41st Annual Probate Practice Seminar

OCTOBER 7, 2022

Trumbull County Probate Court

Judge James A. Fredericka

Robins Theatre
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41st ANNUAL PROBATE PRACTICE SEMINAR

October 7, 2022

7:30 - 8:00	**Check-in**	
8:00 – 8:45	**Medicaid Estate Recovery**	Robert Byrne, Esq. ***Assistant Attorney General, State of Ohio***
8:45 -9:15	**11th District Opinions of Interest to Probate Practitioners**	Hon. Mary Jane Trapp ***11th District Court of Appeals***
9:15 - 9:30	**Refreshment Break**	
9:30 - 10:30	**Evidence**	Adam Fried, Esq. ***Reminger Co., LPA***
10:30 -11:00	**Mental Health and Addiction Services in the Community**	Katie Cretella ***Trumbull County Mental Health & Recovery***
11:00 – 11:30	**Lunch**	
11:30 – 12:30	**Forget Work/Life Balance: A Fresh Take on Maintaining Balance and Handling Stress**	Dave Caperton ***Motivational Keynote Speaker***
12:30 - 1:15	**Drafting Wills and Trusts**	Claire Robinson May, Esq., Professor of Law ***Cleveland-Marshall College of Law***
1:15 – 1:30	**Refreshment Break**	
1:30 – 2:30	**Where in the Rules Does it Say That? Professionalism**	Kimberly Vanover Riley, Esq. ***Montgomery Jonson LLP***
2:30 – 3:15	**Current Topics in Probate Panel Discussion**	Hon. Robert N. Rusu, Jr. ***Mahoning County Probate Court*** Hon. Kevin W. Dunn ***Medina County Probate Court*** Hon. Jack R. Puffenberger ***Lucas County Probate Court***
3:15 – 3:30	**Case Law Update**	Hon. James A. Fredericka ***Trumbull County Probate Court***

MEDICAID ESTATE RECOVERY

Robert Byrne, Esq.
Assistant Attorney General
State of Ohio

ROBERT J. BYRNE, ESQ.

Robert graduated from Eaton High School in 1970, did a six-year stint in the Navy, then returned to school. He earned a BA with Distinction in Economics from San Diego State University in 1984 and his JD from The Ohio State University, College of Law in 1988. He joined the Office of the Attorney General in February 1989 and was assigned to represent the Ohio Department of Human Services in Medicaid subrogation matters. In 1994 he added the Medicaid Estate Recovery program to his area of practice. He speaks often to bar association seminars and other groups affected by Estate Recovery. He is a member of the Ohio State Bar Association. He retired *2/28/19* and returned *2/3/20* to the very same office he had been in prior to retiring.

ATTORNEY GENERAL OF OHIO

MEDICAID ESTATE RECOVERY

In 1993 Congress passed the Omnibus Budget Reconciliation Act, which mandates that states participating in the Medicaid program institute a program of estate recovery. 42 United States Code Section 1396p. Congress set minimum standards including population subject to recovery, services covered, and assets subject to recovery, and granted the states discretion to be more inclusive in their programs. The State of Ohio, through the Ohio Department of Job and Family Services (the Department), requested a waiver of the January 1994 deadline and received a waiver until January 1, 1995. The Ohio legislature enacted provisions to define the Estate Recovery program in Ohio. Ohio Revised Code Sections 5162.21 et seq. At the time of updating this handout, the program in Ohio is twenty years old. Despite the twenty-five years in operation, there are still attorneys and many laypersons who are unaware of much more than the existence of Medicaid Estate Recovery. Hopefully, these materials, no matter how brief, will help to alleviate that lack of information.

Who is Subject to Estate Recovery?

The Medicaid Estate Recovery program applies to all individuals who received any services for which Medicaid has paid and those services were rendered after the recipient reached the age of fifty-five and to all permanently institutionalized individuals regardless of age. This is the expanded population allowed by the federal statute. The program began with the minimum population required by the statute.

One of the most common misconceptions of the estate recovery program is that a recipient must be a resident of a nursing home for at least thirteen months before being subject to estate recovery. There is in fact no minimum time for receiving service, either nursing home or home-and-community-based services. The confusion results from the thirteen-month period after which a nursing home resident is asked to sell the homestead if there is not a community spouse or other exempt situation. (this has been changed to thirteen months)

What Assets Are Subject to Recovery?

Until2005, all assets which would be subject to administration in probate court were subject to recovery. The State of Ohio had elected to utilize that minimum standard set by Congress for assets subject to Estate Recovery. However, HB66 amended the program to include all real and personal property and other assets in which the decedent had a legal title or interest at the time of death . This includes assets conveyed to a survivor, heir, or assign of the decedent through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement. The effective date of the new provision was September 29, 2005. It applies to those recipients with date of death on or after that date. Property transferred out of the recipient's name may still be pursued if the transfer was improper under the Medicaid regulations (county's jurisdiction) or if it was fraudulently transferred (Estate Recovery's jurisdiction).

What Services Are Subject to Recovery?

Initially the services subject to the estate recovery were nursing home, home and community based services, drugs, inpatient hospital, and the qualified-Medicare-beneficiary (QMB) portion of those services. Once again, this was the minimum list set by Congress. The legislature expanded the program to cover all services, effective 7/97. It does not include Medicare premiums but it does include Managed Care Premiums. It no longer includes Medicare crossover services.

Administration of the Program

The Medicaid Management Information Systems (MMIS) of the Department maintains a tracking file of all Medicaid recipients subject to the estate recovery program. The tracking file is an ongoing record of all services provided to that recipient for which Medicaid has made payment. Each business day, MMIS prepares an electronic file listing data for all recipients in the tracking file for whom the status has been changed to "deceased" during that month. There are two ways the status is changed to "deceased" and not all of the persons listed on the dail file may have actually died during that month. Upon the death of a Medicaid recipient, the caseworker at the county Department of Job and Family Services changes the eligibility computer to indicate the deceased status. Due to various factors, the county does not always change the indicator during the month of the death. The other way the status is changed is by using information from the Bureau of Vital Statistics, Ohio Department of Health. If the status is changed in this way, there is generally a period of six or more months between the date of death and the status change.

The file is provided to the Office of the Attorney General, Collections Enforcement Section (AGO) and run onto their computer system. The AGO generates an initial letter by computer to the last known address of the recipient. The letter requests general information about next of kin or responsible parties be provided to the AGO. If the response identifies estate information, the AGO forwards an initial claim letter to the estate representative. If the response only identifies next of kin or responsible party, the AGO generates a follow-up letter in an attempt to obtain estate information. The initial claim letter identifies the interim claim amount, which is the amount of services actually paid by the Department at the time the tape is prepared and transferred to the AGO. The final claim amount includes all those bills incurred prior to death but not actually paid until after the interim claim amount was determined. The final claim amount may reflect credits from the nursing home back to ODJFS for payments made for dates after date of death. The final claim amount is not automatically sent to the estate representative. The interim claim letter advises that the final amount will be available approximately six months after date of death. This allows time for all bills to be submitted, paid, and entered onto the system. Upon request for a final claim amount, the AGO will request and forward an itemized printout indicating all services, which comprise the final claim amount. A printout can be obtained any time after date of death by calling (614) 779-0105 or (614) 752-8085.

Notice/ Presentment of Claims

Generally, statutes of limitation do not bind the state. Ohio Dept. Of Transportation vs. Sullivan (1989), 38 Ohio St. 3d 137. An older common pleas case, In re Moore (Franklin Co. CP 1958), 154 N.E.2d 675, held that a claim by the Ohio Department of Mental

Retardation for support was not barred by the one-year claim presentment limitation of Ohio Revised Code Section 2117.06. The Department therefore has maintained the position that the one-year claim period statute does not bind it. The Department has prevailed in cases at the common pleas level in three counties (Sandusky, Summit, and Warren). One case in Summit County was appealed by the estate and the Court affirmed the trial court's decision that the one-year bar does not apply to the claim by the State, *Ohio Department of Human Services v. Fred Eastman* (C.A. Summit Co. 2001), 145 Ohio App. 3d 369, Ohio App. LEXIS 3373.

Effective September 25, 2003, the legislature enacted ORC 2117.061. The section requires fiduciary to determine if Medicaid paid any bills on behalf of the decedent or decedent's predeceased spouse and if yes, to give notice to the State. The notice is to be given within 30 days of the application to release from administration or the application for appointment of the executor or administrator. The notice may be mailed to either the local special counsel for the particular county, if that is known, or to Medicaid Estate Recovery, 150 E. Gay Street, 21st Floor, Columbus, Ohio 43215. The Department then has 90 days after notice or one year after date of death, whichever is later, to present the claim. If there will not be a claim, the Estate Recovery staff will send a letter advising that there will not be a claim. If notice is not given, the claim period does not expire. This was challenged and resulted in a decision by the Ohio Supreme Court that the time for the claim presentation does not begin to run if the notice is not provided. *In re Centorbi*, (2011), 186 Ohio St.3d 263. The estate had argued that if notice is not provided that the claim must be presented within one year after the date of death. The Supreme Court held that the language "or" coupled with "whichever is later" created two dates and, if notice was not given, the time for "90 days" does not begin to run.

Other Considerations

The priority of the estate recovery claim falls under paragraph (8) of Ohio Revised Code Section 2117.25, debts due the State of Ohio. This was established by a change to 2117.25 effective September 25, 2003 to include Medicaid Estate Recovery specifically. Some courts have suggested that the claim might be made under paragraph (4), "debts entitled to a preference under federal law" or (5), "expenses of last illness". Although federal law mandated the program, the federal law did not indicate any preferential treatment in the administration of probate estates. In many cases some portion of our claim might actually qualify for "expenses of last illness". However, the AGO does not distinguish the claim unless all the facts of a given estate would dictate that the effort to distinguish the portion of such is warranted.

The question often arises whether an estate can be too small for the AGO to make a claim for estate recovery. The answer is "no". However, if the estate is a checking account with

$150.00, the court costs and attorney fees will prevent any possible collection.

In instances where the only asset is a bank account held solely in the decedent's name, the funeral has been paid, and the family does not wish to open an estate, ORC Section 2113.041 provides that we can submit an affidavit to the bank to recover directly from the bank. We cannot use this affidavit for QIT accounts.

In small estates where the Department's claim amount exceeds the value of the estate, the Department suggests that the estate consider the claim to be that amount available to the Department in its priority. It is costly and unnecessary to go through insolvency proceedings if the Department's claim is the only reason the estate would be insolvent.

Personal needs allowance (PNA) accounts at nursing homes are covered by Ohio Revised Code Section 5162.22. PNA s are to be paid as follows:

0-60 days after death (1) surviving spouse, (2) estate representative appointed by the court, or (3) funeral home for unpaid expenses

60-90 days after death To the Department through the AGO

Surviving spouse - Pursuant to the federal statute, there is no claim as long as there is a surviving spouse. The Department is entitled to recover from the estate of the surviving spouse to the extent of the assets passed through the recipient's estate to the surviving spouse. *Ohio Dept. of Job and Family Services v. Tultz* (2003), 152 Ohio App.3d 405, 2003 Ohio App LEXIS 1510.

Liens - Although specifically authorized by statute, the Department is not currently utilizing liens except in situations where there is no surviving spouse and there is property that could satisfy the claim or there is a surviving spouse with property that is not the surviving spouse's residence. The change in 2005 prohibits the placing of a lien on property that is the residence of the surviving spouse. That had been the most common use of liens in order to protect our claim until the passing of the surviving spouse (*Tultz*, above). In cases of surviving spouses, we are using the Affidavit on Facts Relating to Title as provided in ORC 5301.252.

Undue Hardship – The Department has enacted regulations defining "undue hardship", which became effective in September 2007, OAC 5101:1-38-10. The regulation sets forth the time frame for requesting a hardship exemption, for the Department's decision, for an appeal of the Department's decision, and for the response to the appeal. The regulation sets forth the parameters but is not all inclusive. Generally it is limited to situations which if our claim is not waived; a surviving individual would be deprived of a necessity of life. Examples include a family farm or business, which provides the income for survivors, or a family member other than a child or spouse, resides in the recipient's homestead property and has no other means of providing a home for him or herself.

Local Counsel – In August, 2003, the Office of the Attorney General began utilizing local counsel to assist in the Estate Recovery program. They will operate within the same guidelines and procedures as the Columbus office. In cases where the fiduciary declines to serve, the local counsel may ask the court to be appointed administrator pursuant to ORC Section 2113.06.

TOD Deeds – Effective September 29, 2007, beneficiaries on TOD deeds must provide to the county recorder a completed form (ODM07408) indicating whether the owner or the owner's predeceased spouse had received Medicaid benefits. The recorder will send a copy of the form to the administrator of the estate recovery program before recording the transfer.

Life Estates- Although property law historically treats life estates as extinguished at the life tenant's death, the MER statute provides for timing of the claim immediately prior to the moment of death. This gives effect to the specific inclusion of life estate in the assets that are subject to the claim. The only appellate decision to date on the life estate issue is *Admr., State Medicaid Estate Recovery Program v. Miracle*, 2015-Ohio-1516 (CA 4th Dist.). Not only did the court uphold the right to recover from the remainderman, it extended that right to property outside the State of Ohio.

Long Term Care Insurance – Effective September 1, 2007, there is a Qualified Long Term Care Partnership (QLTCP) program, described in OAC 5101:1-38-11. It allows applicants for Medicaid to disregard assets as available in the spend-down process equal to the amount of the benefits allowed under long-term care insurance purchased by the applicant. All assets disregarded in the application process will be exempt from estate recovery. This has been a non-factor in MER.

RECENT CASES

Ohio Department of Medicaid v. Nina French, Exctr. Of Est. of Harry L. Ward, 2020-Ohio-2744 (2nd Dist.) – Recovery from deposit at community care residential center. Recipient was first spouse to pass. Trial court granted summary judgment in favor of ODM. Court of appeals affirmed. Supreme Court of Ohio declined jurisdiction.

In re Estate of Anderson, 2020 Ohio 6924. Local counsel for ODM filed an estate to recover child support arrearages. Trial court held that they were asset of estate, not of children. The court of appeals affirmed.

Weisenmayer v. Vaspory, 2019-Ohio-1805 (2nd Dist.) – Local counsel for ODM filed a lien on residence of recipient after death. At sale, title company paid ODM/MER claim. Nursing home had a claim against estate but had not reduced it to judgment and no lien. They argued that all proceeds from sale should go to the probate estate and then be paid according to ORC 2117.25 which gives the nursing home a one spot priority over MER. Court ruled in favor of ODM/MER and court of appeals affirmed. No appeal taken.
Prepared by:

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11TH DISTRICT OPINIONS OF INTEREST TO PROBATE PRACTITIONERS

Hon. Mary Jane Trapp
11th District Court of Appeals

Court of Appeals of Ohio
Eleventh Appellate District

Judge Mary Jane Trapp

Judge Mary Jane Trapp is recognized throughout the state for her distinguished legal knowledge and experience. Judge Trapp returned to the bench in February 2019, having previously served six years as a judge on the Eleventh District Court of Appeals from 2007 to 2013. She has served as its Administrative Judge in 2008 and as its Presiding/Administrative Judge in 2009, 2010, and 2021. She has also served as a visiting judge on the Supreme Court of Ohio and in four sister districts by assignment of the Chief Justice.

Judge Trapp is a leader at the state and national level in issues of administration of justice and legal reform. She has served on nine Supreme Court of Ohio commissions, committees, and task forces to develop policy for the bench and bar and served on Ohio Judicial Conference and College committees, including continuing service on the Ohio Jury Instructions Board of Editors, which she co-chairs, and on the Appellate Law and Procedure Committee. She also chairs the Education Committee of the Council of Chief Judges of the State Courts of Appeal. She is the President Elect of the William K. Thomas Inn of Court.

During her time in the private practice of law, she served as President of the Ohio State Bar Association, enjoyed the highest “AV” rating for legal ability and ethics, a Super Lawyer designation in Business Litigation and Mediation, and she is a Fellow in the trial lawyer honorary society, Litigation Counsel of America, which is composed of less than one-half of one per cent of American lawyers.

Judge Trapp is the recipient of numerous awards, including the Southeast Ohio Food Bank Community Service Award, the Ohio Women’s Bar Association Founder’s Award, the Lake County Democratic Women’s Club Woman of the Year award, the Ohio Legal Assistance Foundation‘s Presidential Award for Pro Bono Service, the Ohio State Bar Association’s Nettie Cronise Lutes Award, the Women's Leadership Council award from United Way Services of Geauga County, and the McGregor Foundation Inspire Award. She is a Columbus School for Girls’ Alumna of the Year and the first Ohio Court of Appeals judge to be awarded a Henry Toll Fellowship by the Council of State Governments. In 2021, Judge Trapp was awarded the Ohio Bar Medal, the Ohio State Bar Association’s highest honor.

Judge Trapp is an author, lecturer, and regular contributor to television, radio, print, and social media outlets. She was married to her former law partner, the late F. Michael Apicella and is a stepmother, grandmother, and recent great-grandmother. Judge Trapp graduated from Mount Holyoke College, cum laude in May 1978 and received her law degree from the Case Western Reserve University School of Law in 1981. She was admitted to the Ohio Bar in 1981 and admitted to practice before the Sixth Circuit Court of Appeals and U.S. Supreme Court.

Probate Caselaw Update for the period 9.1.21 to 8.29.22

Judge Mary Jane Trapp, Ohio Court of Appeals, Eleventh Appellate District

Adoption

In re Adoption of A.K. | 2022-Ohio-350 | Supreme Court of Ohio | Decided: February 10, 2022

A parent's right to consent to the adoption of his or her child is not extinguished under R.C. 3107.07(A) for lack of sufficient contact with the child when the parent has acted in compliance with a no contact order prohibiting communication or contact with his or her minor child.

https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2022/2022-Ohio-350.pdf

Adoption

In re Adoption of R.R.L. | 2022-Ohio-1100 | 11th Appellate District | Decided: March 31, 2022

Dismissal of petition for adoption of child is affirmed in light of evidence that father provided support to child during the year preceding the filing of the petition, the burden is on the petitioner to demonstrate by clear and convincing evidence that the parent failed to support the child, and there was evidence of father's payment of obligations relating to child and commitment to his support; even though father missed some monthly payments during the one-year period before the petition was filed, the total support obligation amount was satisfied, which is consistent with the purpose of the statute relating to consent, R.C. 3107.07(A).

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Guardianship/Jurisdiction

Carney v. Olmsted Operator, L.L.C. | 2022-Ohio-1585 | 8th Appellate District | Decided: May 12, 2022

In guardian's action in common pleas court against nursing home, alleging denials of visitation in violation of R.C. 3721.13, trial court did not err in dismissing complaint for lack of subject matter jurisdiction where contentious guardianship proceedings were pending in probate court at the time the complaint was filed, probate court has exclusive jurisdiction over all matters touching guardianship, including visitation matters, and jurisdiction does not move out of probate court just because visitation claims are raised in terms of defendant's conduct.

