



CLEVELAND METROPOLITAN Bar Journal

FEBRUARY 2020

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Hon. William K. Thomas

PROFESSIONALISM AWARD

NOMINATIONS NEEDED!

The CMBA requests nominations for the Hon. William K. Thomas Professionalism Award to honor a lawyer or judge who has significantly contributed to the enhancement of professionalism in the Greater Cleveland legal community by exemplifying the goals of the Ohio Supreme Court's A Lawyer's Creed and A Lawyer's Aspirational Ideals and by furthering the ideals expressed in the Mission of the CMBA. The award will be presented at the CMBA's Annual Meeting on June 5th.

SUBMIT NOMINATIONS BY FRIDAY, APRIL 17, 2020 TO:

Ethics and Professionalism Committee

Attn: Karen Rubin, Chair

1375 East 9th Street, Floor 2

Cleveland, Ohio 44114

or e-mail to Heather Zirke at hzirke@clemetrobar.org

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Insurance Law Section

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CALLING ALL LAWYERS! CALLING ALL LAWYERS!



Ian N. Friedman

Called the “Father of Western Philosophy,” Greek philosopher Aristotle declared: “At his best, man is the noblest of all animals; separated from law and justice he is the worst.”

We, lawyers of varying disciplines, share the responsibility of honoring this great profession. The law helps to maintain a civilized society in which civil and criminal disputes are processed daily. To honor it, we must protect it. Throughout the history of civilized people, the role of the lawyer has been scrutinized, questioned and degraded. In the face of such challenge, all lawyers must stand together in educating the naysayers so that the rule of law may persist as a beacon of light and hope. The law is too integral to society to sit passively by and watch the unchecked casting of stones. The time is now for all lawyers to embrace every opportunity to teach those who question the importance of our system of jurisprudence. This is one of those times in history in which the law, if left to stand alone, could fall.

This column is not intended to be political. The Cleveland Metropolitan Bar Association is a large organization whose members subscribe to different political affiliations and beliefs. It is safe to say though, that each of us believes in the dignity of the profession. We know that the legal system, however fallible due to human factors, is the greatest forum for ordinary citizens to settle personal disputes and seek redress against perceived injustice. Choose not to view the challenges set forth below as partisan. Instead, please consider the evolving opinions of the non-lawyer community. Respectfully, we must recognize how recent events are shaping

witness’ impressions and attitudes toward the entire legal system.

Please consider the prospect of people questioning:

- Whether they can opt not to comply with a subpoena to testify or produce evidence;
- Whether judges are serving the ends of justice or are beholden solely to political ideology;
- Whether investigative agencies still adhere to their mission of imparting blind justice to uphold individual rights;
- Whether the judiciary remains an independent branch of government;
- Whether jurors are safe from ridicule and threat; and
- Whether our legal system is designed only to work for the rich, powerful and politically connected.

If the system of law were to erode, the United States would lose a prominent pillar on which it was built. The American Bar Association, cited for its’ liberalism and partisanship, has been marginalized from its long role in vetting judicial candidates. I am sure, like many of you, that friends and family have asked you questions after witnessing the recent impeachment hearings, criminal pardons and attacks on the judiciary. Regardless, of your personal affiliations, we *must* act now to prevent our great justice system, from falling prey to misunderstanding, untrustworthiness, and mockery. We owe it to ourselves, our clients, and the future practice of law. As officers of the court, we are obligated by our oaths to accurately teach the fundamentals of law to all those not armed with a legal education.

The rule of law has been challenged before but as a profession, we cannot stand idly by

and assume that *that this too shall pass*. What we do and who we serve are too important. As lawyers, I implore each of you to let the people know that subpoenas require attendance and production. Stand up to unjustified attacks on judges. Make clear that those in the public service arena are inherently good and work for the people. Stress in your discussions the importance of an independent judicial branch. Emphasize the importance of jury service to all who ask. Share with anyone willing to listen that justice is not reserved only for some and that the ordinary citizen can still be heard. These are not mere lofty goals or ideals. This is what we *must* do in defense of our chosen profession and to ensure that the American system of jurisprudence is maintained in its highest form.

Can we make a difference? History has shown that great change can result from the effort of a mere few. We are approximately 5,500 members strong and we cannot afford to not try.

Ian Friedman is a partner at Friedman & Nemecek, L.L.C., which is a Cleveland-based criminal defense law firm. He is the current President of the CMBA. He has served as President of the American Board of Criminal Lawyers, Ohio Association of Criminal Lawyers and CM-Law Alumni Association. He is an Adjunct Professor at CM-Law where he teaches Cybercrime. He is a recipient of the CMBA’s William K. Thomas Award for Professionalism and was named by Best Lawyers in America as 2019 Lawyer of The Year, Criminal Defense: General Practice. He has been a CMBA member since 2002. He can be reached at (216) 928-7700 or inf@fanlegal.com.

INTERNATIONAL WOMEN'S DAY SUMMIT 2020

THURSDAY, MARCH 5

CLEVELAND METROPOLITAN
CONFERENCE CENTER

International Women's Day is a global day acknowledging the social, economic, cultural and political achievements of women, while also serving as a call to action for accelerating gender parity. This collaborative Cleveland Summit will give women and men the opportunity to learn from and celebrate women of great achievement, in addition to inspiring one another to continue the pursuit for equality.

The all-day Summit also features the American Bar Association's traveling exhibit commemorating the 100th Anniversary of the Nineteenth Amendment guaranteeing women's constitutional right to vote. The exhibit includes historic photos and artifacts, detailing the story of the battle for women's suffrage and outlining the challenges that remain today.

Ignite Keynote Christine Brennan



Award-winning national sports columnist for USA Today, commentator for CNN, ABC News, PBS Newshour and NPR, and best-selling author

5.5 CLE hours pending



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The Scoop

CMBA Member Q&A



Jill Shankar

Firm/Company: Sobel, Wade & Mapley
Title: Of Counsel Attorney
College: Sarah Lawrence College
Law School: Cleveland-Marshall College of Law

IF YOU WERE NOT PRACTICING LAW, WHAT WOULD YOUR PROFESSION BE?

A veterinarian or a photographer

WHAT DO YOU LOVE ABOUT YOUR JOB?

Fighting for people to be treated fairly at work. Work is such an important feature of modern life, and it shouldn't be a place where people are stuck tolerating discrimination.

TELL US ABOUT YOUR PETS.

We have an 18-year-old feline named Nikki, whom we rescued from the Sun Luck Garden Plaza on Taylor Blvd. one cold, rainy day when she was a tiny, bedraggled kitten. We also love to be pet foster parents. We took care of two St. Patrick's Day kittens, Shamrock and Dublin, who were rescued out of a garage and needed to be socialized. And we just finished fostering a 6-ish-year-old cat named Casey whom someone found on the street; she needed some TLC before and after her dental surgery. Another major project, when the timing is right, will be spending a year raising a puppy for the Guiding Eyes for the Blind.

HOW DID YOU MEET YOUR SPOUSE?

On his second day of work at the Duck tape company on the west side, formerly known as Manco but now known as ShurTech Brands, I introduced myself after he finished a drink from the water fountain. I had been with the company for a couple years while he had just moved to Cleveland, and I wanted to welcome him. We started dating six years later!

ONE FUN FACT ABOUT YOU?

I've never had a cavity.



Matt Miller

Firm/Company: Weston Hurd LLP
Title: Partner
College: Bucknell University
Law School: Cleveland-Marshall College of Law

A RECENT MILESTONE FOR YOU OR YOUR FAMILY?

Baby No. 3 arriving this Spring

FAVORITE CLEVELAND HOT SPOT

Westside Market

EAST SIDE OR WEST SIDE?

West side. Bay Village to Rocky River to Bay Village

HOW DID YOU MEET YOUR SPOUSE?

My wife sat next to me in Commercial Law. I was a 2L and she was a 3L.

TELL US ABOUT YOUR FIRST EVER JOB.

Worked at a golf course when I was in 8th grade. Learned to tap a keg my first day of my first job

WHAT'S YOUR FAVORITE BOOK?

The Girl Who Played With Fire and *The Girl Who Kicked the Hornet's Nest*

WHAT'S ON YOUR BUCKET LIST?

An invitation to play golf at Cypress Point Club

Nicole Braden Lewis

Firm/Company: Tucker Ellis LLP
Title: Counsel
College: Denison University
Law School: Case Western Reserve University

WHAT DO YOU LOVE ABOUT YOUR JOB?

The people! In my national practice, I work with interesting clients, colleagues at my firm, lawyers across the country, and experts in numerous disciplines such as engineers, medical experts, and product technicians. They are so smart. I love problem-solving with them.

HOW DID YOU MEET YOUR SPOUSE?

My husband Zach and I met at a wedding a month after I took the Bar. My college roommate married his best friend from high school.

WHAT ADVICE WOULD YOU GIVE TO A LAW STUDENT?

Learn everything you can, not just the things that will be on an exam. You have so many opportunities. Our law schools host lectures by nationally and internationally respected authorities, which are free to students even if you are not currently taking a class in the subject area. Cleveland Orchestra student tickets are only \$15.

TELL US ABOUT YOUR FIRST EVER JOB.

Babysitting. I took a Red Cross course and had a bag of children's books and activities I would bring with me to the house. I learned a lot about motivating kids to do simple personal tasks like brushing teeth, and I also watched a lot of Saturday Night Live.

WHAT WOULD REALLY SURPRISE PEOPLE ABOUT YOU?

I will be tap-dancing again in the show-stopping last number of the Cleveland City Dance Annual Spring Concert.

INTERESTED IN BEING FEATURED OR KNOW SOMEONE WHO MIGHT?

E-mail Jackie Baraona at:
jbaraona@clemetrobar.org.





SPOTLIGHT ON: LEGAL INNOVATOR COMMITTEE

CHANGE IS EVERYWHERE

Alex Gertsburg

Twenty years ago, when I graduated from law school, many lawyers were still researching and Shepardizing case law by following a trail of bread-crumbs in books (remember books?). If you were an attorney or paralegal, you likely worked in a brick-and-mortar office, probably not from your home and definitely not in a Starbucks. Your reliance on technology was just starting to reach beyond a phone, Microsoft Word and really slow dial-up internet. Your options for billing your clients were fairly limited: hourly billing was king, contingency fees were generally limited to injury and employment cases, and a flat fee poked its head through once in a while, usually for routine document preparation or a will.

Ten years ago, the internet had already revolutionized almost every industry and ours was no different. Legal files were already moving to the cloud. Firms were going paperless. Books were rarely used for anything anymore. Shared workspaces had popped up. Virtual law firms started to challenge brick-and-mortar firms. Westlaw and Lexis were seeing stiff competition. “The billable hour is dead!” became a rallying cry. E-discovery had gone from an idea to an industry, and rules of procedure and ethics were catching up fast.

Today, we are still seeing radical change in our industry. Legal Zoom and other companies are commoditizing, right-sizing and process-ing many legal services, from contracts to estate plans to real estate. Companies are moving more work in-house. Generational changes, gender issues and virtual law firms are transforming work preferences and environments. Alternative fee arrangements have become ever-more creative. Legal

outsourcing companies and consultants have made owning and operating a law firm much easier. Social media is a permanent force in marketing and information distribution.

For at least 2,500 years, philosophers from Heraclitus to Anastasio have agreed that “change is the one thing you can count on.” It’s here and it’s happening whether we are open to it or not, whether we are following it or not, and whether we are the change-makers, the change-deniers or the change-observers.

Members of Legal Innovator, the recently-established CMBA Committee and the somewhat-successor to the previous Technology Committee, *are* the change makers. The mission of the Legal Innovator Committee is “to elevate CMBA members and the legal profession through exploration of innovative and disruptive strategies in client service, organizational and professional relationships, and technology.” Each month, Legal Innovator will meet to explore one of six themes:

- Organizations: Innovative attorney and law firm organizational structures and strategic planning, data
- Client services: New and disruptive ways to deliver and design legal services to clients
- Technologies: Improved and changing technologies
- People: Attorney / staff compensation, hiring and retention, generational differences
- Fees: Alternative billing and fee arrangements
- Marketing: New marketing techniques and strategies

What’s working and what’s not working? What’s out there? What’s coming? The Committee will discuss, present (internally and with external speakers), and share content each month on these and other themes. We have created a Facebook group where members

can exchange posts, articles, tactics and other interesting and news-worthy items. (Join the group at (<https://www.facebook.com/groups/CMBALegalInnovator/>). We will support and work with other sections and committees to widen both the idea-generators and the audience to hear them. Above all, we will be a resource to members of the committee and the CMBA.

