss the case as improvidently allowed, there have been occasions when a written opinion has accompanied a decision to DIG an appeal, and these can provide helpful clues for practitioners who, wishing to preserve their win at the district court of appeals, may find it appropriate to DIG for dismissal, as *Mercy* successfully did.[13] For example, in *Ahmad v. AK Steel Corp.*, then-Justice (now Chief Justice) O'Connor drafted a concurring opinion, agreeing with the Court's decision to dismiss a discretionary appeal and certified-conflict case as improvidently allowed, given that "[a] hallmark of judicial restraint is to rule only on those cases that present an actual controversy," and that "[i]n light of the complete lack of evidence of any code violation, this appeal presents nothing more than a garden-variety open-and-obvious-hazard case that is neither of substantial constitutional import nor of public or great general interest."[14] Similarly, in *State v. Urbin*, the late Chief Justice Moyer penned a concurring opinion in an appeal that was dismissed as improvidently allowed because the "appellant waived the primary legal position he now presents" and "resolution of the case is dependent upon factual determinations and the sufficiency of the evidence."[15] The Supreme Court's Rules of Practice also provide guidance for practitioners about improvidently certified conflicts and improvidently accepted jurisdictional appeals.[16] Armed with an understanding of the applicable principles, cases, and rules, readers of *Ohio Lawyer* can be well prepared to "pick up a shovel and DIG" if the need arises. ■

Author bio

Brad Hughes, a partner in Porter Wright's litigation department and member of the firm's appellate practice group in the firm's Columbus office, represents clients in appeals, original actions and complex commercial litigation. Hughes participates in many of the firm's cases pending in the Ohio Supreme Court, assisting co-counsel with jurisdictional memoranda, merit briefs, original actions and preparations for oral argument.

Endnotes

1 *In re J.S.*, 136 Ohio St.3d 8, 2013-Ohio-1721 (Lanzinger, J., dissenting from the Ohio Supreme Court's decision to DIG an appeal concerning serious-youthful-offender sentencing under R.C. 2152.13).

2 William Shakespeare, *Macbeth*, Act 5, Sc. 5.

3 Adam Liptak, "Justices Say Time May Be Wrong For Gay Marriage Case," *N.Y. Times*, March 26, 2013, available at www.nytimes.com/2013/03/27/us/supreme-court-same-sex-marriagecase.html?pagewanted=all&_r=0.

4 Adam Liptak, "Who Wanted to Take the Case on Gay Marriage? Ask Scalia." *N. Y. Times*, March 29, 2013, available at www.nytimes.com/2013/03/30/us/supreme-courts-glimpse-at-thinking-onsame-sex-marriage.html?pagewanted=all&_r=0.

5 Id.

6 Id.

7 *Hollingsworth v. Perry*, 133 S.Ct. 2652, 186 L.Ed. 2d 768 (2013).

8 *CSAHA/UHHS-Canton v. Aultman*, 2012-Ohio-897 (5th Dist.)

9 *Memorandum in Support of Jurisdiction of Appellants Aultman Health Foundation, Aultman Hospital, Aultcare Corporation and McKinley Life Insurance Company*, Ohio Supreme Court Case No. 2012-0665 (April 19, 2012).

10 The author's firm, Porter Wright Morris & Arthur LLP, represented amicus curiae Catholic Health Association of the United States (CHA) in the merit briefing stage, in support of Mercy.

11 *Appellee Mercy Medical Center's Motion to Dismiss Appeal as Improvidently Accepted*, Ohio Supreme Court Case No. 2012-0665 (Jan. 14, 2013), at 1.

12 *Id.* at 7.

13 See Entry, Ohio Supreme Court Case No. 2012-0665 (March 13, 2013).

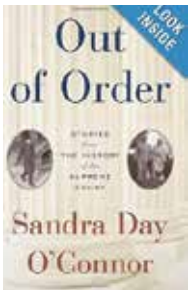
14 *Ahmad v. AK Steel Corp.*, 119 Ohio St.3d 1210, 1211, 2008-Ohio-4082.

15 *State v. Urbin*, 100 Ohio St.3d 1207, 1210, 2003-Ohio-5549.