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Jurisdictional priority

State ex rel. Minshall v. Swift | 2022-Ohio-2158 | 6th Appellate District | Decided: June 23, 2022

In brothers' dispute about division of property that belonged to their now-deceased mother where one brother filed a petition for a writ of prohibition to prevent judge in probate court from exercising jurisdiction over trust claims on the basis of jurisdictional priority because of a pending case in the general division of common pleas court, prohibition is denied since the probate court has general subject matter jurisdiction over the trust claims, authorizing the judge to resolve specific challenges to that jurisdiction, there was no showing of patent and unambiguous lack of jurisdiction, and petitioner can challenge probate court's rulings through a direct appeal.

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Inter vivos trust/Jurisdiction

White v. White | 2021-Ohio-3488 | 11th Appellate District | Decided: September 30, 2021

In plaintiffs-beneficiaries' action in the general division of common pleas court naming defendant-appellant as a necessary party and alleging that defendants-brothers/trustees fraudulently obtained trust modification prior to mother's death, the court did not err in denying appellant's motions for formal accounting and in ordering final distribution of estate since the probate court has concurrent jurisdiction with the general division pursuant to R.C. 2101.24(B) where the case involved decedent's inter vivos trust rather than administration of her estate; also, because plaintiffs dismissed their suit in the probate court before filing in the general division, the jurisdictional priority rule is not applicable.

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Name change

In re Name Change of E.S. | 2022-Ohio-2107 | 10th Appellate District | Decided: June 21, 2022

Following resolution of divorce action, mother's applications in probate court to change children's last name to her last name hyphenated with father-former husband's last name were properly granted where mother did not waive her right to seek name change since the absence of any provision in the divorce filings permitting mother to request the name changes did not reflect an intent by mother to abandon her right to file name change applications in the probate court, and father provided no evidence to support his assertion that the parties negotiated this issue out of the divorce settlement agreements, former R.C. 2717.01.

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Disclaimer/Laches

Clark v. Beyoglides | 2021-Ohio-4588 | 2nd Appellate District | Decided: December 29, 2021

In beneficiaries' action seeking city's acknowledgement of their disclaimers of decedent's real property, prompted by the city's issuance of nuisance abatement notices to beneficiaries, the trial court's summary judgment in favor of beneficiaries is affirmed since the probate court correctly analyzed the effect of the disclaimers, and estate administrator's defense of laches is without merit since there was no evidence of unjustifiable delay on beneficiaries' part and no reason to preclude the disclaimer.

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Real property/Spousal allowance

Estate of Hatcher-Hamilton v. Hamilton | 2022-Ohio-1834 | 9th Appellate District | Decided: June 1, 2022

In dispute between daughter-executor and decedent's husband about ownership of decedent's house, trial court did not err in granting husband's motion to convey the house to himself and in ordering daughter to file a certificate of transfer since husband was entitled to allowance for support of surviving spouse, R.C. 2106.13, he elected to receive decedent's interest in the house in satisfaction of spousal allowance, R.C. 2106.10, and where daughter failed to provide a transcript, she cannot challenge the probate court's adoption of the magistrate's factual finding regarding the value of the house.

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Birth certificate/Gender identity

I*n re Application for Correction of Birth Record of Adelaide* | 2022-Ohio-2053 | 2nd Appellate District | Decided: June 17, 2022

Denial of plaintiff's application to change the sex marker on her birth certificate was not error since R.C. 3705.15 does not allow for amendments to a birth certificate, even though it allows for corrections of errors, the language of the statute does not specifically grant authority to the probate court to alter the sex marker unless it was originally made in error, and even though evidence showed that plaintiff's sexual identity is now female, both psychologically and in lifestyle gender expression, the sex marker accurately recorded her male anatomy at the time of birth.

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Survival/Wrongful death

In re Estate of Riddle | 2022-Ohio-644 | 6th Appellate District | Decided: March 4, 2022

In estate's application to probate court requesting that all proceeds from wrongful death and survival claim settlement be allocated as a survival claim, trial court did not err in allocating a small portion of settlement as wrongful death proceeds since decedent's initiation of litigation was for his pain and suffering prior to death, so the proceeds should be characterized predominantly as and for the survival claim, and daughter's contention that the entire settlement should be allocated as wrongful death proceeds was not supported by the court's comprehensive analysis, R.C. 2305.21 and 2125.02.

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Will

Estate of Todd v. Flahive | 2021-Ohio-4419 | 5th Appellate District | Decided: December 14, 2021

Denial of decedent's brother's application to probate decedent's will was not error where the purpose of the court's R.C. 2107.24 hearing was to determine if a submitted document was decedent's last will and testament and brother failed to explain the existence of three documents with decedent's original signature, thereby failing to establish that a will existed under the statutory requirements; as well, brother's handwriting expert was less credible than estate's expert, who testified that none of the presented documents had been signed by decedent.

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Concealment/Appeal

In re Estate of Notarian | 2022-Ohio-2927 | 11th Appellate District | Decided: August 22, 2022

In executrix's concealment action against trustees of family trust, resulting in a judgment requiring trustees to return four parcels of property to the probate estate, trustees' appeal of the transfer back order is dismissed for lack of a final appealable order since, while the concealment action is a special proceeding for purposes of R.C. 2505.02(B)(2), the judgment on appeal did not affect a substantial right and therefore may be appealed only after the trial court determines whether restitution is owed, R.C. 2109.50.

> PDF

Trust/Attorney fees

Bryan v. Chytil | 2021-Ohio-4082 | 4th Appellate District | Decided: November 10, 2021

In trustees' action to declare no violation of fiduciary duties and to seek authorization to distribute trust assets where beneficiaries disputed, inter alia, fees paid to attorneys, it was not error to affirm fees paid to decedent's attorney who considered Prof.Cond.R. 1.5 when assessing the fee for preparing decedent and wife's estate planning documents, for assisting trustees in administering trust and for assisting trustees in distributing trust assets after wife's death, and also attorney used probate court's rule as a guideline to determine a reasonable fee; in addition, challenge to fees paid from trust assets to attorney representing trustees in litigation with beneficiaries is without merit since Ohio courts specifically allow a trustee to recover attorney fees from a trust after the trustee successfully defends allegations of a breach of fiduciary duty.

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Real estate appraisal

In re Estate of Clonch | 2021-Ohio-2815 | 11th Appellate District | Decided: August 16, 2021

In a distribution of decedent's estate where son filed exceptions to inventory, the trial court did not err in accepting appraised value of real estate as set forth in inventory where, although administrator's appraiser valued the property nearly a year after son's appraiser, administrator's appraiser made a more thorough inspection of the property at issue, finding that the interior of the residence was in significant disrepair, and appraiser testified that there would be no significant difference if he had assessed property a year prior, R.C. 2115.02.

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Administrator's claim

In re Estate of Gates | 2022-Ohio-1091 | 5th Appellate District | Decided: March 31, 2022

In administrator's application for allowance of claim against mother's estate for reimbursement for repairs, improvements and maintenance to mother's property, trial court erred in finding that application was filed untimely where, although general creditor claims would have been filed untimely pursuant to R.C. 2117.06, a claim brought by administrator was within time period specified under R.C. 2117.02.

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Settlement agreement

In re Estate of Millstein | 2021-Ohio-4610 | 8th Appellate District | Decided: December 30, 2021

In curator's appeal of administration of decedent's son's estate, judgment finding agreement in settlement of son's estate precluded decedent from asserting property rights as beneficiary of estate is affirmed where settlement agreement precluded proceedings that were adversarial in nature, decedent voluntarily entered settlement agreement and initially waived objection to inventory, and even though settlement agreement arose from unrelated trust litigation, it was executed to prevent decedent from wasting resources through continued and frivolous filings.

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Undue influence

Fikes v. Estate of Fikes | 2022-Ohio-2075 | 1st Appellate District | Decided: June 17, 2022

In disinherited son's challenge to validity of father's will, asserting undue influence, the trial court did not err in granting summary judgment to estate since there was no evidence that decedent's brother-executor exercised undue influence over decedent, executor rebutted the presumption of undue influence arising from executor's fiduciary relationship with decedent by showing that decedent relied on legal advice in deciding to disinherit his son, and the presumption of attorney's undue influence did not arise because attorney was not a beneficiary under decedent's will.

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Attorney fees

In re Estate of Dickens | 2022-Ohio-1543 | 12th Appellate District | Decided: May 9, 2022

In administration of estate, trial court did not err in reducing the amount of allowed attorney fees since the fee agreement between attorney and beneficiary did not support the fee application where attorney did not request the guideline fee or explain why the guideline fee was not used, the court did not disapprove the guideline fee, attorney failed to produce an itemized bill pursuant to fee agreement, and attorney failed to file an application for extraordinary attorney fees, R.C. 2113.36, Prof.Cond.R. 1.5(a).

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Appeal

In re Estate of Zeak | 2022-Ohio-951 | 10th Appellate District | Decided: March 24, 2022

In estate administrator's appeal of order to file amended final and distributive fiduciary's account, trial court's judgment disapproving administrator's partial and final accounts is affirmed where administrator failed to provide a transcript in compliance with Civ.R. 53(D), he did not attend the hearing and did not challenge the determination that he waived his appearance or that a finder's fee should be removed from account, his argument that

hearing was cancelled is unsupported by the record, and the dispositive issue concerning execution of finder's fee agreement was supported by the record.

> PDF

Administrator

In re Estate of Maybury | 2022-Ohio-977 | 5th Appellate District | Decided: March 25, 2022

In mother's application to administer estate of decedent-daughter and motion to vacate the appointment of decedent's former husband-father of decedent's children as administrator, the trial court did not err in denying the motion since the R.C. 2105.05 statute of descent and distribution provides that decedent's children are entitled to inherit from her, decedent's mother had no personal interest in estate and consequently no capacity to attack former husband's appointment, and because children were minors and unsuitable to administer estate, former husband was appointed pursuant to R.C. 2113.06.

> PDF

Contract/Evidence

In re Estate of Stover | 2022-Ohio-989 | 3rd Appellate District | Decided: March 28, 2022

Dismissal of decedent's son's action against executor seeking enforcement of terms of will as it related to a contract to purchase land was error since the contract to purchase land unambiguously stated the purchase price and the basis for the price, decedent's will referenced the contract with specific instructions to executor regarding decedent's intentions, and executor's allegation that a separate writing referenced in the contract and detailing son's assistance to parents was not attached was not, by itself, enough to open the door to extrinsic evidence or to render the contract invalid.

> PDF

Trust/In terrorem clause

In re Estate of Reck | 2022-Ohio-719 | 2nd Appellate District | Decided: March 11, 2022

Following appellant-daughter of decedent's filing of declaratory action challenging amendment to trust that removed her as successor trustee where appellant filed a motion to remove appellee-daughter as executor of their father's estate, the trial court did not err in granting summary judgment to appellee on reasoning that appellant lacked standing since her act of filing the declaratory judgment complaint in the common pleas court triggered application of the in terrorem clause in the trust, thereby divesting appellant of her status as a beneficiary of the trust, resulting in her lack of standing, Bradford.

> PDF

Foreclosure

Bankers Guar. Title & Trust Co. v. Moyer | 2021-Ohio-4058 | 11th Appellate District | Decided: November 15, 2021

In bank's foreclosure action against estate administrator for default on mortgage note, summary judgment for bank was not error where decedent's estate defaulted on the loan, and although bank's claim for unpaid balance on the promissory note was barred as a claim against the estate pursuant to R.C. 2117.12, the foreclosure action was an action in rem and not a claim against the estate, and therefore the claim was not barred under operation of statute.

> PDF

Negligence/Insurance

Doczi v. Blake | 2021-Ohio-3433 | 4th Appellate District | Decided: September 23, 2021

In negligence claim by plaintiff, victim of auto accident, against estate executor for damages from assets of estate, summary judgment for executor was not error since plaintiff failed to strictly comply with R.C. 2117.06; however, to the extent that the summary judgment precluded plaintiff's claim against estate to collect potential award from insurance coverage, the trial court erred since R.C. 3929.06 provides that if plaintiff obtains a civil judgment against decedent's estate, plaintiff would be entitled to have judgment satisfied by insurance coverage since insurance proceeds would not constitute assets of the estate.

> PDF

Trust beneficiary/Judicial estoppel

Galavich v. Hales | 2022-Ohio-1121 | 7th Appellate District | Decided: March 31, 2022

In plaintiff's breach of trust action against defendants-estate of mother's trustee and beneficiary of trustee's estate, alleging that he was beneficiary of mother's trust, summary judgment in favor of defendants was not error where mother created express trust with plaintiff as intended beneficiary of farm, but plaintiff knowingly failed to disclose inheritance in bankruptcy proceedings after death of mother, and doctrine of judicial estoppel forecloses his ability to benefit from trust.

> PDF

Will

Skalsky v. Bowles | 2022-Ohio-1568 | 5th Appellate District | Decided: May 10, 2022

In plaintiff-decedent's brother's action against defendant-executor/beneficiary seeking a declaration that plaintiff was sole beneficiary of estate, trial court did not err in finding that defendant was entitled to estate proceeds where extrinsic evidence was properly admitted to resolve ambiguity as to which provision in will was to apply, Civ.R. 1(B) was applied to allow admission of evidence provided after deadline, and evidence showed that decedent had poor relationship with plaintiff and intended his assets to pass to defendant.

> PDF

Guardianship

In re Guardianship of Glasgow | 2022-Ohio-1366 | 12th Appellate District | Decided: April 25, 2022

Appointing attorney as guardian of person and estate of impaired care center resident was not error where attorney presented convincing evidence that resident was incompetent and unable to care for herself and her property, that resident was physically impaired and wholly dependent on others for daily needs, and that she suffered from dementia and other mental disorders and lacked decision-making capabilities, so guardianship was in resident's best interest, R.C. 2111.01, 2111.02.

> PDF

Legal malpractice/Standing/Privity

White v. Sheridan | 2022-Ohio-2418 | 10th Appellate District | Decided: July 14, 2022

In executor/beneficiary's legal malpractice action against attorney for negligently causing decedent's home to pass to daughter rather than to executor/beneficiary, summary judgment in favor of attorney on reasoning that executor/beneficiary lacked standing was error where, although attorneys are not liable to third parties under strict privity rule, decedent's claim for legal malpractice survived his death pursuant to R.C. 2305.21, and executor is in privity with decedent and may sue for negligence in estate planning.

> PDF

Guardianship

In re Guardianship of Baker | 2021-Ohio-3692 | 2nd Appellate District | Decided: October 15, 2021

In guardianship action in which attorney was appointed guardian for the person and estate of medically incompetent ward, trial court did not err in denying ward's brother's and cousin's motion to vacate proceedings pursuant to R.C. 2111.47 and/or Civ.R. 60(B)(5) and restore ward's competency since attorney-guardian complied with R.C. 2111.04 by

providing notice to ward's next of kin, movants failed to demonstrate that they had a meritorious defense entitling them to relief under Civ.R. 60(B), and cousin attempted to transfer ward's property to himself with unrecorded power of attorney.

> PDF

EVIDENCE

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Reminger Co., LPA

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PRACTICE AREAS

Estate Planning

Corporate & General Business

Elder Law & Special Needs Planning

Estate and Trust Administration

Estate and Trust Mediation Services

Estates and Trusts

Estates, Trusts, and Probate Litigation

Guardianships

EDUCATION

B.A., The Ohio State University, 1992

J.D., Case Western Reserve School of Law, 1995

ADMISSIONS

State of Ohio, 1995

U.S. District Court, Northern District of Ohio, 1996

U.S. Court of Appeals, Sixth Circuit, 2000

As chair of Reminger's estate, trust, and probate litigation practice group, you can expect an incredibly broad working knowledge of the areas of law that touch upon the disputes he routinely handles, coupled with a rare ability to quickly capture the factual essence of your claim. Adam has served as lead trial attorney in hundreds of successfully pursued/defended estate and trust disputes. He has tried many high stakes cases to verdict: will and trust contests, executor and trustee removal actions, interpretation of wills and trusts and ambiguities, accountings, breaches of fiduciary duty, and claims seeking to void gifts and beneficiary designations. Many of the cases he has handled are often cited in the courts throughout Ohio.

Adam is active in academia. He has taught the wills, trusts, and estate class at Cleveland Marshall School of Law and has been invited to lecture to many prestigious organizations, including the Ohio Association of Probate Judges, the American Academy of Forensic Psychiatrists and the Law, the American Academy of Trust and Estate Counsel, the Association of Certified Fraud Examiners and many bar associations. He believes successful advocacy requires skills such as fact development through deposition and story telling though cross examination as well as the ability to educate clients, parties, and the court about the nature of the claim and supporting law.

Representative Experience

The breadth of Adam's experience in matters related to the "World of Probate and Estates" is well known throughout the legal community. Over the approximate 20 years of almost exclusively handling probate, trust, estate, and guardianship type disputes, he has literally pursued and defended hundreds of cases and problems falling within his niche. His track record and client testimonials are demonstrative of his recognized skills in discovery, analysis, writing, and trial.

Honors & Recognitions

Rated AV® Preeminent™: Very Highly Rated in Both Legal Ability and Ethical Standards by Martindale Hubbell Peer Review

Listed in *Best Lawyers in America* for Elder Law and Litigation - Trusts and Estates, since 2009

Selected as *Best Lawyers* Lawyer of the Year 2015, 2018 – Litigation – Trusts and Estates – Cleveland

Selected as *Best Lawyers* Lawyer of the Year 2019, 2021 – Elder Law – Cleveland

Recognized as a Rising Star and as a Super Lawyer by *Ohio Super Lawyers Magazine,* including special recognition as Top 50 Cleveland and Top 100 Ohio

Community & Professional

Fellow, American College of Trust and Estate Counsel

Fellow, American Bar Foundation

Fellow, Cleveland Metropolitan Bar Foundation

Past President, William K. Thomas, American Inns of Court

Past Chair, the C3A (FKA the Consortium Against Adult Abuse)

Trustee, Heights Schools Foundation

Member, Probate Trust and Estate Section Council, Ohio State Bar Association

American Bar Association

Finding Intent

Those Frustrating Ambiguities in Wills and Trusts and the Rules for Resolving them

General Rules of Interpretation

Plain Meaning Rule = No Extrinsic Evidence

When interpreting a will, extrinsic evidence of the testator's intent is not admitted. The reader must rely only on the "plain meaning" of the document.

Wigmore's Critique of the No-Extrinsic Evidence Rule

Any effort to limit the proofs to the words of the document runs afoul of the truth that words always need interpretation.

According to Wigmore, the plain meaning is simply the meaning of the people who did not write the document.

Strict adherence "plain meaning"

Attorney to Testator– to whom do you want to leave the rest of your property? Who are your nearest relations? Her reply: I've got about 25 first cousins, let them share it equally.