Visit the CMBA’s website for more information about the Committee in general or the Facebook page for real-time updates.

As the refrain — ‘the legal profession and law firm of tomorrow will look nothing like they look today’ — keeps growing with time and with change, the opportunity presents itself: bring the legal change-makers in the CMBA together regularly and let them cross-pollinate, and do it here in Cleveland. We already know some of what’s on the horizon: AI is coming our way with a force. Big data is already here. What else is coming down the pipe? Join us in the Legal Innovator Committee to tell your story, to listen to others’, or and to join the conversation.



Alex Gertsburg is owner of The Gertsburg Law Firm Co., LPA. He has been a CMBA member since 2001. He can be reached at (440) 571-7777 or ag@gertsburglaw.com.

GET ENGAGED!

For information on how to join the Legal Innovator Committee, contact Melanie Farrell at (216) 539-3711 or mfarrell@clemetrobar.org.

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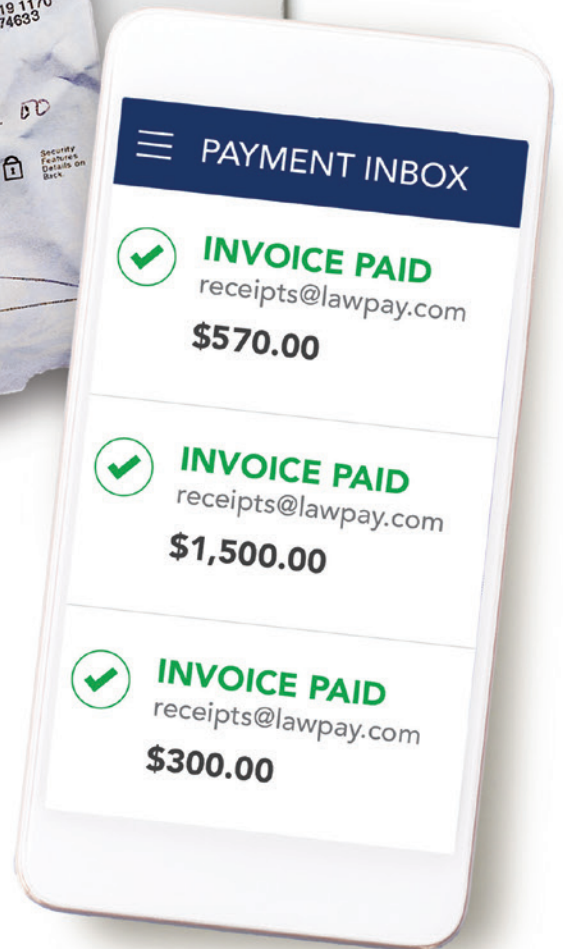


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**CLEVELAND METROPOLITAN
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You Know US

Cleveland Mock Trial

Volunteer legal coaches & judicial panelists needed

The Cleveland Mock Trial Competition gives local high school students a chance to prepare their best legal arguments for an exciting day of competition with their peers. Coached by volunteer legal professionals, teams take turns representing the prosecution and defense in a criminal trial, giving them the opportunity both to hone their legal skills and to learn more about important issues facing teens today. The top attorneys, witness, and essay writer are awarded a paid summer internship at the Cleveland Municipal Court.

Attorneys, judges, and law students are invited to volunteer as coaches and/or judicial panelists for the Cleveland Mock Trial starting February, 2020. Legal coaches visit their assigned classrooms about once a week from March through the competition in early May (3–4 visits total based on volunteers' availability and schedules) to help students understand mock trial basics. Volunteers can also sign up for one or both trials on **Competition Day May 8: 9:00 – 11:00 a.m. or 12:00 – 2:00 p.m.** at the Justice Center in downtown Cleveland. No trial experience necessary, just an enthusiasm for supporting local high school mock trial teams.

Sign up today by emailing jpaine@clemetrobar.org.
Learn more at CleMetroBar.org/ClevelandMockTrial.






Health Care Law Update & Medical/Legal Summit 2020
April 24 & 25



Want to take center stage at the CMBA?

Chairing a program or speaking at CMBA CLE is a great way to build your exposure! Email your name and CLE idea to CLE@CleMetroBar.org.

ARE YOU
READY

TO
ANSWER

THE CALL
TO LEAD?

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Joseph J. Morford
Marlon A. Primes
Beth Ann Schenz



By regulation, the Cleveland Metropolitan Bar Association (CMBA) annually invites any and all Members of the Association to submit their recommendations or self-nominations for future volunteer leadership positions. For the upcoming 2020–2021 Fiscal Year beginning July 1, 2020, the CMBA is accepting nominations for the following positions:

Vice President

Serving one year as vice president before advancing for one year to president-elect, and then serving one year as president

Director

Six (6) CMBA Members to each serve one, three-year term as a member of the Board of Directors

The primary consideration by which all candidates for an open position will be evaluated is a **demonstrated history of service to the CMBA** through engagement with and/or leadership of the CMBA's Sections, Committees and/or CLE programs.

IDEAL CMBA OFFICERS & DIRECTORS WILL

- be committed to the CMBA's mission & goals
- work collaboratively with others
- offer adaptability, creativity, innovation & vision
- have a passion for the legal profession
- be open to considering different/new points of view
- accountability
- have earned the respect of peers
- be energetic, be responsive & follow through
- have time to devote to the CMBA & a willingness to make the CMBA a priority commitment
- represent diverse life experiences, backgrounds, experiences, practice areas, segments of the legal community

All nominations are due by 5 p.m. on Monday, March 2, 2020 and should be sent to:

CMBA Nominating Committee c/o CEO, Rebecca Ruppert McMahon

If by mail to: 1375 E. 9th Street, Floor 2, Cleveland, Ohio 44114 or by email to: rmcmahon@clemetrobar.org

Visit [CleMetroBar.org/Nominations](https://www.clemetrobar.org/nominations) for details.



CELEBRATING CLEVELAND'S GEMS



Rebecca Ruppert McMahon

“Leadership is not about title or a designation. It's about impact, influence and inspiration. Impact involves getting results, influence is about spreading the passion you have for your work, and you have to inspire teammates and customers.” So says Robin Sharma, one-time lawyer, best-selling author of *The Monk Who Sold His Ferrari* series and an internationally recognized leadership speaker.

This statement may ring a bell since I shared it a couple of years ago. It continues to stick with me because I think it could have been written about our Bar. Impact, influence and inspiration are the hallmarks of all that we do within our Bar.

As you know, there are two different legal entities at work within our Bar:

- the **Bar Association** which runs the day-to-day activities of our Bar from our 41 Sections and Committees, annual institutes and other 170+ CLE programs, to pro bono clinics for the homeless and pro se divorce litigants, to community-inclusive initiatives like the Hot Talks series (don't forget: free and open to the public the 2nd Tuesday of every month at noon in our Conference Center) and our school-based programs; and

- the **Bar Foundation** which, as the charitable fundraising arm of the CMBA, is responsible for raising critical dollars in support of the pro bono and community programs operated by the Bar Association.

Thanks to the incredible, collective efforts of all of you, our members, our Bar Association and Bar Foundation are creating significant impact, spreading broad-based influence and sharing what we hope is a contagious inspiration for giving back. We are, by any definition, leaders.

This month, we are releasing our newest **Impact Report** — the annual report of the Bar Foundation which spotlights the impact the Bar Association's community and pro bono programs are having in our region, and the incredible fundraising success our Bar Foundation has achieved during the last fiscal year. Within the 2018–2019 Impact Report, you will see specific examples of how our Bar harnesses the brilliance of Cleveland's gems — the legal, business and civic communities — to lift up those in need and the next generation, including these:

- **Nearly 1,000 individuals within our Bar donated more than 13,000 hours in service for more than 3,500 people** — with an estimated value of just under **\$2,000,000**.
- Our **pipeline programs** are creating truly life-changing opportunities for Cleveland and East Cleveland school students, like **Jzinae Jackson**, an associate with **Zashin & Rich**, who found inspiration and encouragement to become a lawyer through her experiences with the **Ohio Mock Trial Program**, the **Stephanie Tubbs Jones Summer Legal Academy** and the **Louis Stokes Scholars Program**.
- Together with our partners at the Legal Aid Society, Scranton Road Ministries, the Cuyahoga County Public Defender's Office and others, we are developing a **Say Yes to**

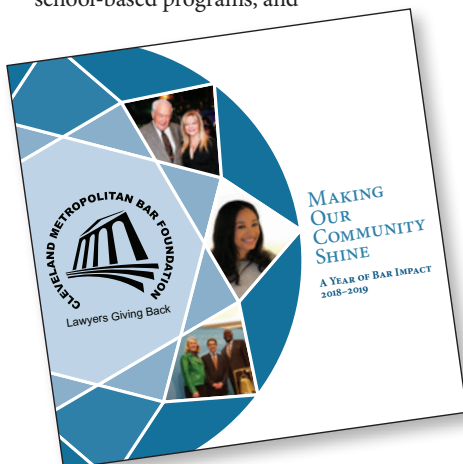
Education Cleveland game plan to help meet the legal needs of Cleveland Metropolitan School District students and their families that in so many ways prevent students from attending and achieving success in school.

- Thanks to the incredible generosity of our legal and business community, combined with the hard work and devotion of our event planning committees and staff, the Bar Foundation's three annual Special Events really “rocked it”, successfully honoring dedicated public servants and community leaders, and **raising more than \$250,000** to support our award-winning, **Lawyers Giving Back** programs.

The full 2018–2019 Impact Report is being mailed to all Foundation Fellows and Sponsors. Additional copies are available any time for pick-up at the CMBA, and an electronic version is accessible at: www.CleMetroBar.org/2018-19-Impact-Report.

With a little more than four months left in this membership year, our Association and Foundation are on track to complete yet another outstanding year. Thanks to the tireless leadership of Presidents **Ian Friedman** and **Pat Krebs** — and that of both organizations' Boards of Directors — in addition to the passionate engagement of so many members, the state of our Bar is profoundly strong. If you have not yet answered the call to speak at an event, write an article, lead a section or committee, plan an event, volunteer for a clinic or otherwise lend your support this year, come meet us at the Bar soon to find out how you can join the legions of lawyers, paralegals and other business professionals who are leading the way in Cleveland.

Rebecca Ruppert McMahon is the CEO of the CMBA. She has been a CMBA member since 1995. She can be reached at (216) 696-3525 or rmmcmahon@clemetrobar.org.





AN EXCELLENT AND ENGAGED COMMUNITY LEADER

Patrick J. Krebs

For the past several years, the Cleveland Metropolitan Bar Foundation (CMBF) has publicly recognized a member of our community with our highest honor, the Richard W. Pogue Award for Excellence in Community Leadership and Engagement. This year's recipient is Judge Solomon Oliver, Jr. Judge Oliver's life story is a truly remarkable one, and his service as a federal judge is long and distinguished. I encourage everyone to do a quick internet search to learn more about Judge Oliver's inspiring journey, from growing up in Bessemer, Alabama in the segregated South to becoming the Chief Judge for the Northern District of Ohio.

Although Judge Oliver would be deserving of the Pogue Award based solely on his 25 years of outstanding judicial service, we are also recognizing him for his significant engagement in the Cleveland Bar. Judge Oliver's many contributions include volunteering with a variety of Cleveland Metropolitan Bar Association (CMBA) programs funded by the CMBF, including several pipeline programs designed to connect students to mentors, resources, and practical experiences that help them succeed in achieving their education and career goals. Those diversity pipeline programs, which start in high school and continue through college and law school, are making a real difference in the lives of thousands of students each year with the help of people like Judge Oliver.

The 3Rs Program — Rights, Realities and Responsibilities — connects lawyers, judges, law students, and paralegals with 11th grade high school students in Cleveland and East Cleveland schools through a series of in-person lessons designed to help foster an understanding and appreciation of the U.S. Constitution, as well as share important information about how students can achieve their goals beyond high school. For more than a decade, Judge Oliver has welcomed 3Rs students into his

courtroom to meet with and hear from Assistant U.S. Attorneys, Federal Public Defenders, and special agents from both the U.S. Marshals Service and the FBI. Following mock charges and an arrest by the respective agencies, students put on a suppression hearing before Judge Oliver, who issues rulings and provides a judicial perspective of what is involved in reaching a decision. He also spends time talking with the students about the importance of education and working diligently in pursuit of their individual goals.



The Stephanie Tubbs Jones Summer Legal Academy introduces high school students to the legal profession through hands-on experiences. Judge Oliver has regularly served as a guest faculty member, sharing his insights and wisdom, and challenging and inspiring students to take an aggressive role in charting their future career paths.