16 S.Ct.Prac.R. 8.04: "When the Supreme Court finds a conflict pursuant to S.Ct.Prac.R. 8.02, it may later find that there is no conflict or that the same question has been raised and passed upon in a prior appeal. Accordingly, the Supreme Court may sua sponte dismiss the case as having been improvidently certified or summarily reverse or affirm on the basis of precedent." S.Ct.Prac.R. 7.10: "When a case has been accepted for determination on the merits pursuant to S.Ct.Prac.R. 7.08, the Supreme Court may later find that there is no substantial constitutional question or question of public or great general interest, that leave to appeal in a felony case was not warranted, or that the same question has been raised and passed upon in a prior appeal. Accordingly, the Supreme Court may sua sponte dismiss the case as having been improvidently accepted or summarily reverse or affirm on the basis of precedent."

Books & Bytes

Book review



***Out of Order: Stories from the History of the Supreme Court*, by Sandra Day O'Connor. 251 pages. New York, NY: Random House. 2013. Illus. $26.**

Out of Order: Stories from the History of the Supreme Court, as the title implies, is a series of various vignettes and short essays about the U.S. Supreme Court by former justice, Sandra Day O'Connor. Her fifth book, *Out of Order*, spans the entire spectrum of the court's history, ranging in discussions from the first Chief Justice, John Jay, through the current Chief Justice, John Roberts Jr.

O'Connor's book is chock-full of cocktail hour esoteric trivia about the Supreme Court. ("Every President, except William Henry Harrison, Zachary Taylor, and Jimmy Carter, has had an opportunity to appoint at least one justice.") One chapter is devoted to a discussion of various Supreme Court firsts, including, of course, the author's distinction as the "First Woman on the Supreme Court—or the FWOTSC, as I like to call myself."

After Chief Justice John Jay became the first Chief Justice to resign, George Washington nominated John Rutledge to fill the seat, which led to the first confirmation battle. Rutledge so disliked the administration's handling of negotiations with Great Britain over Revolutionary War reparations and protection of American shipping interests, "saying that he would rather George Washington die than he sign the Jay Treaty." O'Connor notes, "This was probably another first—the first time that a nominee to the Supreme Court publicly wished for the death of the man who nominated him!"

Since her retirement from the Court in 2006, the author has been a frequent speaker on the lecture tour. "People often ask me who the best oral advocate to argue before the Court was while I was on the bench. There were many talented oral advocates whom I heard, but no one presented better arguments on a more consistent basis than the current Chief Justice, John Roberts." Roberts, writes O'Connor, "possessed an unusually clear and straightforward manner of presenting his arguments, even in cases that were highly technical or arcane. I understand that he refined this style by taking time to explain the gist of his cases to a person who was bright, but untrained in the law. I think that many other oral advocates would do well to take this page from Roberts's book."

O'Connor describes in brief sketches four justices who she regards as "larger-than-life": Stephen Field, Oliver Wendell Holmes Jr., James McReynolds and William Douglas. McReynolds, notes O'Connor, "is commonly regarded as one of the *worst* justices to ever sit on the Supreme Court. While McReynolds is famous for his virulent opposition to the New Deal, his abysmal reputation stems mostly from his astonishingly mean and bigoted character." McReynolds, appointed by Woodrow Wilson, crassly referred to President Franklin Roosevelt as "that crippled jackass." She recalls, "He infamously used his black valet, Harry Parker, as a human bird dog, requiring him to wade through icy water to fetch the ducks McReynolds shot when hunting." O'Connor also deals with some of the procedural evolutions of the Court over the past two centuries. Incredibly, there were no time constraints for oral argument or page limitations on briefs in the early years of the Supreme Court. In modern practice, "Classical oral exposition is discouraged, and advocates are lucky if they get more than two unbroken sentences out of their mouths before the Justices interrupt with difficult questions."

Justices in frontier America were subjected to the harsh job requirement of circuit riding. She recounts some the hardships that Justice James Iredell faced in the late 1700s. Iredell wrote his wife to inform her that while he was in North Carolina, "he had been robbed by a 'Scoundrel' on the road who had 'unstrapped my Portmanteau from behind the Chair.'"