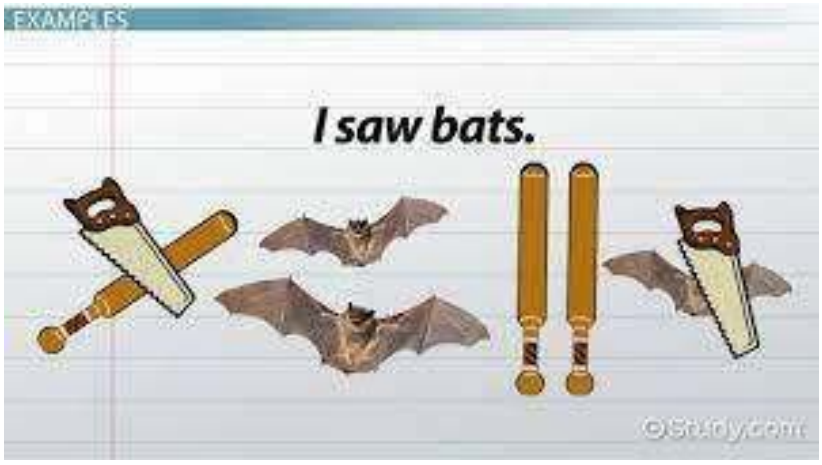
Scrivener: "All the rest residue and remainder to my heirs at law living at the time of my decease, absolutely; to be divided amongst them equally"

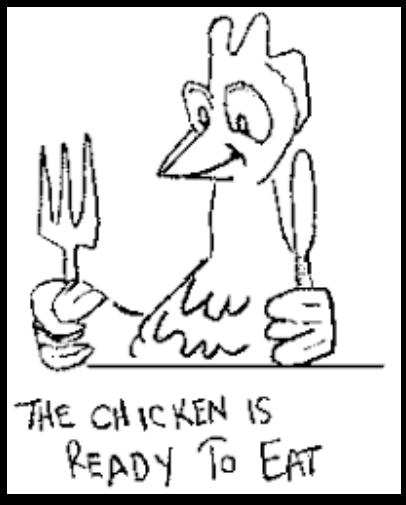
Testator died with a maternal aunt.

Holding?

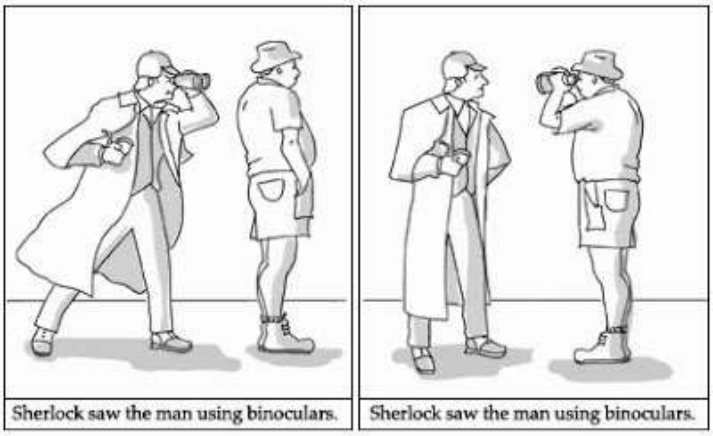
Mahoney v. Granger, 1933, 186 N.E. 86, Supreme Court, MA.

- The testator's statements could only be admitted so far as they tended to give evidence of material circumstances surrounding the testator at the time of the execution of the will. As the words, "heirs at law" were words in common use, susceptible of application to one or many, and when applied to the special circumstances of this case, the testator had only one heir, her Aunt.
- A mistake by the draftsman does not authorize the court to reform or alter it with amendments.


EXAMPLES
I saw bats.
©Study.com


THE CHICKEN IS
READY TO EAT

Ambiguity is not easy



Patent vs. Latent Ambiguity

Patent

- Ambiguous on its face. The 4 Corners of the document itself do not make sense & cannot be effectuated

Latent

- Ambiguity manifests when trying to give effect to words that otherwise seem clear.

Example of Patent Ambiguity: Traditional View No Extrinsic Evidence

- Will left certain properties, in trust for the benefit of his spouse during her lifetime. The will detailed how the properties were to be distributed in the event his spouse predeceased him. The will did not state how the remainder interest in the properties was to be distributed if his spouse survived him.
- Both parties agreed that the ambiguity found in the will is a patent ambiguity and, as such, extrinsic evidence may not be used to determine the intent of the testator. Instead, we must look only to the language of the will. After doing so, we must agree with the analysis of the trial court, that the Court cannot simply assume that the Decedent intended to distribute his property in a given manner if his spouse survived him. The will does not address how to distribute the farms in the event the Decedent's spouse survived him. Under these circumstances, we agree with the trial court's finding that the properties at issue must pass through intestacy.

McBride v. Sumrow, 181 S.W.3d 666, 670 (Tenn.App.2005)

Example of Patent Ambiguity: Modern View Extrinsic Evidence Allowed

One clause in T's will left the "disposable portion of my estate" to T's daughter, A. While the very next clause left "my entire estate" to T's daughters, A and B.

Morris, the decedent's late attorney, stated that the last clause of Paragraph 5 was misplaced and a typographical error. He said the decedent intended to leave the disposable portion to Sanches and the remainder of the estate to both daughters, share and share alike.

That comports with our natural reading of the entire will. The testator clearly intended to leave the disposable portion to Sanches and "*further* bequeath" the entire balance of the estate to both heirs. The word "further" clearly expresses the intent that the remainder of the estate was an additional bequest after the legacy of the disposable portion. Our interpretation gives effect to each disposition

- Succession of Neff, 98-0123 (La. App. 4 Cir 06/24/98), 716 So.2d 410, 412

Latent Ambiguities: Extrinsic Evidence Permitted

- It is settled doctrine that, as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence.
  - *Patch v. White*, 117 U.S. 210 (1886)

Latent Ambiguity Arising from Existence of two or more Persons or Things Exactly Fit the Description in the Will

- Example: "To my niece, Alicia", but Testator had two nieces named Alicia.
- Referred to as **Equivocation**.
- Extrinsic Evidence admissible on the reasoning that the extrinsic evidence merely made the terms of the will more specific without actually adding to the will's terms. *See Succession of Bacot*, 502 So.2d 1118, La. App. 1987
- **Personal Usage Exception** – In *Moseley v. Goodman*, T left money to "Mrs. Moseley". Mrs. Lenore Moseley, the wife of the cigar store owner where T traded, but whom T never met, claimed her bequest. The Court, however, held that the bequest went to Mrs. Lillian Trimble, whom T called "Mrs. Moseley". Trimble's husband was a salesman in Moseley's cigar store and was called Moseley by T; his wife – dubbed "Mrs. Moseley" by T – managed the apartment house where T lived and did kind things for him. *Moseley v. Goodman*, 195 S.W. 590 (Tenn. 1917).

Latent Ambiguities Created when the Description in the Will does not Exactly Fit any Person or Thing

- Example: T devised his home to Mr. and Mrs. Wendell Richard Hess, or the survivor of them, presently residing at No. 17 Barbara Circle. At time of execution Wendell and his wife, Glenda lived at there. Soon thereafter, Wendell divorced Glenda and they sold the house. Wendell then married Verna. Verna tried to collect the devise, claiming that she alone met the description, Mrs. Wendell Richard Hess.
- Extrinsic evidence was admitted that showed the intent that the devise was intended to go to Glenda because she shared a common interest in antiquities with T.
  - *IHL v. Oetting*, 682 S.W.2d 865 (Mo. App. 1984).

Formalism v. Quest: searching for intent

- " . . .[T]he law of will interpretation has gradually evolved from a stiff and often artificial formalism to an almost organic approach to interpretation that extols the quest for the testator's intention. Courts today, seeking to temper technical rigidity, contemplate a reduced role for the application of rules of construction in the will's context, with the trend toward admitting extrinsic evidence to cure a multiplicity of ills in wills. In the course of this evolution . . . the rules governing the admission of extrinsic evidence have been increasingly relaxed and refined. Modern codifications of will interpretation methods are remarkably brief and appear to have abandoned any pretense that a will's meaning can be divined through the mere application of a series of formalistic rules.

- Richard F. Sorrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 Case W. Res. 65, 66

Patent Ambiguity?

- T. in one provision of his will, left the remainder of his estate to his companion of 30 years. In a second provision, T left the remainder of his estate to T's next of kin by the laws of decent and distribution. The provisions were incompatible.
  - *Skalsky v. Bowles*, 5th Dist. Holmes No. 21CA004, 2022-Ohio-1568

Skalsky v. Bowles: Holding

Trial Judge declared that T's intent was to leave the remainder to the companion and dismissed the brother's complaint.

The Court allowed for extrinsic evidence to be admitted where there is a latent ambiguity appearing in the will, not for the purpose of showing the testator's intention, but to assist the court to better interpret that intention from the language in the will. Citing *Barr v. Jackson*, 5th Dist. Delaware No. 08 CAF 09 0056, 2009-Ohio-5135

In this case, the language of each provision was clear and intelligible. An **ambiguity** existed as to which provision was to apply to the will. We find **extrinsic evidence** was properly admitted "to resolve the **ambiguity** and aid in the interpretation or application of the will" and [**8] to "give that construction" which Jeffrey intended. Skalsky v. Bowles, 5th Dist. Holmes No. 21CA004, 2022-Ohio-1568, ¶ 23

Belardo v. Belardo, 2010 Ohio 1758, 8th Dist.

- Belardo's will left the entire estate to his wife, Josephine, and provided that in the event she should predecease him, the estate was to pass to my beloved son's John and James, share and share alike, absolutely and in fee simple.
- Josephine and James predeceased Bolardo. John claimed that James' son, was not a beneficiary.
- Court found intent in the 4 corners, because it was presumed Bolardo is presumed to have known about Ohio's anti-lapse statute and because he did not include survivorship language.
- When the language of the will is clear and unambiguous, the testator's intent is believed to be found in the express terms of the will. The Court may only consider extrinsic evidence to determine the testator's intent only when the express language of the will creates doubt as to its meaning.

Bogar v. Baker 2017-Ohio-7766

- Specific gift of "real estate located at 13300 Diagonal Road, Salem, Ohio together with all contents of said real estate."
- House, furnishings, out buildings, vehicles, farm equipment, bank account passbooks. What are the "contents of" the real estate?

Bogar v. Baker 2017-Ohio-7766 (7th Dist.

- "Where there is a latent ambiguity appearing in a will, extrinsic evidence is admissible, not for the purpose of showing testator's intention, but to assist the court to better interpret the intention from the language used in the will."

Trusts & Settlor's Intent

- The court may reform the terms of a trust, **even if they are unambiguous**, to conform the terms to the **settlor's intention** if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.
  - R.C. 5804.15, which conforms to Uniform Trust Code

Trusts & Settlor's Intent

- In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text.
- NCCUSL Comments – applicable to R.C. 5804.15 apply equally to the OTC as authoritative statements of the intent and application of the statute, to the extent that Ohio has not deviated from the UTC Text.

Holdren v. Garrett, 2011 Ohio 1095 (10th Dist)

- Clause in trust stated: I direct my trustee to give my son the exclusive right and option to purchase [my farm] that is held by the trust by reason of my spouse's death . . . And he shall have two years following my death to exercise this option;
- Son argued that intent was to allow for exercise of option after both parents had died.
- "my death" is a common term and understood to mean the death of the writer of the words.
- 5804.15 requires clear and convincing proof of both the settlor's intent and that "the terms of the trust were affected by a mistake of fact or law, whether by expression or inducement;
- Mistake of law occurs when a person is truly acquainted with the existence or nonexistence of facts, but is ingnorant of, or comes to an erroneious conclusion as to their legal effect.
- Because Court found clause in trust was unambiguous, review was confined to the express terms of the trust itself.

Is this ambiguous?

I leave my farm to my nephew, William, and his wife, Wanda. Upon the death of the survivor of William and Wanda, **I leave my farm to their children.**

- Do we have a latent ambiguity here?
- Should we allow evidence of the Testator's family situation, business and financial situation? Would we better understand what Testator meant by "their children"?

Radziseweki v. Szymanczak, 2012 Ohio 2639

- T's will failed to devise property owned in Poland under her residuary clause;
- Magistrate admitted extrinsic evidence that tended to show T intended her residue should be inherited by the people mentioned in her will to inherit her Ohio property.
- Magistrate determined that, because no residuary clause, the rest and remainder passed by way of intestacy.
- In discussing the ability of the court to use extrinsic evidence when there exists a latent ambiguity, the Court reversed the Magistrate's decision, finding that the same people named in the will were to inherit the residuary.

Court Found no Ambiguity

If the language in a will is plain and its meaning obvious the Court cannot qualify the same by conjecture and doubt from extraneous facts.

The general rule is that the term "children" does not include stepchildren but this is subject to the intent of the testator.

"Their" is of or belonging to them or belonging to or connected with them.

"Their Children"

William and Wanda left their cell phones at home.

What does "their" mean in this usage?

Should the Choice of Vehicle of Disposition Affect the Outcome?

It is clear from the comments under UTC section 415 that it is meant to abolish the plain meaning rule for testamentary trusts and accordingly make the proof issue the same for a testamentary trust as with an inter vivos trust. UTC section 415, however, does not stop there. It authorizes extrinsic evidence to reform a trust even if its terms are not ambiguous.

- Franke and Moody, *the Terms of the Trust: Extrinsic Evidence of Settlor Intent*, ACTEC Law Journal, Volume 40:1, Spring 2014

What's wrong with extrinsic evidence?

- Could be unreliable
- Could be fraudulent or fabricated
- Passage of time

Solution to Extrinsic Evidence

- Clear & Convincing burden of proof

Admitting Extrinsic Evidence

Applicable Rules of Evidence

- Hearsay Issues
- Authentication of Documents
- Recorded Calls, Text Messages
- Photographs
- Medical Records

(Old) Dead Man's Statute

- "Death having closed the lips of one party, the law closes the lips of the other." *In re: Cunningham's Estate, 94 Wash. 191 (1917)*
- Any party interested in the outcome of the proceedings was deemed incompetent to testify
- Ohio no longer follows the dead man's statute.

Hearsay & Exceptions
Declarant Unavailable

Statements of the decedent or incompetent may be admitted if all of the following apply:

- Estate, Personal Rep., or Guardian is a party
- Statement made before death/incompetency
- Statement offered to **rebut** testimony of an adverse party
- Statement is on a matter within the knowledge of the decedent / incompetent

Evid. R. 804(B)(5)

Hearsay & Exceptions
Declarant Unavailable

Statements of the decedent or incompetent may be admitted if all of the following apply:

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- Statement offered to **rebut** testimony of an adverse party
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Evid. R. 804(B)(5)

Hearsay & Exceptions
Declarant Unavailable

Offered to rebut testimony of an adverse party:

- Usually not in Plaintiff's case-in-chief
- Admissible if rebutting testimony of an adverse party who was called in the case-in-chief as if on cross examination. *Drew v. Martino, 2004-Ohio-1071(9th Dist.)*

Hearsay & Exceptions
Availability Irrelevant

Statements of then-existing mental, emotional, or physical condition, including then-existing state of mind, emotion, intent, plan, motive, design
Including a "memory or belief to prove the fact remembered or believed" if the statement relates to the execution, revocation, identification, or terms of declarant's will.
Evid. R. 803(3)

Examples under Rule 803(3)

- In an automobile injury case, witness says: "decedent told me her back hurt 3 years ago"
  Not admissible to prove the fact remembered
- In a will contest, witness says: "decedent told me she felt pressured when she signed her will three years ago.
  Admissible to prove that the decedent actually felt pressured.
- Rationale: testator is best person to know those facts. State of mind of testator is of paramount importance, and their own statements are most probative evidence of the import of his own will.

Admissible Statements by Testator

- Explanation by Testator why they included one sister and not another **is** admissible. *Ament v. Reassure Am. Life Ins. Co.* 2009-Ohio-36 (8th Dist.)
- Statements about a possible new will **are not** admitted as they are about a *purported* will and there's no evidence that such will ever existed. *Gockel v. Eble, 98 Ohio App. 3d 281 (8th Dist. 1994)*
- Diary of testator **is admissible** to prove state of mind and intentions. *Gillespie v. Gray* 38 Ohio Law Abs. 145 (1942)

Questions?

REMINGER
RESULTS. PERIOD.

Adam M. Fried, Esq.
AFried@reminger.com
Tel: (216) 430-2193

MENTAL HEALTH AND ADDICTION SERVICES IN THE COMMUNITY

Katie Cretella
Trumbull County Mental Health & Recovery Board

KATIE CRETELLA

EDUCATION:

Youngstown State University:
Master of Business Administration with a Specialization in Healthcare, 2021
Master of Science in Education with a concentration in Clinical Mental Health, 2017

EMPLOYMENT:

Katie is responsible for monitoring mental health programs and services delivered by provider agencies and overseeing legal and probate functions of the Board.

Coleman Health Services – Director of Crisis Services, 2017-2021

PROFESSIONAL EXPERIENCE:

Katie has experience servicing marginalized populations in the community, hospital, juvenile detention, jail, and K-12 education system. She is the Director of Clinical Services at the Trumbull County Mental Health and Recovery Board where she monitors mental health programs and services delivered by provider agencies and oversees legal and probate functions of the Board.

CERTIFICATIONS:

Licensed Professional Clinical Counselor

PROFESSIONAL AFFILIATIONS:

Chair of the Trumbull County Suicide Prevention Coalition
Co-Chair of the Crisis Intervention Team Training for Law Enforcement

MENTAL HEALTH AND ADDICTION SERVICES IN THE COMMUNITY

Katie Cretella, MBA, MSEd, LPCC

Director of Clinical Services

Trumbull County Mental Health and Recovery Board

TRUMBULL COUNTY
Mental Health and Recovery Board

The mission of the TCMHRB is to improve the well-being of our community by establishing and maintaining a person-centered, recovery oriented system of mental health and addiction services in Trumbull County.