The Louis Stokes Scholars Program enables college students, graduates of Cleveland and East Cleveland public high schools, interested in ca-

reers in the law, to participate in paid summer legal internships with Cleveland courts, law firms, and legal nonprofits. Each year, Judge Oliver invites Stokes Scholars to his courtroom to observe proceedings, and then to spend time engaged in discussions about the justice system, the path to becoming a federal judge, and the individual students' goals for the future. He also serves as a mentor to several Stokes Scholar Alumni.

Judge Oliver's distinguished service on the federal bench and his unwavering support for the CMBA's pipeline programs serve as a shining example for all of us in the Cleveland legal community. Judge Oliver received the Pogue Award on February 8th at Rock the Foundation 15. Please join me in thanking him for all of the work he has done to positively impact the lives of so many people in our community.

In closing, the CMBF could not achieve its mission of giving back to those in need in our community without the tireless work of volunteers like Judge Oliver and the generous support of many sponsors, donors, and fellows. We recognized all of our volunteers, sponsors, donors, and fellows at Rock the Foundation 15 on February 8th, but I wanted to give special mention in this column to our friends at Huntington National Bank. Over the years, Huntington has been steadfast in its financial support of the CMBF, our programs, and our mission. Thank you Huntington for your help in giving back to the City we love!

Patrick Krebs is a partner in the Cleveland office of Taft Stettinius & Hollister LLP and is a member of the Litigation, Public Law, and Sports Law practice groups. He is the 2019-2020 President of the CMBF, a Fellow of the Foundation, and a CMBA member. He can be reached at (216) 706-3867 or pkrebs@taftlaw.com.

Fellows

FEATURE



Rosanne Aumiller

Rosanne Aumiller believes everyone should volunteer, “even a little bit.” Rosanne volunteers much more than a little bit. As a CMBF Fellow and board member, Rosanne is an active, visible leader and advocate for our mission.

Rosanne is a Community Fellow and an affiliate member of the CMBA. She’s not a lawyer, but her work in accounting has always involved the law. “I was very honored to become a Fellow. It’s very prestigious. My centers of influence have always involved lawyers. Everything I do touches lawyers. While there’s always been a business purpose, there can also be a purpose to give back.”

Giving back is a theme that runs through Rosanne’s life. Before being invited to join CMBA, she spent nine years as a board member for AICPA, the world’s largest association representing the accounting profession. Rosanne currently works as a Director for Citizen’s Capital Markets in Cleveland.

She encourages all Fellows to use their influence to make a positive difference. “They could fundraise, they could volunteer through one of our programs, they can talk to their colleagues, friends and family about CMBF.”

Why does she love The Bar? “Doing so much with so little. My favorite part is seeing the return on that investment. It’s actually fun!”



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DON'T FORGET A CHOICE-OF-LAW ANALYSIS WHEN PRESENTED WITH AN INSURANCE COVERAGE DISPUTE

BY CHRIS BATOR & DUSTIN DOW

Insurance law occupies a unique corner of the legal profession for a number of reasons, one of which is the heavy emphasis on conducting choice-of-law analysis. When faced with an insurance coverage dispute, it is important that counsel, whether representing the policyholder or the carrier, not assume that the substantive law of the forum state will apply. A choice-of-law analysis is a must. Insurance law requires a state-by-state analysis that may — and often does — lead to different results depending on which state's laws apply.

A choice-of-law analysis is important because one state court's analysis of an important coverage issue may differ from that of another state with a significant interest in the coverage dispute, including the forum state. For instance, the number of occurrences can be an important issue in a coverage dispute because whether there are one or multiple occurrences could have significant ramifications on the deductible or retention owed by the insured and the amount of policy benefits available. All states are not created equal. Therefore, it is important to know if the governing state will apply the "cause" test, which favors one occurrence, or the "effects" test, which can result in multiple occurrences.

Bad faith claims are also subject to choice-of-law analysis. Some states, like Ohio, recognize bad faith as an independent tort. Other states do not. And if bad faith is a recognized claim, counsel must know the burden-of-proof requirements of a given state and what type of damages can be recovered.

Another example where choice-of-law is important is a claim for breach of privacy, such as a violation of the Telephone Consumer Protection Act. In some states, for coverage to exist, the governing court requires more than just a call to the plaintiff that would violate the TCPA. Rather, analyzing the invasion of privacy language typically found in commercial general

liability policies, courts in those states require disclosure of private information to a third party to trigger coverage — the same type of privacy violation associated with libel. Other states aren't as strict, instead ruling that a privacy violation for the purposes of insurance coverage exists for a TCPA call so long as there is "disclosure" to the recipient of the call. All of which is to say, choice-of-law is complicated but important.

So how does a choice-of-law analysis typically work? When conducting a choice-of-law analysis, start with the premise that the forum state applies its choice-of-laws law. *Ohayon v. Safeco Insurance*, 91 Ohio St.3d 474, 477, 2001-Ohio-100, 747 N.E.2d 206 (2001). *International Insurance Co. v. Stonewall Ins. Co.*, 86 F.3d 601, 604 (6th Cir. 1996) (applying Ohio choice-of-law), citing, *Klaxon v. Stenor Electric*, 313 U.S. 487 (1941); *Mills Pride v. Continental Insurance Co.*, 300 F.3d 701, 704 (6th Cir. 2002) (applying Michigan choice-of-law and Ohio substantive law). Ohio has adopted *Restatement of the Law 2d, Conflict of Laws*, in its entirety. *American Interstate Insurance Company v. G&H Service Center*, 112 Ohio St.3d 521, 2007-Ohio-608, 861 N.E.2d 524 at ¶ 8 (2007).

Under Ohio's choice-of-laws rules, a court must first determine if there is a conflict between the laws of competing states. If there is no conflict, there is no choice-of-law analysis and Ohio law applies. *Mecanique v. Durr Environmental*, 304 F. Supp.2d 971, 975 (S.D. Ohio 2004), citing, *Akro Plastics v. Drake Industries*, 115 Ohio App.3d 221, 685 N.E.2d 246 (1996); *Glidden v. Lumberman's Mutual*, 112 Ohio St.3d 470 861 N.E.2d 109 (2006).

If parties choose the state law in their contract, apply *Restatement 2d Conflicts of Law* Section 187. The parties' choice will control unless there is no substantial relationship and no reasonable basis for the choice, or application of the law chosen is contrary to the public policy of the state having a greater interest than the state chosen and such state

would be the state of applicable law in the absence of a choice by the parties. *Schulke Radio v. Midwestern Broadcasting*, 6 Ohio St.3d 436 (1983). Which is another way of saying, the choice-of-law provision will control unless it really makes sense, as a matter of practicality and fairness, that a different state's law govern the dispute.

So if you have a choice-of-law provision, consider yourself lucky, because often that language will do the heavy lifting for you. In the absence of the parties having chosen which state law to apply, you'll need to figure it out on your own. If Ohio is the forum state, note that Ohio uses the "most significant relationship" test set forth in *Restatement 2d Conflicts of Law* Section 188(1) for insurance coverage disputes. *Ohayon* at 477, citing, *Gries Sports Entertainment v. Modell*, 15 Ohio St.3d 284, 473 N.E.2d 807 (1984). *International Insurance v. Stone-Wall Insurance*, 86 F. 3d 601, 604-605 (6th Cir. 1996). Use the factors set forth in *Restatement* Sections 188 and 6 to determine which state has the most significant relationship. *Ohayon* at 477, citing, *Gries*; *International Insurance*, 86 F.3d at 604-605. Not all states use the most significant relationship test, so it is important to know what the choice-of-laws rule is for your particular forum. That's right: there's a choice-of-law analysis for the choice-of-law analysis.

Moreover, for insurance bad faith claims, which in Ohio are tort and not contract actions, use the *Restatement* test as set forth in Section 145 which provides for a presumption that the place of the injury controls unless balancing of the other *Restatement* factors compels a different result. *In Re Commercial Money Center Equipment Lease Litigation*, 603 F. Supp.2d 1095, 1103-1108 (N.D. Ohio 2009). The forum state's characterization of the bad faith claim as contract or tort controls. *Ryder Truck Rental v. UTF Carriers*, 790 F. Supp. 637, 641 (WD Va. 1992).

In most coverage-related choice-of-law analyses, the most-significant-relationship test is where you'll have to roll up your sleeves. Gathering as many available facts as you can in advance of conducting the analysis is crucial as the following factors are to be taken into account when analyzing which state's law will apply: place of contracting, place of negotiation, place of performance, place of subject matter of the contract, domicile of the parties. *Mills Pride*, 300 F.3d 701 (Ohio law, the place of contract negotiation, place of performance and place of business of parties, controlled on issue of duty to provide notice); *Revco v. Government Employers Insurance Co.*, 791 F. Supp. 1254 (N.D. Ohio 1991), *affirmed*, 984 F.2d 154 (6th Cir. 1992) (under Ohio law, place of contract negotiation and place of business of insured controlled on issue whether umbrella policy dropped down when primary carrier became insolvent); *General Accident Insurance Co. v. Insurance Company of North America*, 69 Ohio App.3d 52, 590 N.E.2d 33 (8th Dist., Cuyahoga Cty. 1990) (Policy applied to all locations of the insured for all risks. Ohio law, where the contract was issued to an Ohio insured, controlled on issue

of duty to defend). Also look to the foreign state's choice-of-law rules. If the foreign state would not apply its own substantive laws, it has no significant interest and the forum's law will apply. *Restatement*, Section 8, Comment k.

Don't assume that you know the answers to these questions just because the client/insured might have told you that it has a Florida insurance carrier for a liability claim arising from a lawsuit in Nebraska. To examine the place of contracting, you may need to mine the correspondence among the client, the carrier and the broker to determine where and when the policy was signed. The same goes for the place of negotiation. Was the policy delivered to the client or to the broker? That might affect the answer to those questions. Is the subject matter of the coverage dispute (*i.e.*, the liability) specific to Nebraska? Or does the policy provide for nation-wide or world-wide liability coverage? Different states will look at that question in different ways.

Choice-of-law analyses can be difficult, and time-consuming, but always should be a first step in analyzing an insurance coverage dispute. After all, the answer to your particular coverage


dispute depends on applying the substantive law of the appropriate state.



Chris Bator is counsel with BakerHostetler and is certified by the OSBA as a specialist in insurance coverage law. He is a member of the firm's litigation practice group and focuses on advising clients concerning insurance coverage issues and resolution of coverage disputes. He has been a CMBA member since 1987. He can be reached at (216) 621-0200 or cbator@bakerlaw.com.



Dustin Dow is an associate at BakerHostetler where his practice includes, among other subjects, insurance coverage disputes, complex insurance coverage analyses, insurance subrogation, and insurance funding mechanisms. In his spare time, he reads articles about interesting insurance cases. He has been a CMBA member since 2012. He can be reached at (216) 621-0200 or ddow@bakerlaw.com.



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2020 GREATER CLEVELAND BENCH-BAR *Memorial* PROGRAM

In Honor and Remembrance of the Lawyers and Judges of Cleveland and Cuyahoga County who passed away between January 1 – December 31, 2019

Monday, April 6th at Noon

CMBA Conference Center Auditorium

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

THOMAS E. ALLEN
F. MICHAEL APICELLA
ELLIOT STEPHEN AZOFF
STEPHEN BUESCHER
LEO LEONARD CIFELLI
AVERY SAMUEL COHEN
THOMAS PATRICK CURRAN
ANTHONY D. DECELLO
ERNIE K. DEMANELIS
MARY LOUISE (MILLER) DUNNING
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JOE ALLEN POWELL
PHILLIP ALLYN RANNEY
NEIL EDWARD ROBERTS
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EDWARD RICHARD "RICK" STEGE
ARTHUR STEINMETZ
CRAIG ANDERS TAME
BRANO URBANCIC
PHILIP JAMES WALL
JAMES JEAN WHITE
THOMAS R. WOLF
WILLIAM TAYLOR WULIGER
PAUL WILLIAM YATES
THOMAS E. YOUNG



If you know an attorney or judge who passed away in 2019 and is not listed, please contact Caitlin Peterson at cpeterson@clemetrobar.org.



THE UNKINDEST CUT OF ALL?

RESPONDING TO LIFE INSURANCE CLAIM DENIALS

BY HENRY G. GRENDELL

This fall, Cleveland's Great Lakes Theater produced a fantastic version of Shakespeare's Julius Caesar. Marc Antony's famous eulogy of Caesar labels Brutus' final thrust (Et tu, Brute?) as the "unkindest cut of all." Antony then rails on Brutus, who was the son of Caesar's lover and, as some historians speculate, Caesar's own son.