While in Georgia, Iredell suffered the indignities of yet another circuit riding mishap. "[H]e had been thrown off by his horse and run over by a wheel of the carriage, leaving his leg 'in so much pain' that he was obliged to stay 'very inconveniently at a house on the road.'" While O'Connor, an avid horse fancier, may have regretted missing the professional opportunities to ride a dusty switchback trail while serving as a justice, she was glad she was not subjected to the inefficient travel requirements. "[T]he idea of traveling hither and yon as an itinerant trial judge, even with the conveniences of modern transportation and communication, is unworkable and unattractive."

Out of Order is one of those rare books that provides a first-hand account of an insider's view of the U.S. Supreme Court. Justices have been notoriously reticent in their writings about the internal details of the workings of the Supreme Court. It is regrettable that O'Connor did not expand on her own day-to-day activities of a quarter-century on the Supreme Court, with more personal glimpses of her former colleagues on the bench. (Her 2003 book, *The Majesty of the Law*, also dealt briefly with some her experiences with her fellow high court jurists.) *Out of Order* is clearly and succinctly written, and not overly burdened with didactic legalese. ■

—Bradley S. Le Boeuf
Akron

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

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

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

Cincinnati

Tamara S. Sack is the new president of the Butler County Bar Association.

Cleveland

Jeffrey S. Dunlap, Ulmer & Berne LLP, has been named to the Leadership Cleveland Class of 2014.

Andrew G. Fiorella, Ulmer & Berne LLP, has been elected to the board of directors of the Cleveland Pops Orchestra.

Columbus

Thomas H. Bainbridge, Bainbridge Firm LLC, has been named chairman of the Ohio Industrial Commission.

Dayton

Hon. Michael Merz, magistrate judge for the U.S. District Court for the Southern District of Ohio, is the recipient of the American Bar Association's 2013 Robert B. Yegge Award.

Fairfield

Cassandra E. Kiesey, Butler County Mental Health Board, is the new secretary/treasurer of the Butler County Bar Association.

Florence Ky.

William "Bill" Robinson, Frost Brown Todd PLLC, is the recipient of the National Center for State Courts' Distinguished Service Award.

Hamilton

Damon L. Halverson, Pater Pater & Halverson Co. LPA, is the new second vice president of the Butler County Bar Association.

West Chester

John J. Reister, Millikin & Fitton Law Firm, is the new first vice president of the Butler County Bar Association.

Youngstown

James "Ted" Roberts, Roth Blair Roberts Strasfeld & Lodge, has been appointed to the Youngstown State University Board of Trustees. ■

In Memoriam

Mary L. Mazziotti, 86	Sylvania	Sept. 19, 2012
Marvin Union, 68	Novelty	Dec. 27, 2012
Robert K. Bissell, 86	Pepper Pike	May 22, 2013
James B. Collier Jr., 68	Pedro	May 30, 2013
Louis B. Conkle, 92	Marion	May 30, 2013
Charles McKnight, 53	Cambridge	June 3, 2013
Thomas Allen White III, 79	Dayton	June 6, 2013
Connie S. Price, 55	Galena	June 14, 2013
William Hudson "Hud" Hillyer, 84	Dover	June 14, 2013
Harlan H. Todd, 84	Dayton	June 16, 2013
Nicholas D. Satullo, 58	Cleveland	June 22, 2013
Todd G. Finneran, 63	Westerville	June 26, 2013
Harold E. DeHoff, 88	Canton	July 21, 2013
Tonya R. Coles, 37	Columbus	July 23, 2013
John Douglas Liber, 74	Naples, Fla.	July 23, 2013 ■

CLE Calendar

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

Construction Law Forum
6.0 CLE credit hours//6.0 NLT credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
9/4 - Columbus - Ohio State Bar Association

Live Simulcast
Guardianships
6.0 CLE credit hours//6.0 NLT credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
9/11 - Columbus - Ohio State Bar Association
9/18 - Cleveland - The Ritz Carlton