TRUMBULL COUNTY MENTAL HEALTH AND RECOVERY BOARD (TCMHRB)

- Provides alcohol, drug, and mental health services to the entire community by contracting with specialized agencies
  - County, state, federal funds, and grants are used to purchase the services from those agencies that have specialized services
  - Levy funds are used to pay for treatment for those that are uninsured and underinsured
  - Direct client services are **not** provided at the TCMHRB (ORC)
- Plans and implements alcohol, drug, and mental health programming and initiatives
- The goal is to provide quality services in the least restrictive settings at the community level
  - Cost-shifting
  - Mental Health Act of 1988- expansion of community-based programs

TCMHRB CONTRACTED AGENCIES

Mental Health

- Adult
  - Coleman Health Services
  - COMPASS Family & Community Services
  - Travco Behavioral Healthcare, Inc.
  - Valley Counseling Services
- Children/Adolescent
  - Alta Behavioral Health
  - Cadence Care Network

Substance Abuse

- First Step Recovery
- Glenbeigh
- Meridian Healthcare
- Neil Kennedy Recovery Center
- Parkman Recovery

**Contracted agencies are required to be certified through the Ohio Department of Mental Health and Addiction Services*

OPIATE LAWSUIT FUNDS

Local Government Share

- $240,000 received in July 2022
- ~$166,000 to be released annually over the next 18 years
  - Funding goes to the Trumbull County Commissioners

Region 7 Share (Trumbull and Mahoning Counties)

- Board has been formed
- Funding to be received unknown
- Application process will be developed by the committee

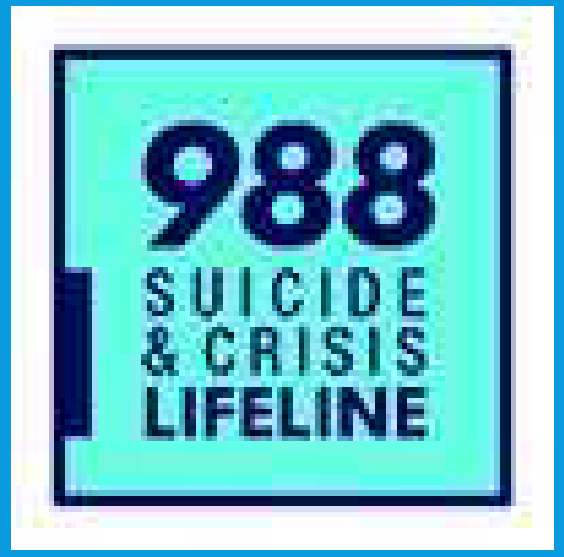
- Giant Eagle settled for $1.125,000 and Rite Aid settled for $1.123,984
  - Funds went to the Trumbull County general fund

SECTION I

MENTAL HEALTH RESOURCES FOR ADULTS

- Outpatient Services
  - Case Management, Counseling, Psychiatry
  - Sliding fee and full coverage for indigent clients
- Pharmacy Programs
- Newest project: Medicare/Older Adult program
  - Community-based services
  - Fully funded, zero cost for clients

MENTAL HEALTH CRISIS RESOURCES



COLEMAN ACCESS CENTER

103 W. Market St
(330)392-1100

- M-F 8 am-4:30 pm or 24/7 at TRMC ED
- Walk-in crisis assessments
- Crisis Community Outreach
- Mental Health Probates
- Mobile Response and Stabilization Services (MRSS)
  - Crisis response for youth up to age 21
  - Up to six weeks of case management
  - Linkage to community resources

RIVERBEND TREATMENT CENTER

- Crisis Stabilization Unit
- Broadway Crisis Unit
- Stepdown unit from inpatient treatment or for clients experiencing a MH crisis but do not meet full inpatient criteria
  - Fully funded, zero cost for clients
  - 24/7 admission
  - Coleman is the gatekeeper- must present to Coleman or TRMC for an assessment
  - Medical clearance at TRMC ED is required
  - Must be voluntary and not withdrawing from substances
  - Average stay ~3-5 days

PSYCHIATRIC HOSPITALIZATION

- Assessments in TRMC ED by Coleman Health Services staff
- Funding for indigent clients at Trumbull Regional Medical Center and Mercy Health St. Elizabeth
- State Hospital- Heartland Behavioral Health
- Franklin Pharmacy

SECTION II

SUBSTANCE ABUSE RESOURCES

Outpatient Services

- Case Management, Counseling, Medication Assisted Treatment (MAT)
- Sliding fee and full coverage for indigent clients

Community Resources

- Narcan kits available at the Trumbull County Combined Health District

DETOX AND RESIDENTIAL RESOURCES

- Inpatient Services
  - Detox at First Step Recovery, Parkman Recovery, or Glenbeigh
  - Residential Program
    - First Step Recovery (males and females)
    - Parkman Recovery (males only)
    - Phase 1: 30 days, Phase 2: 30-60 days
  - Treatment is fully covered for indigent clients
    - Coleman is the gatekeeper- must present to Coleman or TRMC for an assessment

SOBER LIVING

- TCMHRB contracts with 9 Recovery House Operators with a total of 17 Ohio Recovery Housing (ORH) Certified houses
- Not every recovery house in Trumbull County is ORH Certified or contracted with the Board
- Individuals may receive rental assistance to cover ½ of their monthly rent costs for up to 6 months *only* in houses that have a contract with the TCMHRB
- The list of these houses can be found on the Board website at trumbullmhrb.org
- House operators should be contacted directly to inquire about accessing funding

CASE SCENARIOS

LEGAL AID COMMUNITY OUTREACH

EVICTION NOTICE

DETOX TREATMENT

5122.10 AEA

HANDOUTS

TRUMBULL COUNTY
Mental Health and Recovery Board

Ohio Department of Mental Health & Addiction Services
Approved Mental Health Providers
Providers in **BOLD** are contract providers of TCMHRB
Child serving agencies are noted in GREEN. Agencies that also offer substance abuse treatmenet are noted with an asterisk (*)

Provider	Address	Phone Number
Alta Behavioral Health	1950 Niles-Cortland Rd. NE, Warren	(330)736-0073
Belmont Pines	711 Belmont Ave, Youngstown	(330)759-2700
Cadence Care Network	165 E. Park Ave, Niles	(330)544-8005
Churchill Counseling Services	4531 Belmont Ave #8, Youngstown	(330)759-3040
Coleman Health Services*	103 W. Market St., Warren	(330)394-8831
COMPASS Family & Community Services*	320 High Sreet, NE, Warren	(330)394-9090
Greentree Counseling Center	430 Franklin St. SE, Warren	(330)372-2200
Oakwood Counseling Center	1704 North Rd. SE, Warren	(330)856-4111
Open Water Counseling and Recovery Center	4964 Belmont Ave., Youngstown	(330)539-3200
PsyCare		
Warren	8577 E Market St., Warren	(330)856-6663
Cortland	378 N. High St., Cortland	(330)637-8668
Youngstown	2980 Belmont Ave	(330)759-2310
Serenity Center of Youngstown	1947 E. Market St., Warren	(330)533-8888
Specialty Care Counseling LTD	2000 E. Market St., Ste #1, Warren	(330)399-1221
Thrive Counseling	1705 Woodland St. NE, Warren	(330)469-6777
Travco Behavioral Healthcare, Inc.*	2671 Youngstown Road SE, Warren	(330)822-6545
Valley Counseling Services*		
Adult Office	150 E. Market St., Warren	(330)399-6451
Children's Office	318 Mahoning Ave., Warren	(330)395-9563
Southeast Office	4970 Belmont Ave., Youngstown	(330)759-8237

Trumbull County Crisis Services – Mental Health

Help Network
211
Available 24/7
Services: crisis calls, community resources

Coleman Access
Adult Crisis
103 W. Market Street, Warren, 44481
(330)392-1100
Hours: M-F 8 am- 4:30 pm. *Phones roll to Help Network after hours
Services: crisis calls, walk-in crisis services, behavioral health and detox assessments, community mental health outreaches, mental health probates
Youth Crisis – under 21 years old
Mobile Response and Stabilization Services (MRSS)
(330)392-1190/1-888-418-MRSS(6777)
Hours: M-F 8 am- 4:30 pm. *Phones roll to Help Network after hours
Services: mobile outreach, behavioral health assessments, case management, family peer support

Trumbull Regional Medical Center Emergency Room
1350 East Market St., Warren, 44483
Hours: 24/7
Services: behavioral health assessments

Walk-in Clinics for Outpatient Mental Health Services
**Walk-ins are seen on a first come, first served basis. No appointment required.*

Coleman Health Services
103 W. Market Street, Warren, 44481
(330)394-8831
M-F 11 am-1:30 pm

Compass Family and Community Services
320 High St NE, Warren, 44481
(330)394-9090
M-F 8 am-3 pm

Crisis Stabilization Unit
**Treatment is covered 100% by the TCMHRB, regardless of insurance. An assessment must be completed at Coleman Access (8:30 am-3:30 pm) or TRMC (24/7). No appointment necessary.*

- Riverbend Treatment Center
- Broadway Crisis Unit

Detox Services

**Treatment for uninsured and underinsured clients is covered by TCMHRB. To access funds, an assessment must be completed at Coleman Access (8:30 am-3:30 pm) or TRMC (24/7). No appointment necessary.*

- First Step Recovery
- FSR of Parkman
- Glenbeigh – Rock Creek

QUESTIONS?

Katie Cretella, MBA, MSEd, LPCC

Phone: (330)675-2765 ext. 117

Email: kcretella@trumbullmhrb.org

TRUMBULL COUNTY
Mental Health and Recovery Board

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JUSTICE PAT DEWINE
OHIO SUPREME COURT

Justice Pat DeWine Supreme Court of Ohio

Pat DeWine has been a member of the Ohio Supreme Court since January 2017. Prior to his election to the Supreme Court, Justice DeWine served for four years on the First District Court of Appeals, and prior to that, for four years on the Hamilton County Common Pleas Court.

Justice DeWine is an adjunct professor at the University of Cincinnati College of Law where he teaches Appellate Practice and Procedure. In addition, he has taught undergraduate courses at the University of Cincinnati in Ohio Government & Politics and American Courts.

Justice DeWine graduated from the University of Michigan Law School in the top ten percent of his class. He received his undergraduate education at Miami University, where he earned summa cum laude honors. He was also a member of the Varsity Track and Cross Country teams.

After law school, he clerked for the Honorable David A. Nelson on the United States Court of Appeals for the Sixth Circuit. Justice DeWine later practiced law for 13 years in Cincinnati with KMK Law, where he handled a diverse range of litigation matters, including appellate litigation, mass tort bankruptcies, and constitutional issues.

Prior to becoming a judge, Justice DeWine served as a Hamilton County Commissioner and a member of Cincinnati City Council. He was a founder of the Build Cincinnati reform group that successfully passed a charter amendment to allow Cincinnati voters to directly elect the Mayor.

FORGET WORK/LIFE BALANCE:
A FRESH TAKE ON MAINTAINING BALANCE AND HANDLING STRESS

Dave Caperton
Keynote Speaker

keynotes - workshops - seminars

Dave Caperton

Laughing Matters

Dave Caperton believes that laughing matters. Not just because laughter is a great way to build connections and energy, but because it's also a great tool for delivering transformative learning. Drawing on his 20-plus years as an international keynote speaker, business owner, entrepreneur and executive coach and his background as an award-winning educator, stand-up comedian and comedy writer, Dave combines his business experience and teaching strategies with razor sharp humor and comic timing to provide transformative insights on creating balance and building a workplace culture where engagement, retention and service are simply the by-products of making joy a mission-level goal.

Dave's programs fuse in-depth research and proven learning strategies with side-splitting humor and story-telling to deliver programs that don't just inspire laughter, they demolish barriers between groups and open pathways to shift from transaction-based to relationship-driven success. His entertaining conversations about joy and connection provide his clients with a new vocabulary and concrete actions to build connection and trust, and to create a people-centric culture that benefits both employees and customers alike. Since starting his own speaking and coaching business—Speaking of Joy!— in 1999, Dave has worked with over 1000 client organizations across 4 continents teaching them how and why to choose joy for authentic and sustainable success.

Clients and audiences value his programs because they provide a motivational experience that is highly interactive, energizing, and wildly funny. But unlike many humorous speakers, Dave's programs are infused with relevance and transformative takeaways to provide lasting value throughout the event and beyond.

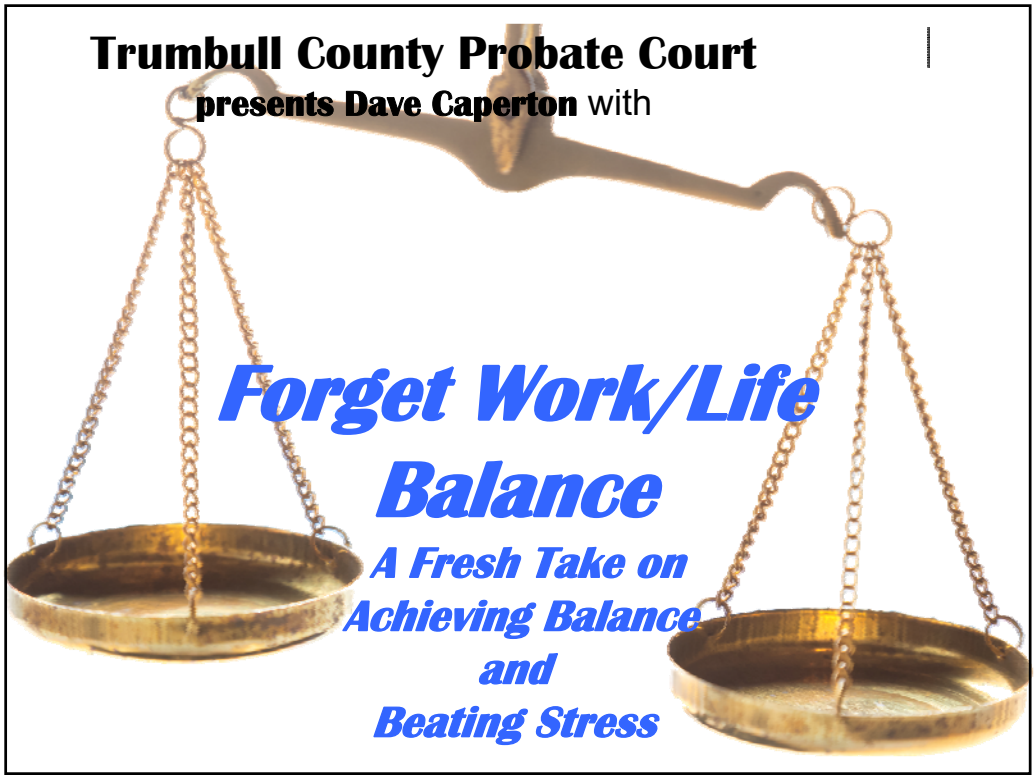
Dave's talks have been requested and lauded by such iconic organizations as JP Morgan Chase, Boeing, Lockheed-Martin, Nationwide Insurance, Limited Brands, The Cleveland Clinic, True Value Hardware, NBC Comcast, the FAA and hundreds of others.

Dave is the author of **Happiness Is a Funny Thing**, and **30 Days To a Happier Workplace.** He and his wife, and partner in joy, Suzanna, live in Columbus, Ohio.

www.davecaperton.com dave@davecaperton.com tel: 740-JOY-FULY

Trumbull County Probate Court

presents Dave Caperton with



Forget Work/Life Balance

A Fresh Take on Achieving Balance and Beating Stress

Work/Life Balance

24,220

Amazon.com results for books about “Work-Life Balance”

Stress and Perception

"The amount of stress and the perception that stress affects health interacted such that those who reported a lot of stress and that stress impacted their health a lot had a 43% increased risk of premature death."

-Health Psychology, 2012

Small Things Matter

"Being more balanced doesn't mean dramatic upheaval in your life. With the smallest investments in the right places, you can radically transform the quality of your relationships and the quality of your life."

-Nigel Marsh

ENGAGEMENT

- 70% of employees are **disengaged**
  Gallup, 2011

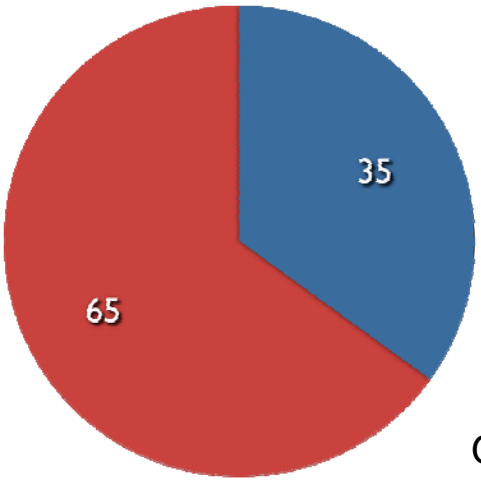
ENGAGEMENT

- 18% are **actively disengaged**
  Gallup, 2011

TRUST

7%

Maritz, 2010



Gallup, 2004

Do-It-Now!

Express **THANKS!**

MISSION part 1

Serve ?

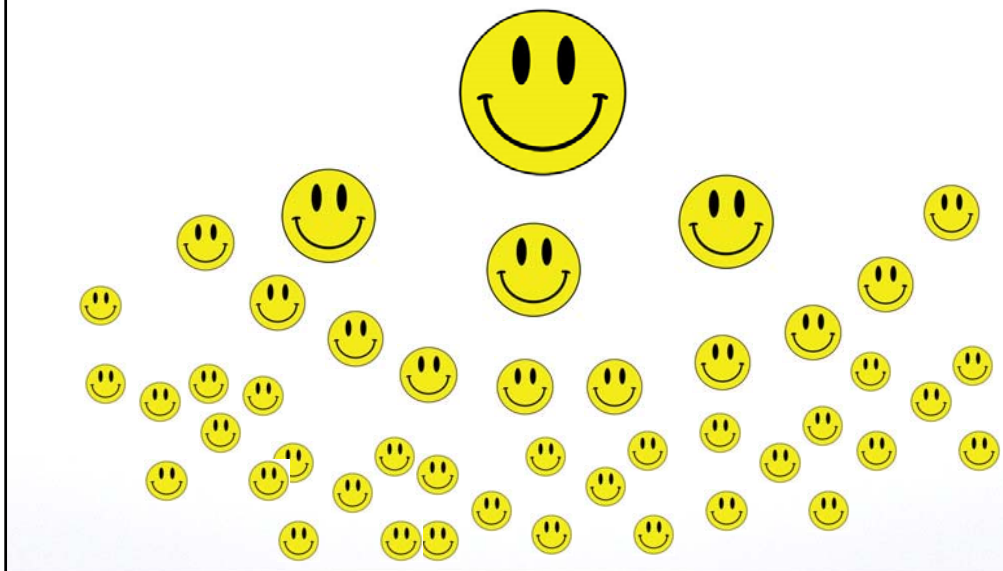
MISSION part 2

Success?