Maybe this is a bit of an exaggeration but, I have always thought that the denial of a life insurance claim can be a similar "unkind cut." People buy life insurance to protect their loved ones. They religiously make their premium payments. When a life insurance company denies coverage, by definition, it is too late for you to do anything about it. You must trust that your coverage will be there when needed.

And, I do not intend to be overly critical of life insurance companies. I spent ten years as the General Counsel of one. Most insurance companies are populated by honest, hard-working people who can make mistakes or who must make judgment calls on difficult claims at times. Nevertheless, when a life insurance claim is denied, the disappointed beneficiary is left with few good options other than to retain counsel and fight against a financial behemoth.

Thus, the question becomes, what should counsel look for in assessing potential coverage for a client with a denied life insurance claim? The first step is to consider

the source of the policy. Is it a policy purchased outside of work or a policy provided through work? The dynamics are different.

If it is a policy that is purchased personally, perhaps through an agent, there are several items to consider. At a high level, while the insured typically needs to prove the existence of coverage, the insurance company carries the burden of proof to demonstrate that a coverage exclusion exists, such as misrepresentation on an application. An insurance company claims person might not consider this factor but counsel would. Failing to consider this point could lead to the denial of "close claims" where the burden of proof makes all the difference in the world.

Another issue is the existence in all life policies of "contestability" clauses. Many people, including attorneys, do not realize that life insurance companies generally cannot contest a life claim after two years except for non-payment of premium. See R.C. § 3915.05. Thus, all claim denials of coverage after policies have been in place for two years or more should be reviewed carefully.

Another basis cited by insurance companies for life claim denials relates to material misrepresentations. Ordinarily, when an insured dies within the two-year contestability period, the insurance company will request medical records from providers. This is when misrepresentations may be discovered. The question then is what types of misrepresentations can void a policy? What if an insured fails to disclose on the insurance application that he or she has diabetes

but dies of a gunshot wound? Does there need to be a connection between the misstatement and the cause of death?

Generally, the answer is no. See *Charles v. Nat'l Life & Acc. Ins. Co.*, 1985 Ohio App. Lexis 7249 (3rd Dist.) (holding that the insurance company properly denied coverage for death caused by a gunshot when it was determined that the insured had misrepresented the existence of a prior diabetes condition in her application). Instead, the courts rely on Ohio Revised Code § 3911.06 which permits a life insurance company to deny a claim based upon misrepresentation when it is "clearly" proven that the misrepresentation was "material," "willfully false" and "fraudulently made." Certainly, these are terms over which a good lawyer can argue.

A final issue is the ability to obtain coverage even if premium payments are missed. For instance, all Ohio insurance policies must contain a grace period of at least one month if a payment is missed. R.C. § 3915.05. If a person makes a final payment then passes away soon thereafter, the grace period can extend coverage by nearly 60 days. Likewise, some insurance policies have waiver of premiums provisions which excuse premium payments if the policy holder becomes critically ill, seriously injured or disabled. Other policies allow a cash value in an insurance policy to be used to pay for missed premium payments. In other words, even if your client tells you that their decedent missed some premium

payments, it is still important to look at the policy to see if there is more to the story.

A more complex situation can arise when the insurance policy was provided as an employee benefit at work. Responding to coverage denials are more complicated in workplace policies that are often subject to ERISA. When Congress enacted ERISA, it sought to encourage employers to provide benefits to employees. One way Congress did this was to create an enforcement scheme which would provide a quick and efficient means for resolving disputes. The result is that the exclusive means to contest a denial of life insurance benefits under a policy subject to ERISA is a claim for benefits under 29 U.S.C. § 1132(a)(1)(B). Unfortunately for the beneficiary, by creating an enforcement scheme which is quick and efficient for the employer/insurer, several significant procedural obstacles were created which are to the detriment of the claimant. Understanding these obstacles from the very outset of the claim is crucial to obtaining a successful result when contesting a denial of coverage in a policy obtained through work.

A challenge for the beneficiary contesting a denied life claim under a workplace policy is that ERISA preempts state law claims. For a non-workplace policy, if the insurance company treats you poorly, you may have a bad faith, or even a fraud claim. This opens the door to punitive damages and attorneys' fees. In contrast, bad faith claims are preempted by ERISA for policies provided as an employee benefit. While attorneys' fees may be available in ERISA cases, the award is discretionary with the Judge. The inability to bring a state law bad faith or fraud claim against an insurer dramatically reduces the beneficiaries' leverage since recovery in an ERISA case is limited to the face value of the policy and only a possibility of attorneys' fees.

Another challenge with ERISA cases is that such cases are typically decided based upon the administrative record alone. Ordinarily, the group insurer will provide an internal appeal for denied claims. If the denial is affirmed internally, an appeal can be taken to (typically) the federal court under 29 U.S.C. §1132. Nevertheless, the court will ordinarily limit its review to the administrative record, which the insurance company may have limited by refusing to consider or produce documents. Many ERISA benefits appeals involve disputes about whether additional discovery may occur and if the administrative record may be expanded.

A related obstacle to obtaining coverage is that the court will usually defer to the administrator's decision. In fact, unless the benefit plan does not have language providing for deference to the administrator's decision (and nearly all plans do) the typical level of deference is high — decisions will be reviewed under an "arbitrary and capricious" standard. Under this standard, the administrator's decision is reversed only if it is not supported by "substantial evidence", if it is "without reason", or if it is "erroneous as a matter of law." Clearly, it can be difficult to obtain reversal of the administrator's decision.

While the standard of review is highly deferential, counsel can reduce the level of deference a court will give. One way to limit this deference is if there is a conflict of interest. A conflict of interest can arise, for instance, if the insurance company that denied the claim or appeal is also the one paying the claim. Deference can also be limited if there is some procedural unfairness in the administrative process. For instance, unfairness can arise if documents or information that are required to be provided under the employee benefit plan or ERISA's administrative enforcement rules are not

provided. These issues typically must be raised at the administrative level. Thus, counsel should take their submissions to the insurer seriously because the ability to add to the record and obtain a more "insured-friendly" level of deference in court will be hotly contested and an uphill battle.

To conclude, while the denial of a life insurance claim might be the "unkindest cut of all", unlike poor Julius Caesar, it does not mean that the fight is over. Instead, the beneficiary needs his or her own "Antony" to pick up the cause and provide a close review of the policy and law which might just lead to a finding that coverage really does exist.



Henry G. Grendell is a partner with the Pepper Pike law firm of Kaufman, Drozdowski & Grendell, LLC. With deep experience as a business litigator and ten-years as a company General Counsel, Henry combines extensive litigation knowledge and experience with the understanding of the needs of business one can only obtain from having worked as a business executive. Henry has been a CMBA member since 1998. He can be reached at (440) 462-6503.

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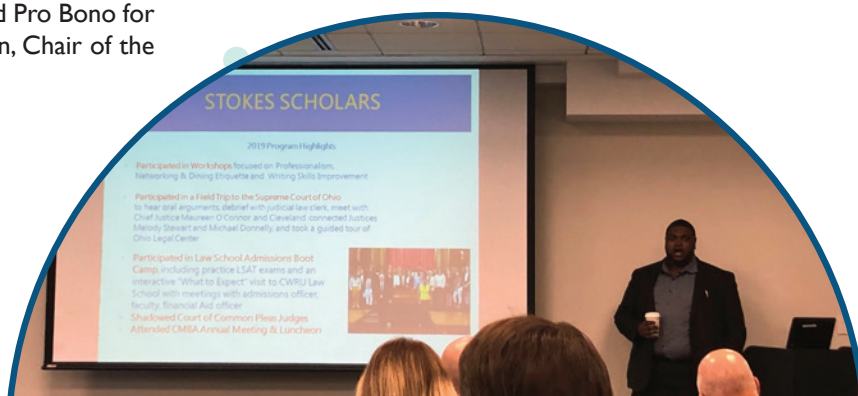
JUDGE4YOURSELF RELEASES JUDICIAL RATINGS

On Monday, January 27, 2020 at CMBA, Judge4Yourself released its judicial ratings for the Cuyahoga County primary election on March 17th. Hundreds of people were able to view the ratings release via Facebook Live. You can find ratings from this five-Bar coalition at Judge4Yourself.com.



SPOTLIGHT ON PROGRAMS

On January 9, directors from both CMBA and CMBF boards, participated in an annual review of CMBA's public outreach and pro bono programs serving the community of greater Cleveland. This Spotlight on Programs allows directors to meet program volunteer leaders and to find out more about what the programs do, how they work, how many volunteers take part, how successful they are in meeting their missions, whether they need additional support and where they are going in the near future. Featured volunteer leaders included Brandon Brown, Chair of the Louis Stokes Scholars Committee; Jaclyn Vary from the Volunteer Lawyers for the Arts and Pro Bono for Non Profits Committees; and Jennifer Himmelein, Chair of the Justice For All Committee.





JUDGE SOLOMON OLIVER, JR. WKYC INTERVIEW

Judge Solomon Oliver, Jr. was interviewed at WKYC Studios by local broadcasting legend Leon Bibb. The interview aired on Friday, January 24, 2020. Judge Oliver was recognized for his distinguished career and as the recipient of the Cleveland Metropolitan Bar Foundation's Richard W. Pogue Award for Excellence in Community Leadership and Engagement. You can watch the interview on CMBA's YouTube channel.



JANUARY HOT TALK

Our January 12th Hot Talk tackled the topic of reducing mass incarceration on the state level. Left to right, the moderator was attorney Scott J. Friedman. Our panelists were 8th District Court of Appeals Judge Ray Headen and Ohio Supreme Court Justice Michael P. Donnelly.





THOUGHTS FROM A ONCE-DEPRESSED LAWYER ASKING FOR HELP IS A STRENGTH

Anonymous

Last year

I'm not ready to be open about this because I'm afraid of the repercussions, so I will remain anonymous. You see, depression isn't treated the same as other illnesses. It carries a stigma with it.

I graduated from law school and soon became an attorney who won more cases than lost. I've helped people get their homes back, saved some from domestic violence, and assisted single mothers get the support they need for their children. I've accomplished much more than others at this point in my life. Yet, I find it difficult to celebrate my victories. I don't believe I am as successful as others think I am. There's a voice inside of my head that tells me that the people are just being nice. I'm not really that successful. Anyone can do this.

At most times, I loathe myself. I try to get back up, but fail, and that makes me feel even worse about myself. When I go home I isolate myself from everyone else. All I want to do is sleep so I don't have to think.

Some treat me as if I can just snap out of it, and that it's all in my head. I wish that were the case.

Sometimes I think about suicide, but I know I would never go through with it. I couldn't do that to my family. It would be so nice, though, to be able to relax and not feel as if I'm constantly in a relationship with a black cloud. I don't want to feel this way. I miss the days of laughter and fun. Why can't I get back to being me?

Today

I have severe depression. It affects the way I think, and it's a major burden on my life...but that doesn't mean I can't fight it.

After staying in bed for three days straight, I decided I had to do something about my mental state before I hurt my family or my clients became victims of a negligent lawyer. I sought help, and it was worth it.

Reluctantly, because I thought no one would ever be able to help me, I called the Ohio Lawyers Assistance Program. From the first moment the friendly clinician answered the phone, I had hope. I told her how I found it difficult to be happy, to get out of bed and go to work, even though I used to love helping people. She listened as I spilled out all of the negative thoughts and inner feelings that I had kept inside for so long. Just being able to unleash those words was the first step in healing. She invited me in for an assessment, and I took the first available appointment.

OLAP guided me through the tough journey of treating depression. There is no miracle cure for this mood disorder, but you can get through it with the right treatment plan. OLAP recommended that I see a psychiatrist and a counselor. The psychiatrist assessed me to see if I needed to take medication, and I saw a counselor once a week for cognitive therapy, where I talked about my thoughts and the therapist taught me how to reverse my negative thoughts. After a year of cognitive treatment, I can say that I am now depression-free and am living a happy life.

I can't say it was easy, but it was worth it. OLAP did not forget about me after that first assessment. They made sure to check up on me at least once every two weeks. I

also had to check in with them so that they knew I was following my treatment plan. Knowing that I had people fighting for me was also helpful in my recovery.

Because OLAP is confidential, they did not have to disclose my depression to my employer, which eased my stress level about what my employer would do if they found out I was ill with depression.