Live Simulcast
Advanced Workers' Compensation
6.5 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4:30 p.m.
9/12 - Columbus, Fairfield, Perrysburg

Live Simulcast
iPad for Legal Professionals
3.0 CLE credit hours (AM)//3.0 CLE credit hours (AM)
Registration: 8:30 a.m.
Program: 9 a.m. - 12:15 p.m.
9/17 - Cleveland, Columbus

Advanced iPad for Lawyers
3.0 NLT credit hours (PM)
Registration: 12:45 p.m.
Program: 1:15 p.m. - 4:30 p.m.
9/17 - Cleveland, Columbus

Criminal Advocacy
6.0 CLE credit hours//6.0 NLT credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
9/18 - Columbus - Ohio State Bar Association
9/25 - Cleveland - The Ritz Carlton

Advanced Workers' Compensation
6.5 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4:30 p.m.
9/20 - Cleveland - The Ritz Carlton

Marvin R. Pliskin Advanced Probate and Estate Planning Seminar
6.5 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4:30 p.m.
9/20 - Columbus - Greater Columbus Convention Center

Finance for Lawyers
5.5 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 3:30 p.m.
9/23 - Cleveland - The Ritz Carlton
9/24 - Columbus - Ohio State Bar Association

Live Simulcast
Trial Technology Workshop
6.5 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4:30 p.m.
9/24 - Cleveland - The Ritz Carlton
9/25 - Columbus - Ohio State Bar Association
9/26 - Fairfield - Receptions North Center

Live Simulcast
Administrative Law
6.5 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4:30 p.m.
9/26 - Cleveland, Columbus

Litigation Section Conference: Advocacy for the Ages
6.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
9/27 - Akron, Cleveland, Columbus, Fairfield, Perrysburg

Ohio Elder Law Institute Highlights Video
6.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
10/1 - Akron - John S. Knight Center
10/1 - Perrysburg - Hilton Garden Inn
10/8 - Cleveland - The Ritz Carlton
10/16 - Columbus - Ohio State Bar Association

How to Understand and Analyze Financial Statements
6.0 CLE credit hours//6.0 NLT credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
10/1 - Cleveland - The Ritz Carlton
10/2 - Columbus - Ohio State Bar Association

Live Simulcast
Midwest Labor and Employment Law Seminar
13.75 CLE credit hours
Registration Day 1: 8:30 a.m.
Program Day 1: 9:30 a.m. - 6 p.m.
Program Day 2: 7:30 a.m. - 4 p.m.
10/3 - Columbus - Hilton Easton Hotel

Live Simulcast
Using Technology to Build Malpractice Avoidance
2.5 CLE credit hours (AM)
Registration: 8 a.m.
Program: 8:30 a.m. - 11:15 a.m.
10/3 - Cleveland, Columbus

Live Simulcast
Debt Collection
6.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
10/9 - Cleveland, Columbus, Fairfield, Perrysburg

Fall Ethics, Professionalism and Substance Abuse
2.5 CLE credit hours (AM)
Registration: 8 a.m.
Program: 8:30 a.m. - 11:15 a.m.
10/10 - Akron, Cleveland, Columbus, Dayton, Perrysburg, Steubenville, Wooster

Live Simulcast
Corporate Counsel
6.5 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4:30 p.m.
10/11- Columbus - Ohio State Bar Association

Family Law Institute Highlights
6.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
10/15 - Akron, Cleveland, Columbus, Fairfield, Perrysburg

Litigation Basics
7.0 CLE credit hours//7.0 NLT credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 5 p.m.
10/16 - Cleveland - The Ritz Carlton
10/30 - Columbus - Ohio State Bar Association

Live Simulcast
Introduction to Domestic Relations Practice
6.0 CLE credit hours//6.0 NLT credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 4 p.m.
10/17 - Cleveland - The Ritz Carlton
Live Simulcast
10/23 - Columbus, Fairfield

Transition to Retirement
3.0 CLE credit hours
Registration: 8 a.m.
Program: 8:30 a.m. - 11:45 a.m.
10/18 - Cleveland, Columbus, Fairfield, Perrysburg

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