JOYFUL INFLUENCE

One person's expressed joy and positivity continues to have a significant impact at a ***THIRD DEGREE OF SEPARATION.***

James Fowler and Nicholas Christakis, 2008



STRESS

=

The body's **response**
to ***any*** **demand**

Eustress

DISTRESS

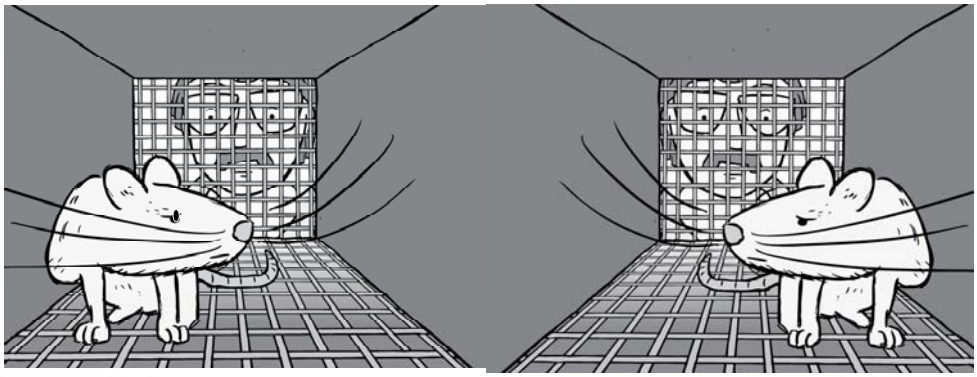
Eustress

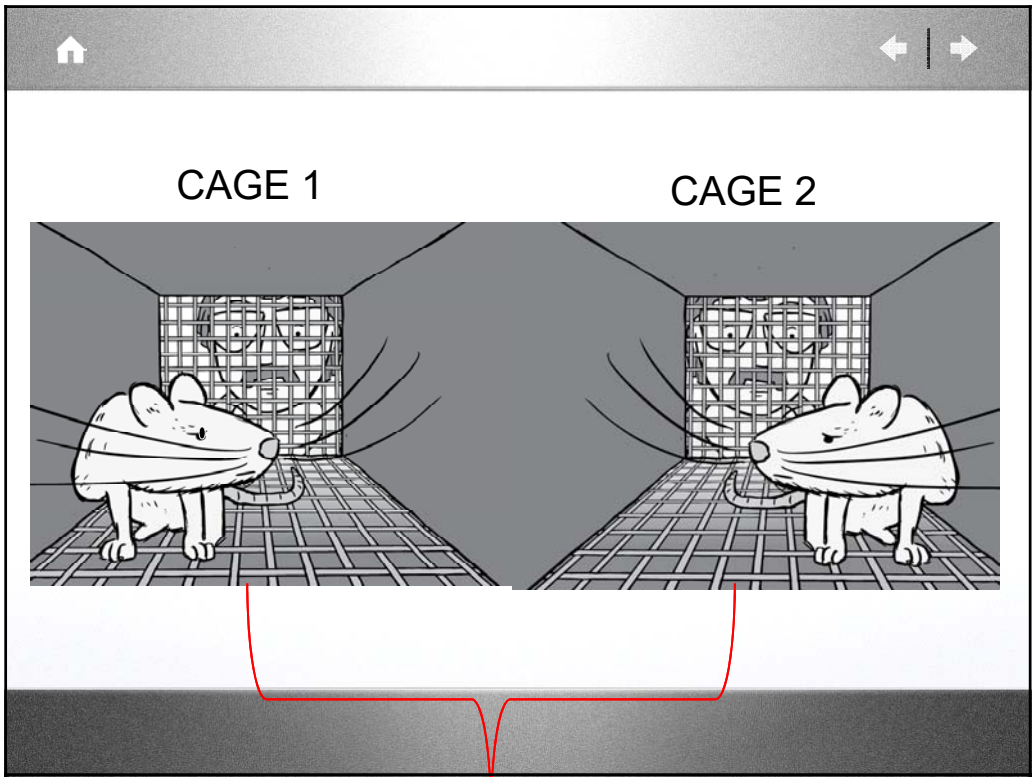
***PERCEPTION* OF CONTROL**

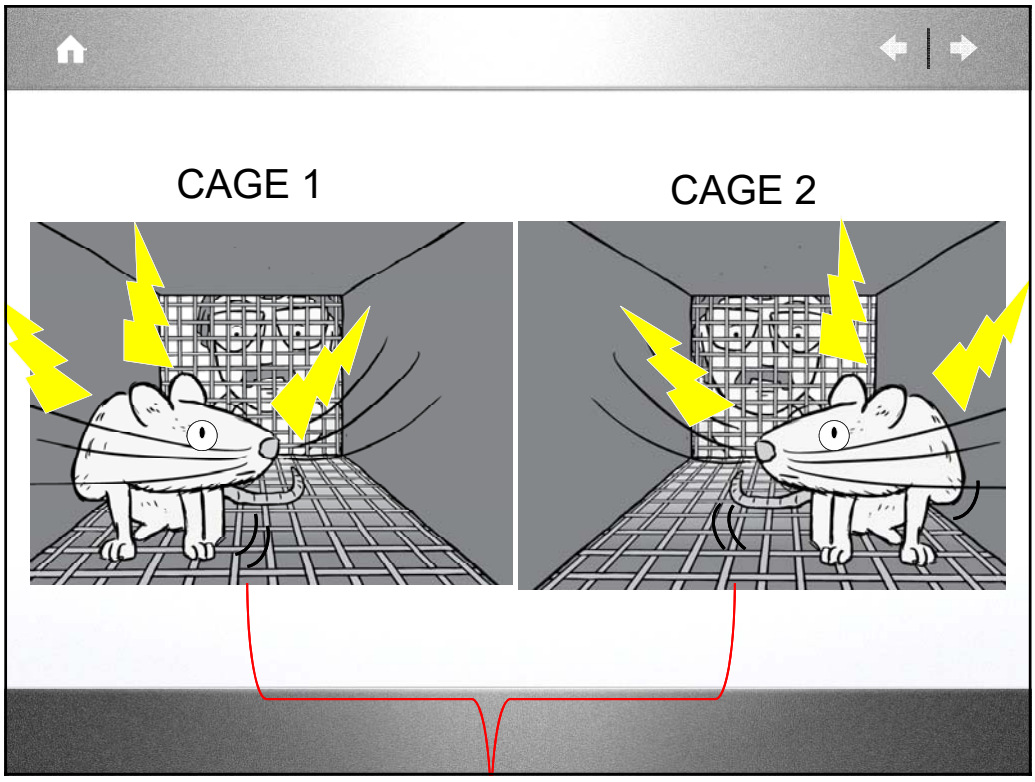
DISTRESS

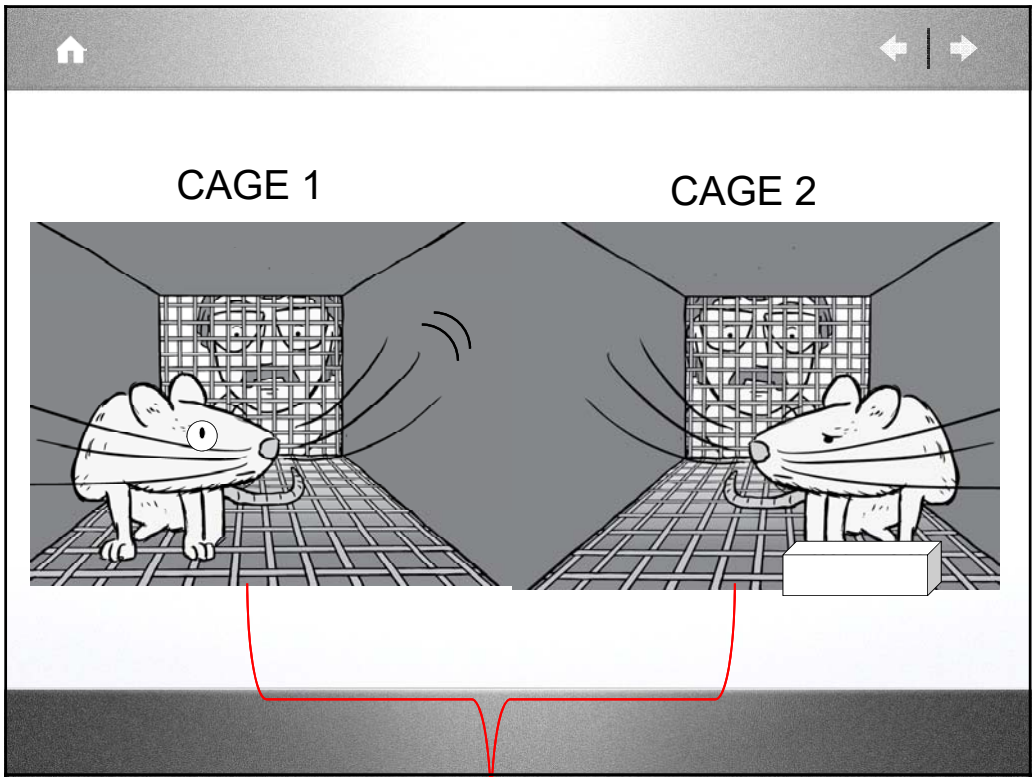
CAGE 1

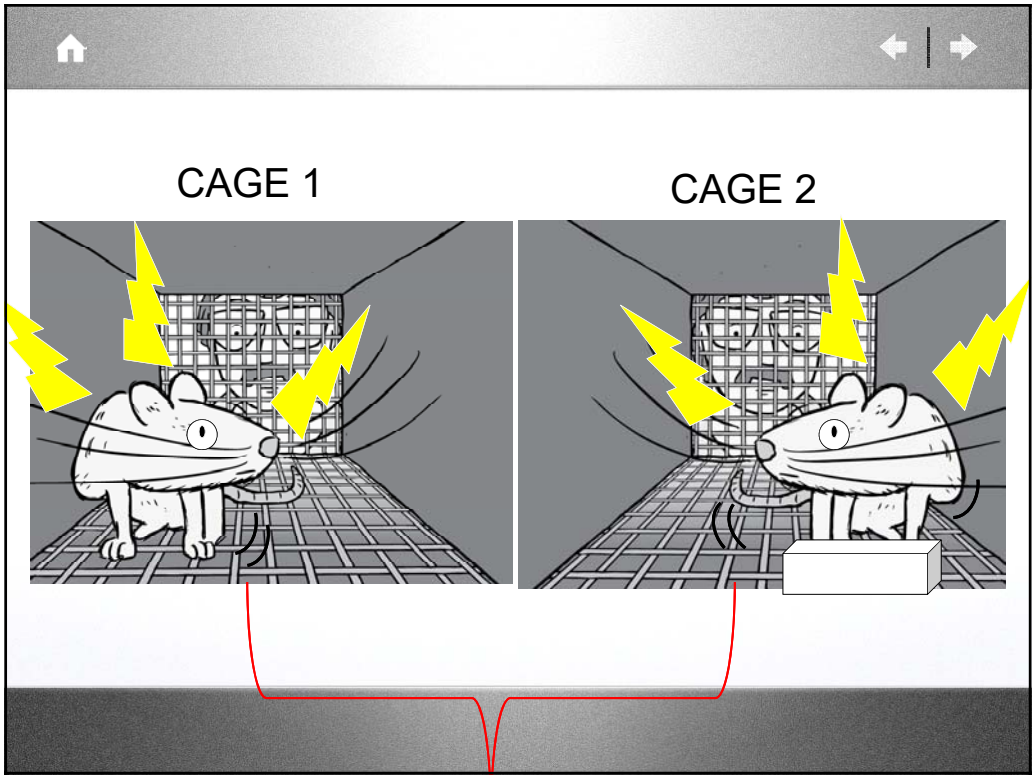
CAGE 2




CAGE 1
CAGE 2


CAGE 1
CAGE 2


CAGE 1
CAGE 2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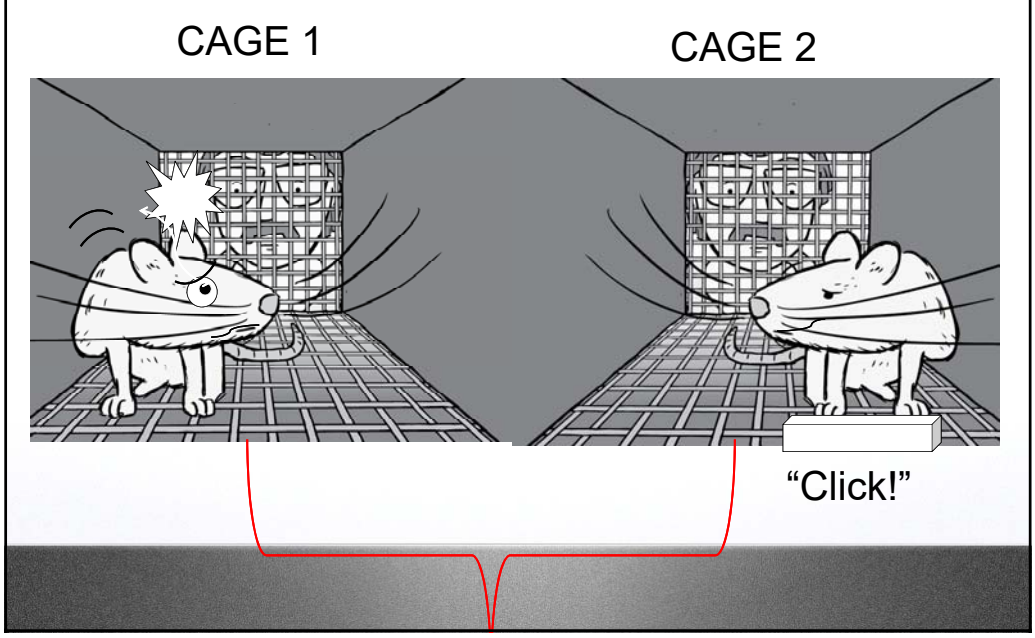


Ingredients for Balance at Work

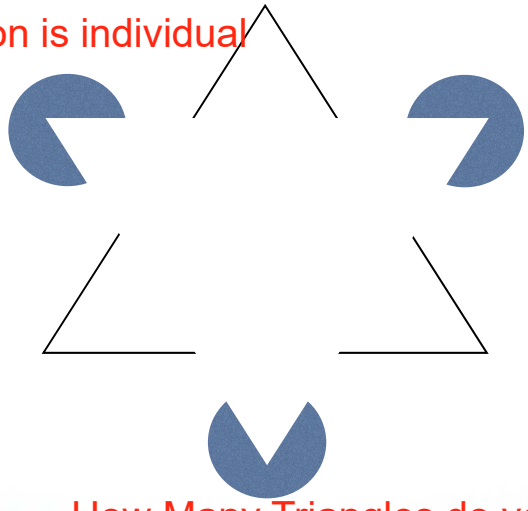
Perception
Challenge
Relationships
Recognition
Meaning
Growth

Intake
Belonging
Support
JOY
Trust
Focus

Perception is ...

REALITY

Perception is individual



How Many Triangles do you see?

Shark Attack!

Do-It-Now!

INTAKE = OUTCOME

Intake

What you **take in** *(physically, mentally, & spiritually)* affects what you **get out** when the pressure is on

Patients who used positive words to discuss their health responded significantly better to treatment and recovered more rapidly from injury than patients who used negative words.

- Dr. James Pennebaker, Univ. of Texas at Austin

Healing Words

SOCIAL SCRIPTS

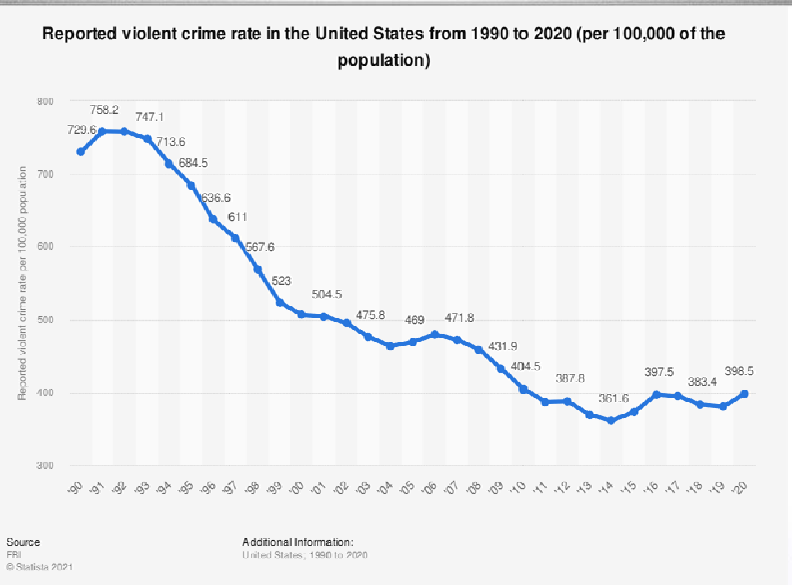
"Compared to 20 years ago, people today . . ."

"The government is. . ."

"Kids nowadays are . . ."

"The American work ethic today is . . ."

"Crime today is . . ."



Healing Humor

- Humor as a Toy
- Humor as a Tool

The Humor Response

- Smile
- Laugh
- Violent Laughter
- Loss of bladder control

Do-It-Now!

Use Compassionate **HUMOR**

Do-It-Now!

LOOK THE WAY YOU WANT TO FEEL

Emotional Meaning

what communicates attitudes and feelings in a face-to-face interaction?

WORDS	7%
VOICE	38%
PHYSICAL	**55%**

A. Merhabian, UCLA

Instant Face Lift

Viewers guessed smiling faces an average of 2.5 years younger

Do-It-Now!

Use the **Magic Ratio**

Magic Ratio of Positives to Negatives

Good Marriage = 5:1

Good Work Team = 3:1

John Gottman, 1992

Do-It-Now!

Check your **FOCUS**

The Power of Focus

JOY ⟷ Pain

How do you explain **adversity** to yourself?

Pessimism vs Optimism

- ***Personal***
- ***Pervasive***
- ***Permanent***

- **Random**
- **Limited**
- **Temporary**

Do-It-Now!

Express **THANKS**

Check your **FOCUS**

Use Compassionate **HUMOR**

INTAKE = OUTCOME

LOOK THE WAY YOU WANT TO FEEL

DRAFTING WILLS AND TRUSTS

Claire Robinson May, Esq.
Professor of Law
Cleveland-Marshall College of Law

Cleveland-Marshall College of Law

Claire C Robinson May

Title: Senior Legal Writing Professor and Admin. Liaison

Office: LL 212A

Phone: 216-875-9842

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Address: 2121 Euclid Ave. LL 212A, Cleveland, OH 44115

Education:

Harvard College, A.B. *magna cum laude*, History and Science 1993
Case Western Reserve University School of Law, J.D. *cum laude*, 1996
Cleveland State University (NEOMFA), M.F.A. Creative Writing, 2014

Brief Bio:

Professor May focuses her teaching on developing students' writing, research, and professional skills needed for success in real world legal practice. Prior to joining Cleveland-Marshall in 2001, Professor May was in private practice with large law firms in Cleveland and Washington, D.C. Prof. May's practice focused on business litigation, including complex commercial matters. She and colleague Professor April Cherry have developed and co-taught an innovative course integrating the doctrine of estates and trusts with the research, document drafting, and other professional skills required for an estates and trusts practice. She is the Founding Chair of the Cleveland-Marshall Women's Committee, and she serves on the College of Law Diversity Council. Professor May presents her work at conferences around the country.

Recent Publications:

Commentary on *In re Will of Moses* in FEMINIST JUDGMENTS: REWRITTEN TRUSTS & ESTATES OPINIONS, Deborah S. Gordon, Browne C. Lewis & Carla Spivack, Eds. (Cambridge University Press 2020).