If you suffer from depression, you are not alone. Twenty-eight percent of attorneys struggle with some level of depression, and 19 percent show symptoms of anxiety.¹ **YOU ARE NOT ALONE.**

Depression is an illness that needs medical treatment. It cannot be cured on its own. I hope that more people begin to realize this. Most people living with depression are afraid to tell others about it in fear of being labeled as crazy or unstable. We need to educate the public about depression and how it needs to be treated as any other illness or disease.

As lawyers, we work together to help clients, to change laws. It's time we also work together to end the stigma of mental health.

#endthestigma

¹ "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys," by Krill, Patrick R. JD, LL.M.; Johnson, Ryan MA; Albert, Linda MSSW in the Jan/Feb 2016 issue of Journal of Addiction Medicine; https://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Me

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**– Ryan Fisher, LRS attorney & Vice-Chair,
LRS Oversight Committee**



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VOIDING VOIDABILITY

RETHINKING RESCISSION OF INSURANCE POLICIES UNDER OHIO LAW

BY KEVIN YOUNG & EMMANUEL I. SANDERS

One of the principle ways insurers evaluate the risks posed by their insureds and assess the likelihood of potential claims when considering whether to issue a policy and how to price that policy is by means of insurance applications and traditional underwriting of those risks. Relying on representations made by their potential insureds, insurers can utilize traditional underwriting methods to try and set out both the extent of coverages to be offered as well the price of such coverage. Consequently, and to ensure the candor of the insureds' responses, insurers are entitled to rescind the policies issued when insureds intentionally make material misrepresentations on their applications.

That is not to say that all states allow rescission under identical circumstances. For instance, under Pennsylvania law, an insurance policy is void *ab initio*, meaning an insurer can rescind the policy altogether even after a claim has been made against the insured, only where "the insurer can establish that the insured knowingly or in bad faith made a false representation and that the misrepresentation was material to the risk being insured." *Associated Elec. & Gas Ins. Servs., Ltd. v. Rigas*, 382 F. Supp. 2d 685, 690 (E.D. Pa. 2004). In California, on the other hand, "the rule in insurance cases is that a material misrepresentation or concealment in an insurance application, whether intentional or unintentional, entitles the insurer to rescind the insurance policy *ab initio*." *W. Coast Life Ins. Co. v. Ward*, 132 Cal.App.4th 181, 186–87, 33 Cal. Rptr.3d 319, 323 (Cal.App.2005).

Despite these variations, most states agree that where an insured intentionally makes material, false misrepresentations in an application for insurance, the insurer is entitled to rescind coverage, even after a

claim is made under the policy. *See also, e.g., Haynes v. Missouri Property Ins. Placement Facility*, 641 S.W.2d 497, 499 (Mo.App.1982) ("A representation in an application for insurance, which is not in the form of a warranty or incorporated in the policy itself, must not only be false, but also material to the risk in order for the insurer to avoid its policy." — applying Missouri law); *Encompass Home & Auto Ins. Co. v. Harris*, 2013 WL 6095496, *4 (Nov. 19, 2013) ("In determining whether an insurer may validly rescind a policy, the Court must first decide whether a misrepresentation occurred, and if so, whether the misrepresentation is material to the risk assumed by the insurer." — applying Maryland law).

But in Ohio, an insured can make fraudulent, material misrepresentations on an application for insurance, and, so long as the insurer does not discover the fraud until after the insured "incurs liability," the insurer is not permitted to rescind coverage so long as the misrepresentation was not incorporated into the insurance policy as a "warranty." As explained by one Ohio court, "[false] representation[s], standing alone, do[] not render the policy void *ab initio* and may not be used to avoid liability arising under the policy after such liability has been incurred." *Fifth Third Mortg. Co.*, citing *Allstate Ins. Co. v. Boggs*, 27 Ohio St.2d 216, 271 N.E.2d 855, 857 (1971) (emphasis added).

This unintuitive result is because of a distinction specific to Ohio insurance law between warranties and misstatements on an insurance application. As articulated in *Allstate Ins. Co. v. Boggs*, 27 Ohio St.2d 216, 271 N.E.2d 855, a misrepresentation is considered a warranty only where (1) "the misstatement plainly appears on the Policy or is plainly incorporated into the Policy," and (2) "there [is] a plain warning that a misstatement as to the warranty will

render the policy void from its inception." *Nationwide Mut. Fire Ins. Co. v. Pusser*, 7th Dist. No. 17 MA 0117, 2018-Ohio-2781, 115 N.E.3d 915, ¶¶ 25, 27. Thus, where a fraudulent misstatement in an application is either not incorporated into the policy itself, or where the policy does not include a warning that a fraudulent misstatement will render the policy void *ab initio*, such a policy is prospectively voidable, but an insurer cannot rescind the policy once the insured has incurred liability. *See, e.g., Goodman v. Medmarc Ins.*, 8th Dist. No. 97969, 2012-Ohio-4061, 977 N.E.2d 128, ¶ 16 ("If the misstatement constitutes a representation, the policy is voidable if the misstatement is made fraudulently and the fact is material to the risk. But the policy is not void *ab initio*."), citing *Boggs*, 27 Ohio St.2d 216, 271 N.E.2d 855 at 857.

Ohio law is unique in this regard. *See* 44 Am. Jur. 2d Insurance § 1013 (only citing Ohio cases for the proposition that in some jurisdictions "a misrepresentation may not be used to avoid liability arising under a voidable policy after such liability has been incurred."); P.L. Bruner & P.J. O'Connor, Jr., *On Construction Law*, § 11:108 (same).

A recent example of Ohio's approach to rescission of insurance policies highlights its underlying unfairness. In *Goodman v. Medmarc Ins.*, a lawyer had previously failed to file an appeal for his client and subsequently agreed to a refund of legal fees, which was memorialized in an "Appeal Resolution" agreement. 977 N.E.2d 128, ¶¶ 2-4. The lawyer later applied for liability insurance and checked "no" on the application regarding possible claims or circumstances that could be expected to give rise to claims. *Id.* at ¶ 6. Later, when the former client sued for legal malpractice during the policy period, the insurer sought to rescind the policy on the grounds that



the lawyer's failure to answer "yes" to the question "whether he was aware of an act or omission that might reasonably be expected to be the basis of a claim," rendered the policy void *ab initio*. *Id.* at ¶ 16. On appeal, the court upheld the trial court's finding that the insurer had a duty to defend and indemnify. Following *Boggs*, the court held that even though the policy incorporated the fraudulent misrepresentations into the policy and deemed them material, it did not specifically warn that the policy would be void *ab initio*. *Id.* at ¶ 23. Acknowledging that an insurer may *cancel* a voidable policy, the court held that under Ohio law it could not do so here because there was a claim already made. *Id.*, citing *Boggs*, 27 Ohio St.2d 216, 271 N.E.2d at 857. Despite the fact that the insured — who knew that there were potential material claims against him — intentionally failed to disclose those claims on his application, the insured could not avoid liability.

Ohio should consider abandoning the above-described approach and follow the lead

of other jurisdictions that allow rescission so long as a potential insured intentionally makes fraudulent, material, misrepresentations on an insurance application. Ohio's current approach incentivizes insureds to make material misrepresentations so long as those representations are not explicitly incorporated into the policy or the policy does not explicitly warn that misrepresentations will void the policy *ab initio*. Moreover, Ohio's approach makes it that much more difficult for insurers to evaluate the risks they are assuming when issuing insurance policies, and to price insurance for those risks, ultimately increasing overall premiums for all insureds. Finally, there is no justifiable reason why insurance policies should be treated differently than any other contract, for which rescission is available so long as "(1) [] there was actual or implied representations of material matters of fact, (2) [] such representations were false, (3) [] such representations were made by one party to the other with knowledge of their falsity, (4) [] they were made with intent to mislead a party to rely thereon, and (5) []

such party relied on such representations with a right to rely thereon." *Cross v. Ledford*, 161 Ohio St. 469, 475, 120 N.E.2d 118, 122 (1954). This five-part, trans-substantive test properly balances the rights of the insured to the coverage purchased, and the rights of the insurer to rescind coverage from insureds who fraudulently misrepresent the risks they pose.



Kevin Young is Chair of the Tucker Ellis Insurance Group and co-author of *Ohio Insurance Coverage* (2013-2019 Editions, Thomson Reuters). He has been a member of the CMBA since 1986. He can be reached at Kevin.Young@tuckerellis.com.



Emmanuel Sanders as an associate at Tucker Ellis. He has been a member of the CMBA since 2018. He can be reached at [Emmanuel.Sanders@tuckerellis.com](mailto:Sanders@tuckerellis.com).

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AIRBNB HOME-SHARING

WHAT'S COVERED (OR NOT) AND WHEN UNDER STANDARD HOMEOWNERS POLICIES AND AIRBNB'S HOST GUARANTEE AND PROTECTION PROGRAMS

BY JUSTIN RUDIN

The short-term rental industry is booming and Airbnb is a big reason why. Its online marketplace has about 660,000 listings in the U.S. alone,¹ and a recent survey indicates that over half of those who own their home would consider renting them through an online platform like Airbnb.² The obvious appeal to Airbnb “hosts” is that its user-friendly platform enables them to list and rent their property whenever convenient to earn extra income without having to worry about using a property agent, a lease, or other transaction costs and inconveniences. But what about insurance?

Perhaps you have heard stories about trashed Airbnb rentals, homes that burned down during a booking, or the shooting at an Airbnb rental in California that left five dead. These and other events can give rise to property damage claims by the host/owner and liability claims against them. This article discusses how home-sharing through Airbnb impacts coverage under standard homeowners’ policies, the extent of coverage provided for hosts through Airbnb’s insurance program, and the coverage gaps that can arise.

Homeowners (HO) coverage insures against losses to the insured’s dwelling, other structures (like a detached garage), contents, and liability claims by third parties for accidents occurring at the property. The main policy exclusions and limitations implicated by home-sharing involve those that deal with rentals and business activities.

Regarding property coverages, the standard HO policy does not have any business or rental exclusions applicable to the dwelling itself. Unless a new exclusion(s) is added by endorsement (discussed below), renting the main dwelling through Airbnb, without more, should not impact coverage for the dwelling itself.

But what if a homeowner has a detached garage with a guest suite or apartment rented through Airbnb? These may qualify as “Other Structures” under Coverage B. If so, renting these

spaces, or merely holding them out for rental on Airbnb may remove them from coverage since the standard HO policy specifically does not cover “[o]ther structures rented or held for rental to any person not a tenant of the dwelling[.]”

Contents coverage can also be affected. HO policies typically do not cover contents “in an apartment regularly rented or held for rental to others.” So an insured who lives in a duplex and routinely and frequently rents out the other living unit would be without insurance coverage for any loss to their belongings in that unit. Thefts occurring during a rental within the area of the house or other structure included in the rental are also specifically excluded. If an Airbnb “guest” (or anyone else) decides they want to take home some of the host’s belongings when they leave the loss would not be covered.

New policy endorsements specifically addressing home-sharing through online platforms like Airbnb further restrict coverage. ISO’s “Home-Sharing Host Activities Amendatory Endorsement” (Home-Sharing Endorsement), for example, limits property coverages in the following ways:

- Excludes dwelling coverage for common exposures arising from Airbnb rentals — loss due to theft, vandalism, and malicious mischief;
- Regardless of whether the property is actually rented at the time of loss or not, there is no contents coverage if the items are located in a space that is primarily held for rental through Airbnb;
- Excludes contents coverage for theft, vandalism, and malicious mischief regardless of where the property is located if these types of losses arise out of the Airbnb rental.
- Removes loss of rental income relating to Airbnb-type rentals that would otherwise be provided under the standard “Loss of Use” coverage for rental income loss.

Liability claims are always a concern. Accidents happen. Maybe an Airbnb guest’s toddler falls into

a swimming pool on the premises and claims the host failed to provide a proper barrier. Shootings at Airbnb rentals have also been reported by the media. The host’s liability may be dubious, but the cost of defending a wrongful death claim based on the host’s alleged negligent failure to provide a safe premises or provide adequate security measures can be financially devastating.

HO policies generally cover the insured’s cost of defending and paying liability claims for bodily injury and property damage accidentally caused to a third party at the covered premises. There is no coverage, however, for liability “arising out of or in connection with” a “business” engaged in by an insured. “Business” is commonly defined as a “trade, occupation or profession engaged in on a full-time, part-time or occasional basis” or any other activity engaged in for money in which the insured made more than \$2,000 in the 12 months before the policy started. Exceptions to this exclusion, however, restore coverage where the property is only rented/held for rental on an “occasional basis” or where only *part* of the premises is rented to no more than two people.

Airbnb hosts who list/host infrequently and derive little income from it or who only allow two guests at a time to stay on part of the premises may not lose coverage under their standard HO policy. The “Home-Sharing Endorsement” referred to earlier, however, introduces two key changes that remove virtually all coverage for bodily injury and property damage liability to others arising out of Airbnb-type rentals. First, it defines “business” to include renting or holding for rental any part of the property through online platforms like Airbnb. Second, it specifies that the limited rental exceptions noted above do not apply to rentals arranged through Airbnb (or similar online platforms).

Airbnb’s insurance program addresses some of these property and liability coverage gaps. On the property side, Airbnb’s “Host Guarantee” covers up to \$1 million in damage caused by an Airbnb



guest or their invitee to the host's property. But as Airbnb warns, the Guarantee is not insurance and "doesn't replace your homeowner's or renter's insurance." And for good reason.

For example, a loss may require debris to be removed, exposed property taken, stored or protected, and alternative housing arrangements. Coverage for these expenses is standard under HO policies but absent from the Guarantee. Besides damage to the host's real and personal property, the Guarantee's coverage is limited to loss of income that would have been derived from Airbnb bookings that were confirmed before the loss but went unfulfilled because of it.

Only damage occurring during the guest's Airbnb booking period is covered. While HO policies cover many risks, "Covered Losses" are "limited to direct physical loss or physical damage to a Host's Covered Property caused by the Responsible Guest or an Invitee of the Responsible Guest[.]" The Guarantee therefore would not cover wind damage or theft from a break-in just because it happened during a booking. These scenarios exemplify instances where the insured may be completely without coverage. If the rented structure sustaining wind damage is a detached guesthouse and falls under Coverage B, HO coverage could

not apply. The HO policy would also exclude coverage for contents stolen by a burglar from the area included in the rental.

Since coverage is conditioned on the damage being "caused by" the guest/invitee(s), the host has the burden of proving this covered cause of loss. Consider the problems posed by a fire loss. Many housefires are declared "undetermined" because causation evidence is often destroyed by the fire. Unless the "guest" or "invitee" admit responsibility, hosts might be unable to prove the loss' cause and therefore, coverage. This problem is unlikely under an HO policy since fire is generally a covered risk regardless of cause.

Recovery is also conditioned upon the host complying with requirements not imposed by an HO policy, including:

- Using "best efforts" to contact the guest and resolve the damage issue with them;
- Reporting the damage to Airbnb within 14 days after the guest's checkout or before the next guest's check-in, if earlier;
- Providing proof of loss within 30 days of the loss;
- Submitting disputes to binding arbitration;
- Pursuing recovery of the amounts paid by Airbnb from the responsible party;
- Keeping confidential the amount paid by

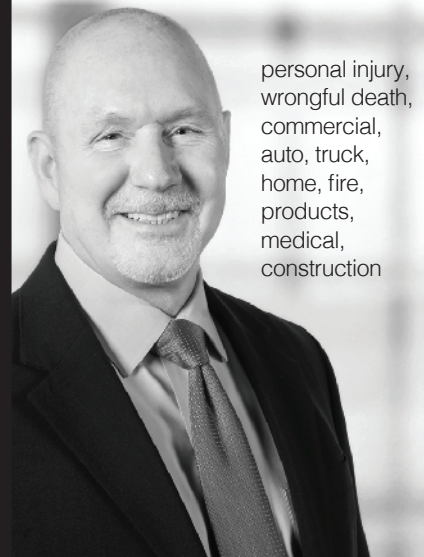
Airbnb if requested and release Airbnb from further liability.

Unlike the Guarantee, Airbnb's "Host Protection Insurance" is insurance and covers the host's liability for bodily injury or property damage. While the actual policy is unavailable to review, Airbnb's summary of coverage reveals the following:

- Primary liability coverage limited to \$1 million per occurrence and per location during the annual policy term. Liability at a given location is thus effectively capped at \$1 million regardless of the number of occurrences, which may be insufficient.
- Coverage includes "many of the costs to investigate a claim" and a legal defense but it is unclear if these costs reduce the limit;
- Coverage applies to incidents giving rise to legal liability of the host to guests and others that arise during a guest's stay at the host's Airbnb property;
- The incident giving rise to liability must occur on or between the check-in and checkout dates arranged on Airbnb's platform.
- Applicable exclusions include intentional acts (of the host or other insured); personal and advertising injury; fungi or bacteria; pollution; communicable diseases, and

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other exclusions typically found in HO and commercial insurance liability policies.

There is no coverage for claims unrelated to the guest's stay even if they occur during the booking. Nor is there coverage for incidents involving guests who arrive before or stay after the scheduled booking period. Those incidents may not be covered by an HO policy either due to the breadth of the "business" exclusion.

Airbnb's Guarantee and liability insurance are free and apply to each booking. While they do have value, a host who only has a standard HO policy to fall back on still has significant exposures. Moreover, trying to establish coverage under the Guarantee and complying with some of its post-loss obligations are tasks that many may prefer to avoid.

Fortunately, ISO offers an endorsement that provides property and liability coverages for short term rentals through providers like Airbnb that were either removed by the "Home-Sharing Endorsement" or never existed to begin with under the standard HO policy. Alternatively, on-demand insurance platforms like Slice have emerged, which provide "pay per use" insurance covering Hosts for property and liability for as little as \$8 a day. Under this model, hosts can buy insurance through an app and turn coverage on and off whenever needed.

Before deciding to home-share, homeowners need to look into whether the coverage they have provides the protection they need for this activity. If the only lines of defense are a basic HO policy and Airbnb's insurance program, then additional insurance tailored to home-sharing is essential.

¹ *Behind the Scenes of Airbnb: The stats & facts 2018*, ETURBONEWS, Oct. 12, 2018, <https://www.eturbonews.com/235339/behind-the-scenes-of-airbnb-the-stats-facts-2018/>

² Megan Leonhardt, *82% of people think Airbnb-ing their home is a good money-making strategy — here's what you need to know*, CNBC, July 3, 2019, <https://www.cnbc.com/2019/07/03/is-running-an-airbnb-profitable-heres-what-you-need-to-know.html>



Justin Rudin, of Rutter & Russin, LLC, represents insurance policyholders with a focus on first-party property insurance and life insurance claims. He has experience representing clients both pre-suit and in litigation in a variety of coverage disputes involving claims for residential and commercial property losses. Justin has been named one of Super Lawyers Rising Stars in 2019 and again in 2020. He has been a CMBA member since 2016. He can be reached at (216) 642-1425 or jrudin@ohioinsurancelawyer.com.

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HERE COMES E-REGISTRATION FOR THE 2020 H-1B FILING SEASON

BY BRIAN J. HALLIDAY

By now, human resources professionals, legal counsel, and other corporate stakeholders in any business connected to the H-1B visa program should be well aware that United States Citizenship and Immigration Services (USCIS) intends to implement a new system this year — indeed this quarter — for filing H-1B visa petitions subject to the annual H-1B visa cap. This ostensibly well-intentioned new system will replace the prior industry practice of preparing hundreds of thousands of complete H-1B visa petitions and submitting them to USCIS each April 1—the official start of what has become known as the H-1B filing season.

As described in a Notice of Proposed Rulemaking (NPRM) by USCIS in the March 3, 2011 Federal Register, this onslaught of H-1B cases would arrive at USCIS's regional processing centers by “multiple truckloads” and “were stacked on pallets on loading docks, in offices and in hallways.” (76 FR 11686, 11693 (Mar. 3, 2011)). From this pool of submitted petitions, USCIS would then conduct a random lottery to select a sufficient number to process against the statutory cap for that federal Fiscal Year. Generally, the annual cap is 85,000 cases (or H-1B visa numbers), with 20,000 set aside for beneficiaries holding U.S.-issued advanced degrees (e.g., master's, Ph.D., J.D., M.D., etc.). The remaining 65,000 are allocated for any beneficiary holding at least a four-year bachelor's degree in the field, or its equivalent. H-1B petitions submitted, but not randomly selected, would be returned to the filer.

In each Fiscal Year since 2007, the H-1B visa cap was reached. In all but five of those years, USCIS had to implement a lottery system to randomly select petitions because a sufficient number of H-1B visa petitions were received within the first week of that year's filing season. In the nine H-1B seasons in which lotteries were conducted, any

given H-1B petition had between a 36% and 69% chance of being randomly selected for adjudication. In the last three years, the odds of “winning” the H-1B lottery ranged between 42% and 45% with approximately 200,000 cases being submitted.

Given that Congress has been unable to pass legislation to correct this fundamental supply and demand problem, in March 2011 USCIS introduced the concept of an electronic H-1B registration system to replace the current process. Rather than having to prepare and file complete, full-throated H-1B petitions, petitioners instead would participate in an electronic registration process from which the lottery would be conducted.

While this makes sense on several levels, it does invite the potential for trouble. The largest consumers of cap-subject H-1B visa numbers historically have been large consulting companies and companies in the Information Technology industry. The business models for a significant portion of these H-1B consumers involve outsourcing H-1B workers to their customers. Put simply, the more H-1B professionals they have available to outsource, the more revenue those resources generate for the petitioner. Thus, those companies have a clear incentive to get as many H-1B visa petitions approved as they can.

Under the prior H-1B filing system, there were *de facto* limitations on the number of cases a given petitioner could submit due to the cost, time, and legal resources required to draft, produce, and submit those petitions. However, by implementing an electronic registration system instead, what's to prevent a voracious H-1B employer from stuffing the new system with untold numbers of e-registrations?

In a comment to the March 2011 NPRM, I asked USCIS how this electronic system would “be safeguarded from potential abuses such as ‘stuffing’ the electronic

registration system with huge numbers of speculative H-1B cases to hedge their bets for a number; or other unfair ‘gaming’ of the H-1B registration process system?” (See Thibodeau, *New Rules May Bring ‘False H-1B Demand’*, COMPUTERWORLD, (Jun. 1, 2011)). And I wasn't the only one. The American Immigration Lawyers Association warned that e-registrations could “generate false H-1B demand” by “creating a flood of unnecessary or unqualified registrations, potentially numbering in the thousands, that will ultimately be abandoned or denied.” (American Immigration Lawyers Association letter to Chief, Regulatory Products Division USCIS (May 2, 2011) AILA Doc. No. 11050267). USCIS then shelved the e-registration concept, only to resurrect it again for implementation in 2020.

The new e-registration rule proposed in September 2019 states that USCIS will: 1) charge \$10 for each e-registration; and 2) have a protocol in place to identify and disqualify any petitions filed by a single employer for the same beneficiary for more than one position. (84 Fed. Reg. 46460 (Sept. 4, 2019)). The H-1B law and regulations are intended to prevent the use of the program for speculative employment (e.g., filing a petition on behalf of a worker for whom the employer does not have a specific opening), and more recently to prevent approval of H-1B status where the resources are outsourced and the petitioner cannot fully document the employee's duties for the entirety of the requested H-1B approval period (See *Third-Party Worksites and Employees Policy*—Policy Memo, USCIS, PM-602-0157, *Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites* (Feb. 2018), AILA Doc. No. 18022362). But at ten bucks per e-registration, there appears little in the rule preventing speculative e-registrations from being submitted *en masse*.

As in 2011, commentary to the September 2019 proposed rule again raised this concern. USCIS's response implied that the 2020 filing season will be some sort of test in this regard: "USCIS will monitor the system for potential fraud and abuse (e.g., monitoring the system to determine if employers are submitting many registrations but filing petitions based on selected registrations at a significantly lower rate, which could reflect gaming of the system to unfairly

improve their odds of being selected)." (84 Fed. Reg. 60307, 60309 (Nov. 8, 2018)) First, this "monitoring" would not be complete until lottery winning cases have been filed and counted by USCIS. Next, there is nothing in the law to define or assess what "gaming of the system to unfairly improve their odds of being selected" means, or what the penalties for doing so would be. USCIS does indicate that it will require an attestation of e-registrants "intended to ensure that each registration is connected with a bona fide job offer and, if selected, will result in the filing of an H-1B petition." (*Id.*). Presumably, this attestation might lay out the details, and the teeth, associated with this monitoring function.

Another comment similarly proposed "there were not enough safeguards in place to prevent unscrupulous petitioners from flooding the H-1B system" and suggested USCIS "conduct additional outreach..., especially to small business entities, so that concerns about potential flooding of the registration system can be addressed prior to implementation." (84 Fed. Reg. 60307, 60310). To this, USCIS responded that it "has already put several safeguards in place to prevent employers from flooding the H-1B registration system, and will monitor the system throughout the registration process."