Learning By Doing: Lessons from an Integrated Doctrine & Drafting Course, in LAWYERING SKILLS IN THE DOCTRINAL CLASSROOM: USING LEGAL WRITING PEDAGOGY TO ENHANCE TEACHING ACROSS THE LAW SCHOOL CURRICULUM, Tammy Pettinato Oltz, Ed. (Carolina Academic Press 2020).

Recent Honors and Awards:

Dean's Teacher Honoree 2019-21 for teaching innovation and excellence
Cleveland State University Service Award for 20 years of service

Teaching Areas:

Legal Drafting
Legal Writing and Litigation
Legal Writing, Research, and Advocacy
Estates and Trusts: Doctrine and Drafting

Professional Affiliations:

Legal Writing Institute
Association of Legal Writing Directors
American Bar Association
Ohio State Bar Association
Cleveland Metropolitan Bar Association
Member of the Ohio Bar

Professional Service:

The Legal Aid Society of Cleveland, Volunteer Attorney, 2022
Election Protection Volunteer Attorney:
Election Protection Call Center Volunteer Attorney, 2020 Presidential election
Official Precinct Observer, 2008, 2012 & 2016 Presidential elections
Official Observer, Provisional Ballot Review, Cuyahoga County Board of Elections, 2004 Presidential election

Community Service:

Board Member, Talespinner Children's Theatre (2014-2019)

Drafting Wills and Trusts

Professor Claire C. Robinson May

Cleveland-Marshall College of Law
Cleveland State University

I. *Whatever Lola Wants….*

Testator/grantor intent

★ Communicate clearly and directly.

★ Ask, review, and confirm.

★ Get to the end of the line (beneficiaries).

★ Counselor role and common sense.

★ NOTES:

II. *…Lola Gets.*

〰Enforceability

★ Comply with all legal requirements.

★ Cover your bases.

★ Plan for contingencies.

★ NOTES:

III. *Up a Lazy River*

〰️Readability

★ Consider your audience(s).

★ Don’t make your reader(s) work!

★ Make your document easy to navigate.

★ Organize with intention.

★ Draft simply.

★ Revise carefully.

★ NOTES:

IV. *All the Things You Are*

〰Vocabulary

★ Terms of art

★ All the words?

★ Legalese and magic words

★ NOTES:

V. *I Can't Get Started*

〰Using Forms

★ Finding forms

★ Updating forms

★ Improving forms

★ NOTES:

VI. *It Never Entered My Mind*

〰️Construction

★ Avoiding ambiguities

★ Avoiding imprecise language

★ Avoiding unnecessary and risky redundancies

★ Anticipating construction issues and resolving them

★ NOTES:

WHERE IN THE RULES DOES IT SAY THAT?

Kimberly Vanover Riley, Esq.
Montgomery Jonson LLP

Kimberly Vanover Riley

Kim Riley is a partner with the law firm of Montgomery Jonson LLP, where she practices in the areas of employment law, civil rights, and disciplinary defense. She provides pre-litigation counseling and policy development to private and public sector employers and public officials; she conducts internal workplace investigations; and she defends public officials and entities in litigation. In addition, she regularly defends attorneys and judges in professional conduct investigations, as well as in hearings before the Ohio Board of Commissioners on Character and Fitness and the Ohio Board of Professional Conduct.

Ms. Riley received her Bachelor of Arts in Communication Arts from the University of Cincinnati in 1994, with distinction as an Honors Scholar. She received her Juris Doctorate from the University of Cincinnati in 1997, graduating in the Order of Barristers.

Ms. Riley is a certified instructor in Human Resources for the National Center for State Courts' Institute for Court Management. She is an Ohio State Bar Certified Specialist in Labor and Employment Law, and she currently serves on its Specialty Board—which sets eligibility standards for the certification, prepares its written examination, and determines applicants' eligibility. She has been regularly included in Ohio's Super Lawyers/Super Lawyer Rising Stars publication, and she has a 10.0 Avvo Rating. She has previously served as the Chair of the Ethics and Professionalism Committee of the Cleveland Metropolitan Bar Association and the Chair of its Labor and Employment Section. She also serves on the CMBA Bar Admissions Committee, and she is a Master of the Bench in the Cleveland Employment Inn of Court. She has served on two joint planning committees of the Supreme Court, Ohio State Bar Association, and Commission on Professionalism to conduct statewide education on sexual harassment prevention for the bar.

Ms. Riley is the original and sole author of the Ohio chapter of BNA's *State-by-State Wage and Hour Law Survey* and its annual supplements, soon in its fourth edition. She has served as a contributing author to the ABA's annual FMLA and ADEA updates on several occasions, and as a co-author of articles in the *Journal of the Law and Social Work* (*Morgan v. Fairfield Family Counseling*: Duty to Control?) and *Women's Studies in Communication* (The Role of Gender and Feminism in Perceptions of Sexual and Sexually Harassing Communication). In addition, she has written articles for the Bar Journal of the Cleveland Metropolitan Bar Association and the Ohio Judicial Conference's *For the Record*.

Ms. Riley frequently speaks to groups of employers, managers, judges, and attorneys on various aspects of employment law, civil rights, and legal ethics. She has served as an adjunct professor at the University of Cincinnati and Cuyahoga Community College, and she has served as a guest lecturer at the Northern Kentucky University and the University of Louisville. She is a regular instructor for the Ohio Judicial College, and she has also presented seminars for the National Center for State Courts Center for Judicial Ethics, the Ohio Common Pleas Judges Association, the Association of Municipal/County Judges of Ohio, the Ohio Association of Probate Judges, the Ohio Association of Juvenile Court Judges, the Ohio Judicial Conference, the Ohio Association for Court Administration, the Ohio Association of Municipal/County Court Clerks, the Ohio Juvenile Detention Directors Association, the Ohio Urban Courts Conference, the Miller Becker/Ohio State Bar Association annual statewide ethics seminar; the Cincinnati Bar Association, the Cleveland Metropolitan Bar Association, the West Shore Bar Association, the Clermont County Chamber of Commerce, the Ohio Society of CPAs, the Society for Human Resources Management, the Southwestern Ohio Chiropractic Association, the Arkansas Administrative Office of Courts, the Arkansas Judicial Conference, the New Mexico Administrative Office of Courts, Lorman Education Services, the Council on Education in Management, and the National Business Institute. She is also independently retained to conduct employee and supervisor training for public and private sector employers.

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Main: (216) 221-4722
www.mojolaw.com

Montgomery Jonson

Cincinnati
600 Vine Street
Suite 2650
Cincinnati, OH 45202
Main: (513) 241-4722
www.mojolaw.com

This year's Ethics & Professionalism presentation will be an interactive hour of questions and answers, designed to help you gauge your familiarity with the ethical rules, and to see how well you would intuitively avoid some of the most common ethical pitfalls confronting practitioners.

You will consider various scenarios and vote on how you would respond on your cell phone, laptop, or tablet. After everyone has voted, we'll see how others voted in real time, then discuss the right answers and the rules/logic behind them.

This is one of the few times we don't want you to read the materials ahead of time. Assessing your on-the-spot reactions will highlight the areas where it's time to dust off your copy of the rules. A link to download all questions, answers, and citations will be provided at the end of the presentation instead.

In addition to your phone, laptop, or tablet, it may be beneficial to bring a paper or PDF copy of the Rules of Professional Conduct and Code of Judicial Conduct to bring along, if you're someone who likes to annotate them:

RPC - https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/ProfConduct/profConductRules.pdf

CJC - https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/conduct/judcond0309.pdf

1

WHERE IN THE RULES DOES IT SAY *THAT*?

(OR THERE ARE NO DUMB QUESTIONS)

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Montgomery Jonson LLP
Cleveland
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TO VOTE ON POLLING QUESTIONS: HTTP://ETC.CH/L7CM

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1. WHAT IS JUDGE FREDERICKA'S FAVORITE MOVIE?

A. The Sound of Music
B. My Cousin Vinny
C. The Godfather
D. Legally Blonde
E. Titanic

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HAD IT BEEN AN OPTION, *SPARTACUS* WOULD ALSO HAVE BEEN AN ACCEPTABLE ANSWER.

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2. Colleague With Benefits?

Ross does outside litigation for Calvin Klein.

Rachel, the in-house attorney who gives him work and to whom he reports on his cases asked him out for a drink after a mediation.

There were sparks.

A. Go for it! Inside and Outside Counsel are akin to colleagues in the same law firm. Also, Rachel isn't Ross' client (but might be his lobster).

B. PIVOT! Even though Calvin Klein is Ross' client, this still isn't permissible.

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RPC 1.8(J) & COMMENT [19]

(j) A lawyer shall not solicit or engage in sexual activity with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

[19] When the client is an organization, division (j) of this rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs, or regularly consults with that lawyer concerning the organization's legal matters.

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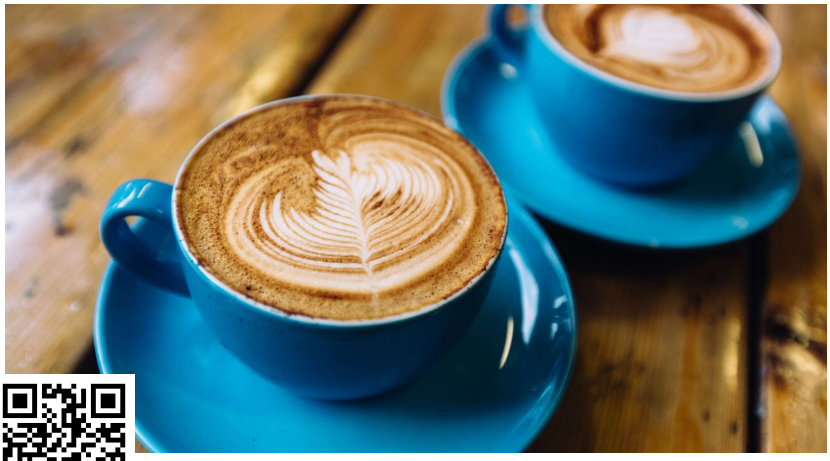
3. Outrageous, Egregious, Preposterous!

Two prospective plaintiffs, Kramer and Elaine, want to retain me to sue Java World for personal injuries they each sustained from hot café latte burns.

A. Green light

B. Yellow light

C. Red light



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RPC 1.7(A)(2)

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:…

(2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

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RPC 1.7(B)

(b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:

(1) the lawyer will be able to provide competent and diligent representation to each affected client;

(2) each affected client gives *informed consent, confirmed in writing*;

(3) the representation is not [prohibited by law or directly adverse in the same proceeding]

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RPC 1.7, COMMENT [25]

Special Considerations in Common Representation

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment, and recrimination.

Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.

In some situations, the risk of failure is so great that multiple representation is plainly impossible…[such as] where contentious litigation or negotiations between them are imminent or contemplated….[or] when it is unlikely that impartiality [between them] can be maintained.

Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

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RPC 1.7, COMMENT [31]—*INFORMED CONSENT*

While potential conflicts should be fully explained and consented to in writing, merely sending clients a letter shouldn't be the beginning or end of the exercise—it typically won't demonstrate informed consent.

- First, have a *dynamic conversation* to explain the potential issues with *adequate examples* to ensure everyone is on the same page (e.g., shared privilege, material limitations evolving re: divergent testimony, litigation instructions, settlement)
- *Then* follow-up with written memorialization.

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4. Show Me The Money!

Kramer and Elaine consented to joint representation. Kramer's deposition testimony was solid, but Elaine's raised questions about intervening negligence by Norman Newman. Newman's testimony seems likely to create new problems with liability in both plaintiffs' liability cases—and they may each benefit by blaming the other.

Java World later made a single settlement offer, refusing to settle with only one party: They offered Kramer free coffee & $50,000, but only offered Elaine some lobster bisque. Kramer wants to settle; Elaine wants to try the case.

A. I can keep representing them both.

B. I can only represent one of them.

C. I have to withdraw from both cases.

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C. I have to withdraw from both cases.

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RPC 1.7, COMMENT [8]

When a conflict arises from a lawyer's representation of more than one client, whether the lawyer must withdraw from representing all affected clients or may continue to represent one or more of them depends upon whether:

(1) the lawyer can both satisfy the duties owed to the former client and adequately represent the remaining client or clients, given the lawyer's duties to the former client (see Rule 1.9); and

(2) any necessary client consent is obtained.

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5. The Jury Demand For…*One Million Dollars*

You represent Andy Dwyer in a suit against the City of Pawnee for injuries he sustained when falling into an open construction pit.

Andy broke both of his legs while drunkenly trying to retrieve a discarded toaster from the pit. He'll never get more than the cost of his medical bills, plus maybe some pain & suffering—and you'll alienate the jury if you ask for more. But Andy insists you seek $1M in closing argument…mostly because he's planning to make a Dr. Evil gesture when you do.

A. You must seek $1M; he's the client.

B. You may seek whatever you think is appropriate.

C. You must seek $1M or move to withdraw.

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5. The Jury Demand For…*One Million Dollars*

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RPC 1.2(A)

Subject to divisions (c) [limiting representation], (d)[illegal/fraudulent], and (e) [criminal/disciplinary threats], a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

A lawyer may take action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer does not violate this rule by…avoiding offensive tactics….A lawyer shall abide by a client's decision whether to settle a matter.

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RPC 1.4

(a) A lawyer shall do all of the following:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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RPC 1.16(B)(4) & COMMENT [7]

(b) Subject to divisions (c), (d), and (e) of this rule, a lawyer may withdraw from the representation of a client if…the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

(c) – must follow tribunal rules for withdrawing/obtaining permission

(d) – Must take reasonable steps to protect clients' interest (e.g., notice, reasonable time for other counsel, delivering file).

(e) – must promptly refund unearned fees.

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RPC 1.16,COMMENT [7]

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests.

The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

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I know my client's family is coming in for Christmas Eve on Friday. I received an adverse ruling in her case on Thursday afternoon – can I want until Monday to pass along the decision?

A. Yes—so long as there is no prejudice arising from this delay, it's okay to wait.

B. Maybe—not unless the client gave me express advance permission to delay news.

C. No—RPC 1.4 requires prompt client communication.

6. Fa La Freaking La

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C. No—RPC 1.4 requires prompt client communication.

6. Fa La Freaking La

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RPC 1.4, COMMENT [7]

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication.

Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client.

A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. …

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7. Judicial Efficiency

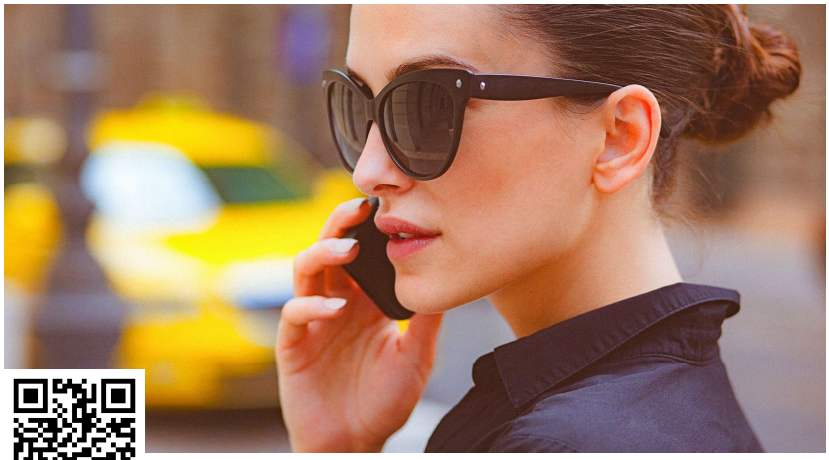
Opposing counsel just filed a MSJ in my case. The Judge calls me and wants to discuss the motion; I say perhaps we should have a court conference or a conference call and involve the other side. The judge says it's not necessary—he has already called the other side to discuss their motion with them.

Can I participate in the call?

A. Yes

B. Maybe

C. No



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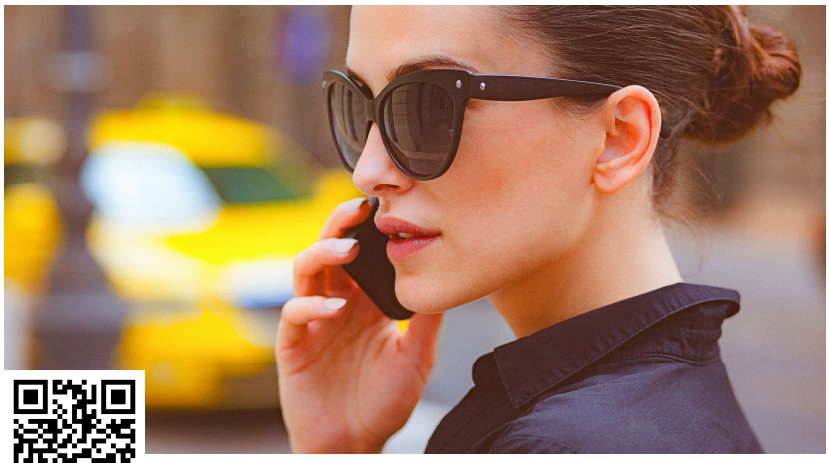

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RPC 3.5(A)(3)(I) & 8.4(F)

(a) A lawyer shall not do any of the following:

(3) communicate ex parte with either of the following:

(i) a judicial officer or other official as to the merits of the case during the proceeding unless authorized to do so by law or court order.

It is professional misconduct for a lawyer to do any of the following:

(f) knowingly assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;

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What most accurately summarizes my obligation(s)?

A. I must report the Attorney and the Judge.

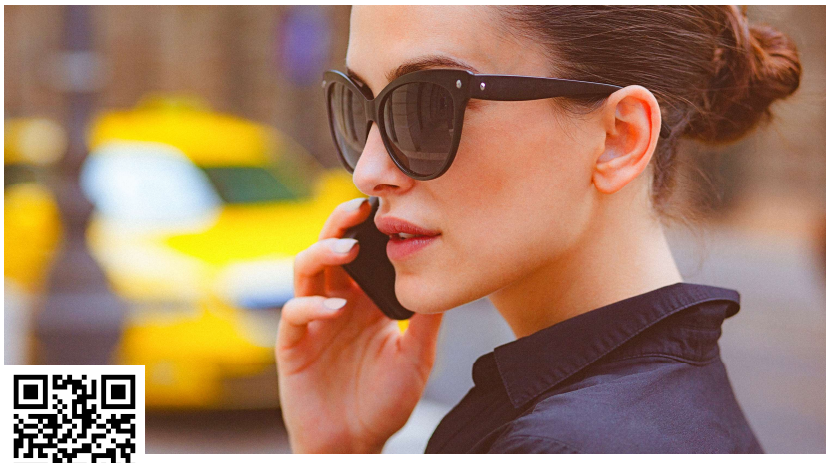
B. I may report the Attorney and the Judge (but I don't have to report either).