What these safeguards may be and how they operate remains undisclosed at this point. However, based on USCIS's responses to stakeholders' concerns to date, it is fair for one to conclude that they may not fully appreciate the potential for abuse in this new e-registration system. Indeed, as of the writing of this piece, USCIS says it "believes it is too speculative to conclude that the H-1B registration system would result in large entities crowding out smaller entities for H-1B prospective employees," (*Id.*) having reached this conclusion after considering this for nearly a decade.

With this backdrop in mind, USCIS has yet to clearly define or explain how Goliath H-1B consumers will be sufficiently checked from devouring H-1B visa numbers this year for themselves, and leaving companies requiring H-1B workers — though not in such large numbers — without key, highly educated personnel they need to remain competitive in their industries. We are left to wait and see whether USCIS's vague references to safeguards and abuse monitoring will, in

practice, be effective. The first test will be to see how many e-registrations are submitted this year, and who submits them.



Brian J. Halliday is a Partner and Co-Director of Green and Spiegel Midwest LLC based in Cleveland, Ohio. He has been a CMBA member since 2004. He can be reached at (216) 896-0855 or bhalliday@gands-us.com.

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GET WHAT YOU (HOPEFULLY) PAID FOR

THE MISNOMER OF “DIRECTORS & OFFICERS” LIABILITY INSURANCE

BY JAMES SULLIVAN & MATT CHIRICOSTA

“What?! This isn’t a D&O claim!” We often hear something like that when we suggest tendering a seemingly ordinary business lawsuit to the policyholder’s Directors & Officers liability insurer. Likewise, when we suggest that privately held business entities carefully consider purchasing

D&O coverage, we sometimes hear, “Why would we spend the money? We’re not a public company. We’ll never have any D&O claims.”

These gut reactions from policyholders are understandable. But they reflect a common and potentially costly misconception of D&O policies for privately held companies: namely, that they narrowly cover only claims against the company or its officers and directors for corporate mismanagement. That might be somewhat accurate for public company D&O policies, which are often written in much narrower language. But it is definitely not the case in the private company D&O context. Indeed, in the private company D&O context, the common product name — “Directors & Officers liability insurance” — is a misnomer that only tells part of the story and often confuses even sophisticated businesspeople and advisors.

Contrary to the “Directors & Officers” terminology, private company D&O policies are typically written in broad language that covers the **company itself** against many types of third-party business claims, not just the prototypical claims of corporate mismanagement. Yet, too often, common misconceptions about these policies cause policyholders to forego tendering a high-stakes business claim to their D&O carrier — or to forego purchasing the coverage in the first place — to their own detriment. Policyholders and their advisors can avoid these potentially expensive missteps by better understanding the wide breadth of coverage provided by the typical private company D&O policy form.

Stop thinking of it as “D&O insurance”; think of it as “business litigation insurance.”

The retired founder of our insurance coverage group, Mike Brittain, coined a great catchphrase:

private company D&O policies are better thought of as **“business litigation insurance.”** We repeat this mantra whenever we can to condition policyholders to think of D&O coverage whenever a business claim is asserted against them. By way of limited example, we have seen private company D&O policies provide defense and indemnity for the following claims:

- product mislabeling class actions arising under draconian state consumer laws;
- misappropriation of trade secrets; and
- tortious interference arising from allegedly hiring the claimant’s former employees and causing them to violate their employment agreements.

None of these claims were brought or threatened against individual corporate officers or directors. Nor did they involve allegations of breach of fiduciary duty or mismanagement of the insured company. Instead, these were business claims brought by third parties against the company for some alleged act or omission unrelated to directors, officers, or corporate management.

So, how and why did the D&O policies end up covering these claims? As always, start with the policy language and, more specifically, the policy’s insuring agreement. In the private company context, a typical D&O insuring agreement reads something like this:

The Company shall pay, on behalf of the **Organization**, **Loss** which the Organization becomes legally obligated to pay on account of any **Claim** first made against the **Organization** during the **Policy Period**, for a **Wrongful Act** committed, attempted, or allegedly committed or attempted by the **Organization** or the **Insured Persons**



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before or during the **Policy Period**, but only if such **Claim** is reported to the Company in writing in the manner and within the time provided in [the policy notice provisions].

The key concept here is the requirement that there be an alleged “Wrongful Act.” Most D&O policies define “Wrongful Act” along these lines:

Any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted by an Insured Person in his or her Insured Capacity or by the Organization.

This definition is remarkably broad. A “Wrongful Act” literally includes, among other things, “*any* act, omission, neglect, or breach of duty” by the Organization or designated “Insured Persons.”

Given this broad wording, many third-party claims against the company clearly fall within the typical D&O insuring agreement. In fact, as reflected in the above example cases, many D&O policies will even defend and settle claims alleging intentional misconduct if the policyholder was savvy enough to negotiate an intentional act exclusion that requires a final judgment against the policyholder before precluding coverage. Consistent with our “business litigation insurance” mantra, we always start with the presumption that a business claim against the company is likely to be at least partly covered. Policyholders and their advisors should presume likewise and always think about D&O insurance whenever a claim is asserted against the company.

In fairness, it bears noting that the ultra-broad coverage typically provided by a D&O policy’s insuring agreement can be significantly reduced by exclusions. For example, D&O policies customarily exclude coverage for bodily injury and property damage, and for intellectual property claims. Thus, exclusions should be top of the mind when assessing coverage. Even then, be sure to carefully review and understand the exclusionary language because sometimes there are loopholes helpful to the policyholder.

What you don’t know *can* hurt you.

To be sure, understanding these concepts is critical, lest this important coverage be forfeited or not purchased in the first place.

No policyholder defending a costly business claim wants to learn after the fact that it forfeited coverage by not timely notifying

the carrier of the claim. But we have seen this very scenario more than once. Even highly sophisticated clients or advisors may not consider notifying the D&O carrier of a claim at the outset because of the common misconceptions about the scope of private company D&O coverage.

And more than once, we have seen coverage counsel brought in to spot this issue only after it was too late to give notice. D&O policies are invariably written on a claims-made basis, meaning that claims must be submitted to the carrier during the policy’s designated reporting period (typically, during the policy period or relatively soon after it ends). In the claims-made context, most jurisdictions — including Ohio — generally require strict compliance with notice requirements. So, if notice was not given during the policy’s reporting period, there often will be little to nothing that even the most ingenious and zealous coverage counsel can do to fix it. Significant insurance dollars for defense and settlement — for which the policyholder paid a significant premium — will be forfeited. Indeed, we have seen clients miss out on millions of dollars of coverage due to this issue. A devastating and avoidable outcome, no doubt.

These situations, as unfortunate as they may be, are understandable. It is easy for non-insurance practitioners to overlook the possibility of insurance coverage at the outset of a lawsuit. For starters, even sophisticated policyholders and advisors may not have deep insurance expertise or a firm grasp on the nuances of D&O and other insurance products. What’s more, when a high-stakes business claim first darkens the doorway, there is much that must be done in a short timeframe: investigating the allegations, interviewing witnesses, researching the legal issues, strategizing how best to respond to the lawsuit, preserving and harvesting electronic data, *etc.* Amidst all these other pressing tasks, it is not necessarily second nature for non-insurance practitioners — be they policyholders or defense lawyers — to think about insurance or to spot arcane insurance issues. This is especially so when the claim is not one that is obviously covered by insurance. For example, while it doesn’t take an insurance specialist to recognize that a third-party bodily injury claim resulting from a slip and fall is probably covered by a general liability policy, it isn’t obvious to most that a trade secret claim might be covered by a D&O policy under certain circumstances. Thinking of D&O insurance as “business

litigation insurance” should help prioritize the issue in all parties’ minds and avoid potentially costly late notice situations.

In a similar vein, the prevailing misconception of D&O policies also sometimes steers astray policyholders’ insurance purchasing decisions. We see many large, privately held entities decline to purchase D&O coverage, often because they believe that the prospect of a prototypical lawsuit against directors or officers is remote. So, the thought process goes, why pay a relatively hefty premium to insure such a remote risk? Again, these assumptions are understandable, but based on a misguided understanding of D&O coverage. Policyholders are much more likely to proactively consider purchasing D&O insurance (including coverage for the company itself, in addition to individual officers and directors) if they better understand that they would be insuring the company against a wide array of potentially high-risk business claims.

Put simply, the importance of D&O coverage for private companies cannot be understated. What private companies are really buying when they buy “D&O insurance” is “business litigation insurance.” And for many privately held companies, having such coverage in place — and knowing to take advantage of it — when a high-stakes, high-exposure claim is asserted may well mean the difference between the claim being merely a disruption to a company versus posing an existential threat.



K. James Sullivan is a partner with Calfee, Halter & Griswold LLP’s Insurance Recovery practice where he counsels corporate insurance policyholders on insurance coverage issues and litigates insurance coverage disputes. He has been a CMBA member since 2004. He can be reached at (216) 622-8567 or kjsullivan@calfee.com.



Matthew A. Chiricosta is an associate with Calfee, Halter & Griswold LLP’s Insurance Recovery practice group where he counsels corporate clients with their insurance coverage needs and claims. Matt represents closely held and publicly traded business clients on a wide variety of matters. He has represented clients in state and federal courts and administrative tribunals throughout the country at all stages of litigation, including trials, post-trial proceedings, and appeals. He can be reached at (216) 622-8284 or mchiricosta@calfee.com.



JUDGES' CORNER

Hon. Brendan J. Sheehan

Although those of you practicing in the Cuyahoga County Court of Common Pleas likely already know me, I wanted to take this opportunity to introduce myself to all of the CMBA members. I recently began serving as the Administrative Judge for the Common Pleas Court and the Presiding Judge for the Cuyahoga County Courts.

My involvement with our courts began when I was a teenager as I watched a lengthy criminal trial with then assistant prosecutor, now retired federal judge Donald C. Nugent explaining the process to me as the trial proceeded. His mentoring was obviously very effective since I spent the rest of my life connected to the courts in various capacities. I worked as a docket clerk for a local law firm during summers and breaks from school, learning the ins and outs of the clerk's office and courtroom protocol. I was a scheduler for Judges James J. Sweeney, William Aurelius, and Jose Villanueva back when entries were made by hand in the huge books you might still be able to see in a dusty corner of the clerk's office. While in law school, I was bailiff to Judges Donald C. Nugent and Peggy Foley Jones and, upon passing the bar, I was the chief law clerk to Judge Nugent in the U. S. District Court for the Northern District of Ohio.

I practiced with a local firm doing general civil law and workers' compensation cases for a couple of years until I joined the Cuyahoga

County Prosecutor's Office where I was a prosecutor in the Major Trial Division of the Cuyahoga County Prosecutor's Office and served as the Chairman of the Ohio Internet Crimes Against Children Taskforce. I have been honored to serve as a judge in the Common Pleas Court since my election in 2008.

Throughout my involvement with our courts, I have seen goals, processes, and procedures evolve in response to social and technological change. Courtroom assistants no longer lug docket books between courtrooms. Law firm docket clerks make fewer in person appearances as electronic filing has become the norm. Fewer handwritten journal entries are processed as the court systems favor electronic entries.

We now face another critical stage in our evolution as the court facilities must be updated. Our courtrooms and jails are no longer optimal for today's societal and physical needs. I hope to promote access to justice by working with the community to develop plans for accessible and safe facilities. Additionally, many processes such as a bail reform and centralized booking should be investigated.

With the goal of access to justice in mind, I look forward to working with the Cleveland Metropolitan Bar Association and the legal community to meet the challenges ahead.

Judge Sheehan has served on the Cuyahoga Common Pleas Court since January 2008. He was elected to serve as the Administrative and Presiding Judge effective January 2020. Prior to assuming the bench, Judge Sheehan practiced as a civil and criminal litigator for 14 years. He has been a CMBA member since 2013. He can be reached at (216) 443-8685 or cp1bs@cuyahogacounty.us.

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YOU OUGHTA KNOW WE'RE ALL JUST A BANANA PEEL AWAY FROM A DISABILITY CLAIM

Andrew November & Rebecca Cervenak

If you haven't spent your entire legal career representing individuals with disabilities, you may not realize (or obsessively think) that everyone is just a banana peel¹ away from a disability claim. Focusing on disability litigation our entire careers, we have encountered a truth: few people plan for disability

and are left unprepared when an unexpected injury or diagnosis, such as slipping on a banana peel, results in an inability to work.

Planning for disability doesn't have to mean going out and purchasing disability insurance (although we think you should). Rather, a simple understanding of our Nation's social safety net, Social Security Disability, is imperative.

Social Security Disability includes two programs that every person needs to know: Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI). Both SSDI and SSI provide monthly benefits for individuals found "disabled." The complexities and nuances of how Social Security defines disability will not be discussed here. In the next few paragraphs, we're going to explore some technical concepts. Our goal is not for you to master these nuances. Rather, we simply want to build your legal radar, so if you or a loved one encounter disability, you know what questions you need to ask and where to find help.

Most people are surprised, sometimes unpleasantly, to learn that SSDI is insurance. SSDI benefits are for individuals that are fully and presently insured. At this point in our journey, you should be asking, am I insured? First, a quick, but important aside, if you work in local or state government in Ohio, you are likely NOT paying into Social Security. Rather, you are obligated to pay into the Ohio Public Employees Retirement System (OPERS) or State Teachers Retirement System (STRS). Public employees in Ohio typically find themselves uninsured for Social Security or subject to a Social Security offset. OPERS and STRS and their corresponding Government Pension Offset and/or Windfall Elimination Provision issues are articles unto themselves.

Once we've determined whether you've paid into Social Security, the question is: are you fully *and* presently insured? The most common issue we see in our office are the folks that are fully insured, but not presently insured. Let's break that down. The starting point is the

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*"If he can settle
a prison riot,
he can settle
anything!"*

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Here, however, is where the real trouble starts. Indeed, if you made it this far into our article, you're about to learn the most important and frightening part of SSDI — the presently insured concept. While you may be fully insured, or even permanently insured, you may not be *presently* insured. For brevity, we will assume you are over the age of 31. For individuals over the age of 31, you need to have earned at least 20 credits during the period of 40 calendar quarters that ends with the quarter in which the disability began. In other words, you must have worked 5 out of the last 10 years at the time of the alleged onset date of your disability. Meaning, no matter how much you have contributed, you cannot qualify for SSDI unless you are still presently insured. Bottom line, do not wait to apply.

If an individual has a remote (old) work history, no work history or even a work history

that did not contribute into Social Security, SSI may be an option. SSI pays monthly benefits to people with limited income and resources who are disabled, blind, or age 65 or older. Since SSI is a “needs-based” program, Social Security scrutinizes an applicant’s current financial situation. To get SSI, your countable resources must not be worth more than \$2,000 for an individual or \$3,000 for a couple. We call this the resource limit. Think of resources mainly as “things,” but also any savings, retirement accounts, or investments. Some examples of excluded resources include the house that you live in, one vehicle that is used for transportation, and household goods.

You may already be thinking, and if so, that was our goal. We told you at the start that this was a 30,000-foot view. It is not only our goal, but our duty, to educate and advocate for the public as well members of the CMBA. If you or anyone you know has questions about Social Security or Long-Term Disability, we invite you to contact our office to learn more. We would be glad to speak to you privately or even to your firm to elaborate on what we learned here today.

¹ I thank Anita Hollander, star of Spectacular Falls, for this apt title taken from her song “Just a Banana Peel Away.” Anita Hollander was diagnosed at the age of 21 with neurofibrosarcoma. At age 26 her left leg was amputated. Anita has dedicated her life to the enhancement of others through art and advocacy, in a career that has included singing, acting, producing, directing, musical theater, television drama, composing, teaching and conducting. She has been a tireless advocate of fellow performers with disabilities.



Andrew November has dedicated 100% of his practice to disability advocacy since 2009. Andrew regularly overturns unjust denials of Social Security Disability & Long Term Disability benefits for his clients. Andrew also founded Ohio's first law practice dedicated to representing Deaf individuals who face discrimination. He has been a CMBA member since 2009. He can be reached at (216) 282-1773 or anovember@linerlegal.com.



Rebecca Cervenak has dedicated her career to disability advocacy and civil rights. She is an associate with Liner Legal and a volunteer teacher with the CMBA's 3Rs program. She has been a CMBA member since 2018. She can be reached at (216) 200-6438 or rcervenak@linerlegal.com.

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Investment Real Estate – Premier Development Partners – Looking to acquire industrial/office sale and lease back or excess corporate real estate. Contact Brian Lenahan (216) 469-6423 or brian@premierdevelopment.com

MarcoAuction.com – Specializing in Reserve Real Estate Auctions For Real Estate not selling! Call Marco for details at (440) 487-1878 www.marcoauction.com

Relationship focused legal search for law firms and legal departments by an experienced attorney. Contact Shawna Rosner, Director- Legal Solutions Group (440) 971-1192 / srosner@directrecruiters.com – www.directrecruiters.com/legal

Security Expert – Tom Lekan – tlekan@gmail.com – (440) 223-5730

Video Conference, Deposition Facility – Plaza West Conference Center, Rocky River offers conferencing and remote video, "smart" whiteboard conference facilities for 5-33 participants. plazawestcc.com (440) 333-5484.

March

All events start at noon at the CMBA Conference Center and all PLI sessions start at 9 a.m. unless otherwise noted

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
2 Office Closed	3 Grants Committee Meeting Grievance Committee Meeting ADR Section Meeting	4 PLI – Doing Deals 2020	5 International Women's Day Summit – 8:30 a.m. PLI – Fundamentals of Taking and Defending Depositions Mental Health & Wellness Committee YLS Council Meeting	6 PLI – Corporate Governance – A Master Class 2020
9 CLEVideo Replay – Professional Conduct VLA Committee	10 PLI – Hot Topics in State & Local Tax 2020 Insurance Law Section Meeting Hot Talk	11 PLI – Advanced Trademark Law 2020: Current Issues PLI – Ethics for Financial Industry Lawyers 2020 UPL Committee Meeting Workers' Comp Section Meeting PLI – Social Security Disability Appeals 2020 – 1 p.m.	12 WELD Speaker – 7 a.m. Ethics Committee Meeting Real Estate Law Section Meeting	13 Social Security and Disability Breakfast Meeting – 7:45 a.m. (Grumpy's Cafe) 3Rs Lesson Five: Police Encounter – 8:30 a.m.
16	17 PLI – 2017 Tax Update Estate Planning, Probate & Trust Law Section Grievance Committee Meeting	18 CLEVideo Replay – Professional Conduct	19 Exit Planning Institute and CMBA Joint CLE – 11:30 a.m. Family Law Section Meeting Labor & Employment Section Meeting	20
23 CLEVideo - Estate Planning Institute – 8:00 a.m. PLI – 25th Annual Consumer Financial Services Institute	24 PLI – 25th Annual Consumer Financial Services Institute Estate Planning Section Meeting	25 CLEVideo - Federal Court Training 3Rs Committee Meeting Small Solo Section Meeting Movie Night – Paper Chase – 5 p.m.	26 Leadership Academy – 9:00 a.m. Court Rules Committee – 11:45 a.m. Cybersecurity Data Privacy Section Meeting PLI – Specialized Deposition Techniques 2020 – 1:00 p.m.	27 Pro Se Divorce – 10:00 a.m. (Cuyahoga County Law Library) Government Attorneys CLE Pro Se Divorce – 1:00 p.m. (Cuyahoga County Law Library)
30 CLEVideo – Law Practice Management – 8:00 a.m.	31			



Grab a Chair!

The CMBA is seeking gently used office furniture!

If your firm or office has chairs, tables, desks, lamps, etc. for public or staff spaces they would like to part with, the CMBA will accept and pick up your tax deductible donations!

Contact Rebecca Ruppert McMahon at (216) 539-3710 or rmcmahon@clemetrobar.org.



The Ethics Hotline is available to CMBA members who have questions about their own prospective conduct as it relates to the Ohio Rules of Professional Conduct. Call the Ethics Hotline at:

(216) 696-3525



New Associations & Promotions



Walter | Haverfield is pleased to announce that **Giulia Di Cenzo** has joined the firm as an associate.

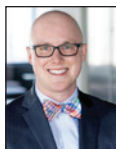


Zashin & Rich Co., LPA. is proud to announce the addition of seasoned employment litigation pro **David A. Posner** to its Employment & Labor Group.

Fisher Phillips announced that attorney **Melissa Dials** has been named a partner:



Frantz Ward is pleased to announce **Bradley N. Ouambo** joins the firm as an associate in its Construction Practice Group.



Frantz Ward is pleased to announce that **Thomas E. Cardone, Thomas G. Haren** and **Allison Taller Reich** are elected to the partnership. Thomas Cardone and Allison Taller Reich are members of the firm's Construction Practice Group and Thomas Haren is a member of the firm's Business Law and Litigation Practice Groups.

Tucker Ellis LLP is pleased to announce that it has elected seven attorneys to the firm's partnership: **Anthony Brosamle, Patrick Clunk, Ndubisi Ezeolu, John Favret, Chelsea Mikula, Michael Ruttinger,** and **Chaz Weber.**

Tucker Ellis LLP is pleased to announce that it has promoted 10 of its attorneys to counsel: **Madeline Dennis, Joseph Ferraro, Valeria Golodnitska, Branden Gregory, Sarena Holder, Ludgy LaRochelle, Joseph Manno, Kelli Novak, Stephanie Rzepka,** and **Jay Shultz.**

Brouse McDowell welcomes Partner, **Lori Kilpeck**, to its Estate, Succession Planning and Probate Administration Practice Group. Lori focuses her practice in the areas of

estate planning, probate, estate and trust administration, probate and trust litigation, elder care and guardianship law. She is admitted to the Ohio and Florida Bars.



Brouse McDowell is pleased to announce that **Alex Quay, Chris Teodosio** and **Teresa Santin**

were elected partners in the firm. Further, two partners were named as new practice leaders — **Wes Lambert** and **Stacy Berliner** as co-chairs of the firm's Litigation Practice Group.



Honors



McGlinchey Stafford PLLC is pleased to announce the inclusion of **Richik Sarkar** and

David Waxman in the 2020 edition of Ohio Super Lawyers.

The law firm of **Buckley King** is pleased to be awarded practice area recognition in the 2020 "Best Law Firms" survey published jointly by U.S. News & World Report and Best Lawyers.

Clients recognized **Ulmer & Berne LLP** for its excellent client service in BTI's latest report – "BTI Client Service A-Team 2020: Survey of Law Firm Client Service Performance."

According to BTI's in-depth research, Ulmer is a "Top 100 Client Service Leader" and is ranked as a "Standout" in investing in client relationships and in client-facing communication.

Reminger Co., LPA is proud to announce that the following attorneys were honored as 2020 Ohio Super Lawyers: **Hugh J. Bode, Adam M. Fried** (Top 50 Cleveland, Top 100 Ohio), **Marc W. Groedel, Gregory G. Guice, Daniel Haude, Thomas B. Kilbane, Frank Leonetti, III, Franklin C. Malemud, Clifford C. Masch, William A. Meadows** (Top 50 Cleveland, Top 100 Ohio), **Russell J. Meraglio, Jr., Ronald A. Mingus, Jeanne M. Mullin, Richard**

J. Rymond, Christine Santoni (Top 25 Women Cleveland, Top 50 Women Ohio), **Joseph S. Simms, John B. Stalzer, Brian D. Sullivan, James J. Turek, Stephen E. Walters,** and **Leon A. Weiss.** Rising Stars include: **Adam J. Davis, Julian T. Emerson, Timothy J. Gallagher, Jonathan Krol, Bethanie Ricketts Murray, Brian P. Nally, Joseph T. Palcko,** and **Paul R. Shugar.**

In November 2019, **Jerry Weiss** was listed in London-based Who's Who Legal: Mediation. Selection is made solely on opinions of law firm clients and experts from around the world. He is the only Ohio mediator to have been chosen for this honor.



Elections & Appointments



Frantz Ward is pleased to share that labor and employment partner, **Brian J. Kelly**, is elected to the Board of Directors of Towards Employment, a nonprofit dedicated to workforce development.



Frantz Ward is pleased to announce that Labor and Employment Partner **Christina E. Niro** has been named the Chair of the firm's Women's Initiative, which is part of its Diversity and Inclusion Committee.



Tucker Ellis is pleased to announce that **Cliff Mendelsohn** and **Carter Strang** have been elected to the Shaker Schools Foundation Board of Trustees.



Announcements

Marcum LLP announced a merger with Skoda Minotti, a market-leading accounting and business advisory firm. The firm adds 31 partners, more than 190 associates, and four offices to Marcum's Midwest and Florida regions.

Something To Share?

Send member news and announcements to Jackie Baraona at jbaraona@clemetrobar.org by the 15th one and half months prior to publication to guarantee inclusion.



Cleveland Metropolitan Bar Association
1375 East 9th Street, Floor 2, Cleveland, Ohio 44114-1785

February 2020

2020 VISION

13th Annual Meeting
Friday, June 5
Hilton Cleveland Downtown