C. I must report the Attorney; I may report the Judge.

D. I must report the Judge; I may report the Attorney.

E. I can't report either one—I didn't observe either of their conduct.

8. Tattletale?



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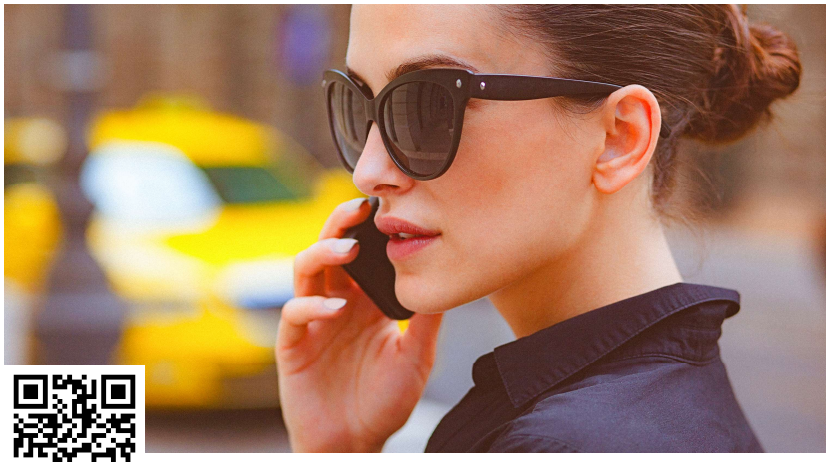

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RPC 8.3(A),(B)

(a) A lawyer who possesses unprivileged knowledge of a violation of the Ohio RPC that raises a question as to any lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.

(b) A lawyer who possesses unprivileged knowledge that a judge has committed a violation of the Ohio RPC or applicable rules of judicial conduct shall inform the appropriate authority.

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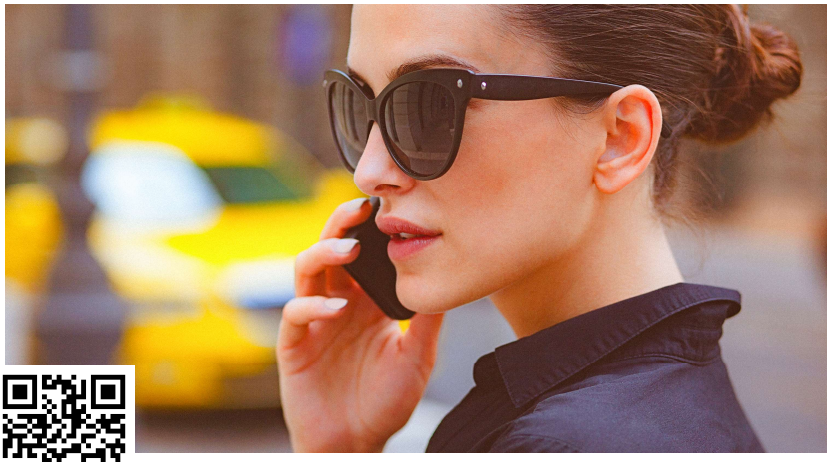
9. Tattletale?

What if the Judge had called me first, before calling the other side, and he didn't press the issue, agreeing to schedule a joint call with counsel instead?

A. I must report the Judge.

B. I may report the Judge.

C. There isn't a violation to report—thanks to me, the Judge didn't violate the rule.



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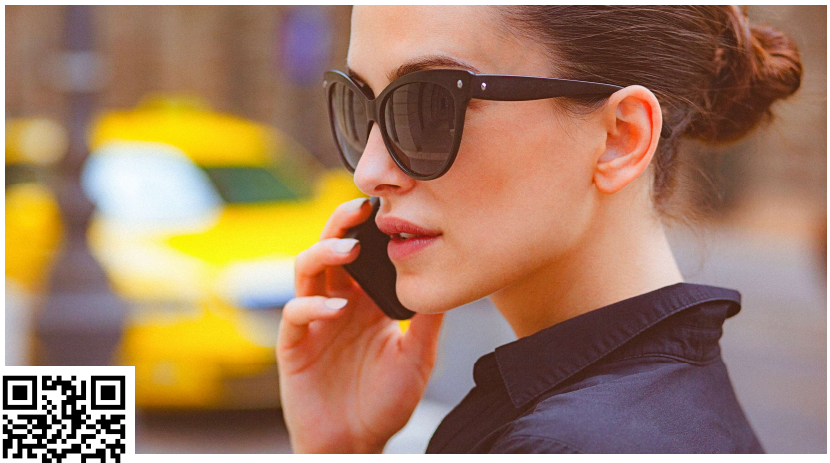

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CJC 2.9(A)(1),(5),(6)

(A) A judge shall not initiate, receive, permit, or consider *ex parte* communications, except as follows:

(1) When circumstances require it, an *ex parte* communication for scheduling, administrative, or emergency purposes, that does not address substantive matters or issues on the merits, is permitted, provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(5) A judge may initiate, receive, permit, or consider an *ex parte* communication when expressly authorized by law to do so;

(6) A judge may initiate, receive, permit, or consider an *ex parte* communication when administering a specialized docket, provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage while in the specialized docket program as a result of the *ex parte* communication.

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I'm representing a physician who is dissolving his practice with another physician. The issues are monetary and both sides are being professional. I see the other physician at a social event and we talked for quite a while about the Browns but nothing about the case. I was trying to create a good impression on him outside the case that I hoped would carry over to our upcoming mediation. He is represented by counsel. Ever since then I have been feeling guilty – what if he mentions our conversation at the mediation? Have I done something wrong?

A. Yes.

B. Maybe.

C. No.

10. Is there a doctor in the (Dog)House?

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36

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C. No.

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RPC 4.2

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order

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RPC 4.2, COMMENTS [2] AND [4]

[2] This rule applies to communications with any person who is represented by counsel ***concerning the matter to which the communication relates.***

[4] ***This rule does not prohibit communication with a represented person***, or an employee or agent of such a person, ***concerning matters outside the representation.*** For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter….A lawyer may not make a communication prohibited by this rule through the acts of another….Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make….

(But is it the smartest idea? Probably not.)

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11. Car Talk, I

My client owns an auto parts store that sells parts via the internet and by phone. The store has a non-compete agreement with a former employee it believes is now managing a competitor's store.

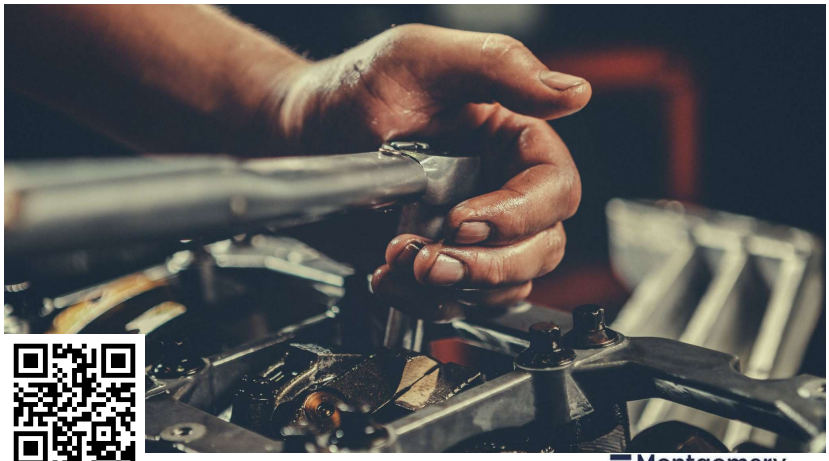
I have sued the competitor and the ex-employee. The competitor denies our former employee works for them, and the ex-employee has dodged service—and isn't represented by the competitor's counsel.

To find the former employee, I'm planning to call the competitor from my cell phone, so my firm name doesn't come up on caller ID, and ask to speak with the ex-employee. If he answers, I'll hang up.

A. Totally OK

B. OK, but exercise caution

C. Not OK at all



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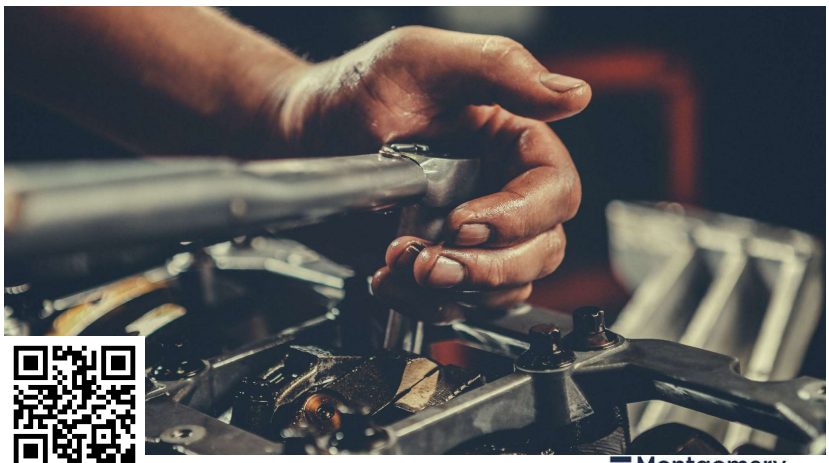

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RPC 4.2, COMMENT [7]

In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule.

In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization

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RPC 3.7

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case;

(3) the disqualification of the lawyer would work substantial hardship on the client.

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- The former employee is a party, but we don't have reason to think he's represented = contact with him is permissible (for now).
- The competitor is a party, and we know it's represented = contact *impermissible* with:
  - Those who supervise, direct, or consult with competitor's lawyers about representation;
  - Those with authority to obligate the competitor in the lawsuit
  - Those whose acts or omissions may be imputed to the competitor
- BPC Op. 2016-5: "Extreme caution should be observed by adverse lawyers when interviewing current employees, even those who do not satisfy the categories in RPC 4.2, [7] [due to potential for inadvertent violation."
- "In close cases, it may be appropriate to notify the corporation's lawyer before making contact with current employees."
- Also, could encounter admissions from competitor's management; could convert ourselves into witnesses requiring our disqualification.

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12. Car Talk, II

I'm not even trying to prove a fact in the case at this point—I just want to serve the former employee.

He is always selling stuff on a local Facebook Marketplace page. I don't have a Facebook account, so I made one using only my first and middle name, and a picture of my dog in my profile.

I responded to a post of his, selling his old vinyl collection, and I'm meeting him in a parking lot this weekend "to buy his records," but I'll serve the Complaint at that time.

A. Yes.

B. Maybe.

C. No.

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I responded to a post of his, selling his old vinyl collection, and I'm meeting him in a parking lot this weekend "to buy his records," but I'll serve the Complaint at that time.

A. Yes.

B. Maybe.

C. No.

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RPC 8.4(C)

It is professional misconduct for a lawyer to do any of the following:

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

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I'm thinking of hiring a Private Investigator instead.

I've told him to call the competitor, saying he wants to speak with the former employee about buying a transmission; when they connect him, he'll have enough of a conversation to demonstrate the employee works there.

A. Yes

B. Maybe

C. No

13. Car Talk, III

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A. Yes

B. Maybe

C. No

13. Car Talk, III

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RPC 8.4(A)

It is professional misconduct for a lawyer to do any of the following:

(c) Violate or attempt to violate the Ohio RPC, *knowingly* assist or induce another to do so, or do so through the acts of another.

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14. Car Talk, IV

My client isn't a lawyer, and I know the Rules permit represented parties to talk with each other. So can I just tell him that *he* can call the competitor to see if the employee answers; or *he* can arrange to meet him on Facebook Marketplace; or *he* can hire a PI to track the guy down or serve him.

This is permissible, right? *Right*?

A. Yes.

B. Maybe.

C. No.

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14. Car Talk, IV

My client isn't a lawyer, and I know the Rules permit represented parties to talk with each other. So can I just tell him that *he* can call the competitor to see if the employee answers; or *he* can arrange to meet him on Facebook Marketplace; or *he* can hire a PI to track the guy down or serve him.

This is permissible, right? *Right*?

A. Yes.

B. Maybe.

C. No.

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RPC 8.4(A), COMMENT [1]

[1] Lawyers are subject to discipline when they violate or attempt to violate the Ohio RPC, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Division (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

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My law practice is a C-corporation. May I still refer to my fellow shareholders as my "partners"?

A. Yes.

B. Maybe

C. No.

15. A law firm by any other name is just as sweet.

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54

My law practice is a C-corporation. May I still refer to my fellow shareholders as my "partners"?

A. Yes.

B. Maybe.

C. No.

15. A law firm by any other name is just as sweet.

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RPC 1.0(H)

As used in these rules:

(h) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

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BUT CONSIDER RPC 7.1-COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make or use a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.

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16. Liar, Liar…(You Know the Rest)

I represented a client before an administrative agency earlier this year. Our opponent exhausted all appeals, and we prevailed.

She just told me she was untruthful in her testimony. What am I obligated to do?

A. Correct the testimony because she defrauded a tribunal.

B. Tell the client to correct her misstatements or you will become obligated to.

C. Nothing—because I didn't learn of the fraud until it was too late to get the decision reversed.

D. Nothing—because it didn't happen in a court proceeding.

E. Nothing—because I learned of the fraud through attorney-client communication.

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16. Liar, Liar…(You Know the Rest)

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D. Nothing—because it didn't happen in a court proceeding.

E. Nothing—because I learned of the fraud through attorney-client communication.

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RPC 1.0(O)

(o) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

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RPC 3.3(A),(B),(C)

(a)(3) A lawyer shall not knowingly…offer evidence the lawyer knows to be false. If a lawyer comes to know if its falsity, the lawyer shall take reasonable measures to remedy the situation, including, if necessary, disclosure to the tribunal…

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person, including the client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable measures to remedy the situation, including, if necessary, disclosure to the tribunal.

(c) The duties stated in divisions (a) and (b) of this rule continue until the issue to which the duty relates is determined by the highest tribunal that may consider the issue, or the time has expired for such determination, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 [Confidentiality of Information].

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My client, Carl Fredricksen, wants me to clear a cloud on the title to some property he owns; however, he doesn't have much money to pay me.

He is willing to give me 10% of the sale proceeds of the house to clear the title.

This seems like a contingency fee contract. The house can be sold with the title as-is, but it won't bring in as much money.

As long as I have a written fee contract, am I covered?

A. Yes

B. Maybe

C. No

17. Alternative Payment Plan

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17. Alternative Payment Plan

My client, Carl Fredricksen, wants me to clear a cloud on the title to some property he owns; however, he doesn't have much money to pay me.

He is willing to give me 10% of the sale proceeds of the house to clear the title.

This seems like a contingency fee contract. The house can be sold with the title as-is, but it won't bring in as much money.

As long as I have a written fee contract, am I covered?

A. Yes

B. Maybe

C. No

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RPC 1.8(A)

(a) A lawyer shall not enter into a business transaction with a client or *knowingly* acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless all of the following apply:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed to the client in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction;

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

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RPC 1.8(I)(2)

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may do either of the following: …

(2) contract with a client for a reasonable contingent fee in a civil case.

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18. Personal Injury Client

Personal injury client, Ann Veal, visited Attorney Bob Loblaw two years and two days after she allegedly sustained injuries in a Banana Stand fire.

I want to call the potential defendant, George Bluth, who is not represented by counsel, and ask him if he has been out of state on vacation (or in jail) for more than three days in the last two years.

If so, my suit might still be timely if I file it today. Can I contact him?

A. Yes

B. Maybe

C. No

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Personal injury client, Ann Veal, visited Attorney Bob Loblaw two years and two days after she allegedly sustained injuries in a Banana Stand fire.

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If so, my suit might still be timely if I file it today. Can I contact him?

A. Yes

B. Maybe

C. No

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RPC 4.3

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

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19. Out of State Client

I have a longstanding client who lives in another state. We have been friends for years and lately our emails and calls have gotten more and more flirtatious, and explicit.

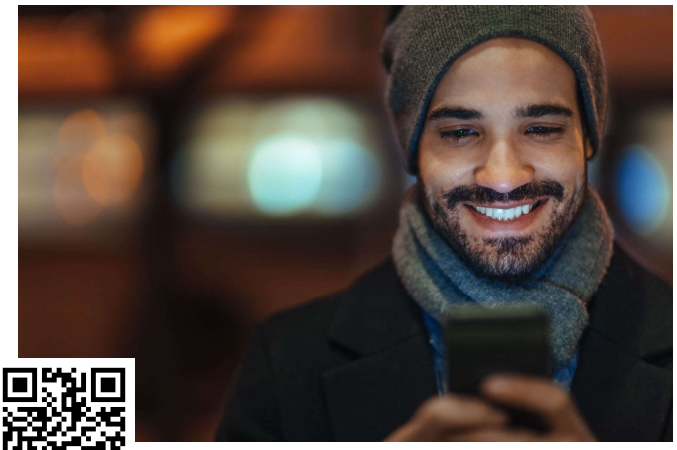
We will never take our relationship any farther than it is right now.

Does this present an issue?

A. Yes

B. Maybe

C. No



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69

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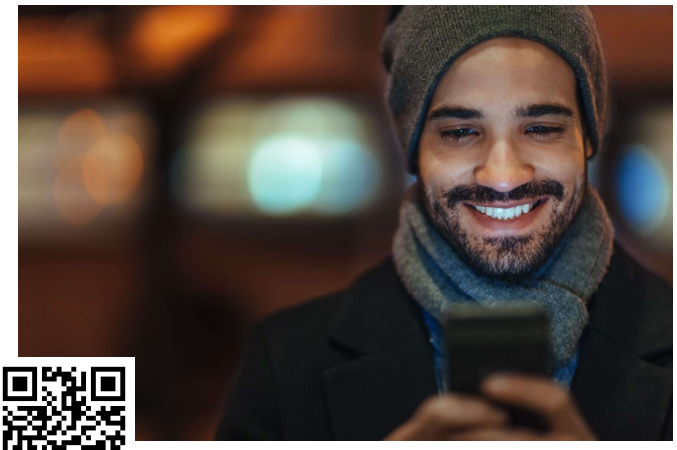

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RPC 1.8(J)

A lawyer shall not solicit or engage in sexual activity with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

RPC 1.8(j) = interpreted expansively

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Jeff Winger contacted me looking for possible representation in a domestic relations matter. The only substance we discussed was that he had been involved in an extramarital affair. He didn't hire me.

Jeff Winger has now sued his next-door neighbor, Shirley Bennett, for defamation. She reported in an online neighborhood chat that Jeff is a pervert and a peeping tom.

Can I represent Shirley?

A. Yes
B. Maybe
C. No

20. The Consultation, Part I

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Jeff Winger contacted me looking for possible representation in a domestic relations matter. The only substance we discussed was that he had been involved in an extramarital affair. He didn't hire me.

Jeff Winger has now sued his next-door neighbor, Shirley Bennett, for defamation. She reported in an online neighborhood chat that Jeff is a pervert and a peeping tom.

Can I represent Shirley?

A. Yes
B. Maybe
C. No

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RPC 1.18(C)

A lawyer subject to division (b) [a lawyer who has learned information from a prospective client] shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in division (d) [written consent and efforts to engage in effective screening].

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21. The Consultation, Part II

If Jeff had revealed to me that he *was* a peeping tom during our consultation, could my partner represent Shirley if I am screened from the matter?

A. Yes

B. Maybe

C. No

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21. The Consultation, Part II

If Jeff had revealed to me that he *was* a peeping tom during our consultation, could my partner represent Annie if I am screened from the matter?

A. Yes

B. Maybe

C. No

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RPC 1.8(C)

A lawyer subject to division (b) [a lawyer who has learned information from a prospective client] shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in division (d) [written consent and efforts to engage in effective screening].

If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in division (d).

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RPC 1.8(D)

When the lawyer has received disqualifying information as defined in division (c), representation is permissible if either of the following applies:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing;

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client, and both of the following apply:

- (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
- (ii) written notice is promptly given to the prospective client.

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RPC 1.0(L)

"Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

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RPC 1.18, COMMENT [7]

Under division (c), the prohibition in this rule is imputed to other lawyers as provided in Rule 1.10, but, under division (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients.

In the alternative, imputation may be avoided if the conditions of division (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(l) (requirements for screening procedures).

Division (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

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22. The Consultation, Part III

What if I had told Jeff, at the beginning of our interaction, not to tell me anything about his situation other than the names of his wife and children so I could check conflicts.

But then he additionally blurted out that his wife had caught him using binoculars to look into his neighbor's bedroom window. Can my partner *still* defend Shirley?

A. Yes.

B. Maybe

C. No

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22. The Consultation, Part III

What if I had told Jeff, at the beginning of our interaction, not to tell me anything about his situation other than the names of his wife and children so I could check conflicts.

But then he additionally blurted out that his wife had caught him using binoculars to look into his neighbor's bedroom window. Can my partner *still* defend Annie?

A.Yes.

B. Maybe

C. No

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RPC 1.8(D)

When the lawyer has received disqualifying information as defined in division (c), representation is permissible if either of the following applies:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing;

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client, and both of the following apply:

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to the prospective client.

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What if, during our preliminary consultation, Jeff had complied with my request to provide only the limited information of his wife and children's names. I declined to represent him without telling him why, but it was partly because I'm casually acquainted with Jeff's wife, Annie Edison?

Can **I** (not my partner) later represent Annie against Jeff in the domestic relations matter?

A. Yes

B. Maybe

C. No.

23. The Consultation, Part IV

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Can **I** (not my partner) later represent Annie against Jeff in the domestic relations matter?

A. Yes.
B. Maybe.
C. No.

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RPC 1.8(C)

A lawyer subject to division (b) [a lawyer who has learned information from a prospective client] shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in division (d) [written consent and efforts to engage in effective screening].

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24. The Consultation, Part V

I undertake Jeff's representation in the domestic relations matter, but he is immediately uncooperative and will not respond to my requests for information needed to respond to discovery propounded upon him.

What can I do?

A. Not much—talk to him about the adverse effects this will have on his defense.

B. Warn him, then seek to withdraw

C. Increase my hourly rate to make it worth my while.

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C. Increase my hourly rate to make it worth my while.

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RPC 1.16(B)(5) & (6)

(b) Subject to divisions (c), [getting tribunal's permission where required] (d)[taking reasonable steps to protect client interests when terminating representation], and (e) [promptly refund unearned fees], a lawyer may withdraw from the representation of a client if any of the following applies:

(5) the client fails substantially to fulfill an obligation, financial or otherwise, to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client.

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After I withdraw from representing Jeff in the DR case, he sues his next-door neighbor, Shirley Bennett, for defamation because she stated on an internet neighborhood chat line that Jeff Winger (now, your *former* client) is a peeping tom and a pervert.

If Jeff doesn't consent, can I defend Shirley in the defamation suit he brought against her?

A. Yes

B. Maybe

C. No

25. The Consultation, Part VI

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25. The Consultation, Part VI

After I withdraw from representing Jeff in the DR case, he sues his next-door neighbor, Shirley Bennett, for defamation because she stated on an internet neighborhood chat line that Jeff Winger (now, your *former* client) is a peeping tom and a pervert.

If Jeff doesn't consent, can I defend Shirley in the defamation suit he brought against her?

A. Yes

B. Maybe

C. No

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RPC 1.9(A)

Unless the former client gives informed consent, confirmed in writing, a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a ***substantially related matter*** in which that person's interests are materially adverse to the interests of the former client.

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RPC 1.0(N)

"Substantially related matter" denotes one that involves the same transaction or legal dispute or one in which there is a substantial risk that confidential factual information that ***would normally have been obtained*** in the prior representation of a client would materially advance the position of another client in a subsequent matter.

[Note: The information you *actually* obtained = immaterial]

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My live-in girlfriend and I practice in the same subject area at different firms.

We're both working from home on a Sunday, and she's drafting a thorny contract. She has asked me to review it, as well as the background documents from her client that factor into what she prepared.

She's not going to bill the client for my time and doesn't want them to think she needs a second set of eyes on it—she just wants me to give it a skim while we're both reviewing it at home. Is this permissible?

A. Yes

B. Maybe

C. No

26. The Phone-A-Friend

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26. The Phone-A-Friend

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We're both working from home on a Sunday, and she's drafting a thorny contract. She has asked me to review it, as well as the background documents from her client that factor into what she prepared.

She's not going to bill the client for my time and doesn't want them to think she needs a second set of eyes on it—she just wants me to give it a skim while we're both reviewing it at home. Is this permissible?

A. Yes

B. Maybe

C. No

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RPC 1.6(A), B(4)

(a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (d)[complying with RPC 3.3/4.1—candor toward tribunal or truthful statements to others].

(b) A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary for any of the following purposes:…(4) to secure legal advice about the lawyer's compliance with these rules;

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DISCIPLINARY COUNSEL V. HOLMES/KERR, 155 OHIO ST.3D 261, 2018-OHIO-4308

- Respondents worked for separate law firms in the same niche area of law practice and were in a romantic relationship.
- Over nearly two years' time, they exchanged >12 emails where they revealed information protected by ACP/WPD, even though not in same firm or co-representing clients, designed to assist the other with their work—or even completing the other's work.

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WHERE IN THE RULES DOES IT SAY *THAT*?

(OR THERE ARE NO DUMB QUESTIONS)

Kim Riley, Esq.
Montgomery Jonson LLP
Cleveland
(440) 779-7978
kriley@mojolaw.com

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CURRENT TOPICS IN PROBATE
PANEL DISCUSSION

Hon. Robert N. Rusu, Jr.
Judge, Mahoning County Probate Court

Hon. Kevin W. Dunn
Judge, Medina County Probate Court

Hon. Jack R. Puffenberger
Judge, Lucas County Probate Court

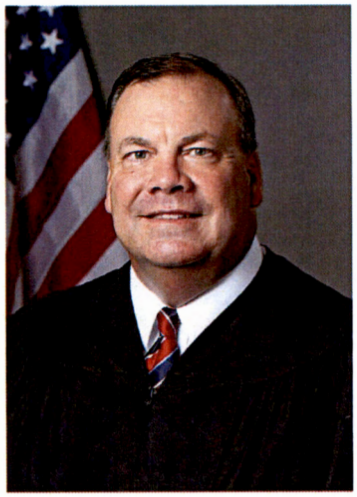
Biography
of
Judge Robert N. Rusu Jr.
Mahoning County Common Pleas Court,
Probate Division

Judge Robert N. Rusu, Jr. is the 20th Probate Judge of Mahoning County taking the bench on July 8, 2014. Prior to becoming the judge, he practiced exclusively in the area of Probate Administrations, Guardianships, Estate Planning, Medicaid, and issues regarding aging.

Judge Rusu is active as an officer with the *Ohio Probate Judges Association* and a member of the *Ohio Judicial College, Probate Law and Procedure Committee.*

Judge Rusu obtained his undergraduate degree from Youngstown State University and earned his Juris Doctorate from the Thomas M. Cooley Law School in Lansing, Michigan.

JUDGE KEVIN W. DUNN

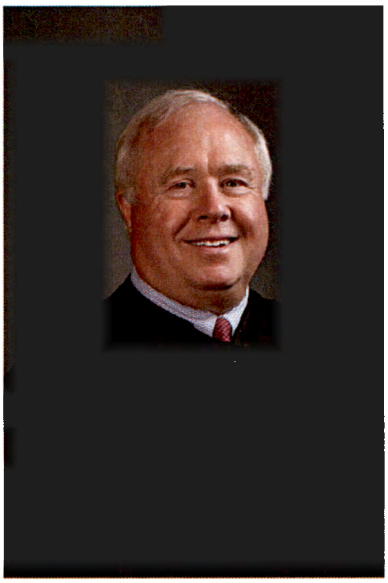


Judge Kevin W. Dunn has been presiding over the Medina County Court of Common Pleas Probate and Juvenile Divisions since August 2013 upon being appointed by Governor John Kasich. The Judge was elected by Medina County voters to continue his duties in the position and began his six-year term February 2015.

After receiving his Bachelor of Arts at Miami University in Oxford, Ohio, Judge earned his Juris Doctorate at the University of Akron School of Law. Judge Dunn was previously in private practice for twenty-two (22) years. During that time, he represented numerous clients in civil and criminal matters, estate planning, and corporate-related proceedings. He also served as prosecutor for the City of Medina and as acting Judge for the Wadsworth Municipal Court.

Judge Dunn is a member of the American Judges Association, National Probate Judges Association, Ohio Judicial College, Ohio Juvenile Judges Association, Ohio Probate Judges Association, The Ohio State Bar Association, and Medina County Bar Association. Judge has also been a presenter at several Continuing Legal Education Seminars, serves as a professional consultant for the government section of the American Legion Buckeye Boys State, and regularly attends conferences for legislation review.

The Judge has also been involved in numerous community organizations including Rotary Club of Medina, the Greater Medina Chamber of Commerce, Red Cross, youth sports, and is a parishioner at Sacred Heart Church in Wadsworth, Ohio. Judge Dunn and his wife have two (2) adult children and reside in Westfield Center, Ohio with their rescue Labrador Retriever, Stella.



Judge Jack Puffenberger

Judge Jack R. Puffenberger has been the Presiding and Administrative Judge of the Lucas County Common Pleas Court, Probate Division, since 1991. Prior to this, he was twice elected as a Judge of the Toledo Municipal Court. He is currently a member of the Ohio Supreme Court Commission on the Rules of Practice and Procedure and the Ohio Judicial Conference Executive Committee where he co-chairs that organization's Probate Law and Procedure Committee. Judge Puffenberger is also a member of the Executive Committee and a Past President of the Ohio Probate Judges Association, as well as currently serving on the Judicial Advisory Committee.

Judge Puffenberger is a former Trustee of the National College of Probate Judges and a former member of the Board of Governors of the American Judges Association. He has served on the Ohio Supreme Court Board of Commissioners on Grievances and Discipline and the Ohio Supreme Court Advisory Committee on Technology and the Courts and is currently a member of the Executive Committee of the Lucas County Bar Association. He is also active in numerous professional and community organizations.

Judge Puffenberger received his B.A. from Kent State University, M.S. from Youngstown State University and J.D. from the University of Toledo College of Law.

CASE LAW UPDATE
2022

Hon. James A. Fredericka
Judge, Trumbull County Probate Court

CASELAW UPDATE
Ohio Association of Probate Judges Conference
(with permission) Hon. Elinore Marsh Stormer
Summit County Probate Court
June 2022

JUDGE JAMES A. FREDERICKA
Trumbull County Probate Court
161 High Street, NW, 1st Floor
WARREN, OHIO 44481
Telephone: (330) 675-2520
Facsimile: (330) 675-2524

James A. Fredericka, life-long resident of Trumbull County, Ohio; admitted to the Ohio State Bar, 1978; also admitted to practice before U.S. Court of Appeals, Sixth Circuit; U.S. District Court, Northern District of Ohio.

Education: University of Notre Dame (B.A., 1975, Economics, graduated Summa Cum Laude - with highest honors. Case Western Reserve University (J.D., 1978); Honor Fraternities: Phi Beta Kappa; Omicron Delta Epsilon (Economics). John F. Kennedy High School, Warren, Ohio (1971).

Personal: Married to Lou Ann Malone Fredericka, 43 years; Children - Gina Marie (Graduate, St. Mary's College 2013, Graduate, Kent State University, B.S.N. 2016, Nurse); Michael James (Graduate, University of Notre Dame 2015, University of Akron, School of Law, J.D. 2018, Attorney at Law).

Work History: Trumbull County Probate Court Judge, February 9, 2015 to present; Private Practice 37 years, primarily with Ambrosy and Fredericka; Richards, Ambrosy and Fredericka; Trumbull County Assistant Prosecuting Attorney, 1978-1984.

Honors: Martindale-Hubbell Peer Review Rating - AV Preeminent, highest rating for professional ethics and legal ability. American Registry – America's Most Honored Lawyers, Top 1%. 2016 Public Official of the Year Award by NASW Ohio Chapter-Region IV.

Teaching Experience: University of Notre Dame - Non-Regular Teaching Staff; Guest Speaker - Ohio Association of Probate Judges, Trumbull County Probate Practice Seminars, Trumbull County Bar Association Seminars.

Organizations: Trumbull County Bar Association (President, 1998-99); Member: Probate Law and Procedure Committee of the Ohio Judicial Conference, Ohio Association of Probate Judges, the National College of Probate Judges, and the American Judges Association.

Community Service & Organizations: Trumbull County Probate Court Veterans Assistance Program, Trumbull County Senior Court Assistance Program, and Guardian Angels of Trumbull County. Past Chairman, Warren Civil Service Commission. Former Board Member: American Red Cross Trumbull County Chapter, Catholic Community Services, Inc., of Trumbull County, Notre Dame Schools, Saint John Paul II Parish Board and Finance Council.

CASE LAW UPDATE— JUNE 2021- MAY 2022

Judge Elinore Marsh Stormer

CONTENTS

ADOPTION

TOPIC: **A parent's right to consent to the adoption of their children is not extinguished under R.C. 3107.07(A) for lack of sufficient contact with the child when the parent has acted in compliance with a no-contact order prohibiting communication or contact with their minor child.**
TITLE: **In re Adoption of A.K., Slip Opinion No. 2022-Ohio-350**
COURT: **The Supreme Court of Ohio**
COUNTY: **N/A**
DATE: **February 10, 2022**

Appellee, the natural father of A.K. and C.K. was convicted of murdering their natural mother in 2007; A.K. and C.K. were placed with the appellants, their maternal grandparents and have been in their legal custody since 2007; that same juvenile court proceeding placed a no-contact order on the appellee. Appellants filed an adoption petition in 2015, the appellee objected, and the adoption proceeding was bifurcated. The magistrate's decision on the consent hearing found that appellee's failure to communicate with the children in the one year proceeding the filing of the adoption petition was not justified, and that the no-contact order established evidence of a justifiable excuse. Appellants appealed and the trial court found that father's consent was not required, as his own actions led to the no-contact order and therefore it could not provide justifiable cause for his lack of contact with the children.

Appellee appealed to the Eighth District Court of Appeals; that appellate court affirmed the trial court's decision. The appellate court found that it would be unjust to allow the appellee to use his imprisonment to justify his no-contact with the children when his actions were the

reason for his imprisonment in the first place. The case was remanded to the trial court for a best interest hearing; the trial court found that the adoption of the children by their grandparents was in their best interest and granted the appellants' petitions. Appellee appealed again. The Eighth District found that under *In re Adoption of B.I.*, 2019-Ohio-2450, appellee's reliance on the no-contact order constituted justifiable cause for his no contact with the children.

The appellants appealed to the Ohio Supreme Court. The Court found that the issues in the present case were "more intelligible" than the issues raised in *B.I.*, which found that "the interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter." *In re Adoption of B.I.*, 2019-Ohio-2450, ¶ 41. Based upon those conclusions, the Court held that: (1) a parent's right to consent to the adoption of his or her child is not extinguished under R.C. 3107.07(A) when the parent did not have more than de minimis contact with the minor child during the statutory period because the parent was acting in compliance with a no-contact order prohibiting all communication and contact with the child; and (2) that therefore, in order for the adoption proceedings in this case to go forward, the appellee's consent is required.

TOPIC: **Failure to comply with statutory requirements for objections waives; the trial court correctly concluded that, under R.C. 3107.07(K), respondent-appellant's consent to the adoption of his daughter by petitioner-appellee is not required. Consequently, the trial court did not err by granting petitioner-appellee's motion for summary judgment.**
TITLE: **In re Adoption of M.L., 2021-Ohio-2805**
COURT: **Third Appellate District**
COUNTY: **Shelby County**
DATE: **August 16, 2021**

Minor child was removed from biological parents' custody and placed with adopting mother, who was awarded permanent legal custody. Biological mother consented to the adoption, but biological father opposed. Biological father untimely filed his objection under R.C. 3107.07(K) and evidence of impermissible attempts to object (a pre-filing phone call and a notarized letter that the court never received) did not satisfy the statutory requirement for objections and timely filings of objections. Trial court's motion for summary judgment finding that biological father's consent was unnecessary for the adoption to proceed was upheld.

TOPIC: **Trial court erred in denying an adult adoption that met the statutory requirements of R.C. 3107.02(B).**
TITLE: **In re Adoption of T.N.N., 2021-Ohio-4111**
COURT: **Twelfth Appellate**
COUNTY: **Brown**
DATE: **November 22, 2021**

Appellant is the biological grandmother of the intended adoptee. Both appellant and the intended adoptee gave testimony that while appellant is the biological paternal grandmother of the intended adoptee, she acted in a maternal capacity for the majority of the intended adoptee's life— going so far as to state that the intended adoptee and her biological father have more of a

sibling relationship than a parent-child relationship. The intended adoptee testified that she did not have a substantial relationship with her biological mother and that any interactions they did have were very toxic. The trial court denied the adoption petition, stating that "the adoption seems to be more about the removal of [the intended adoptee's] Mother than the true need for an adoption." Appellant appealed and the appellate court found that the appellant and intended adoptee met the statutory requirements as outlined in R.C. 3107.02(B)(3); judgment reversed and remanded.

TOPIC: **Trial court erred by not determining if the biological father's lack of contact with the child was justifiable and erred by not following the statutory steps of R.C. 3107.161 when they automatically dismissed petitioner's petition based on the child services agency recommendation modification.**
TITLE: **In re Adoption of E.G.C., 2021-Ohio-4178**
COURT: **Twelfth Appellate**
COUNTY: **Clinton**
DATE: **November 29, 2021**

Second appeal of the same case; appellate court previously remanded the case with instructions for the trial court to determine whether biological father's lack of contact was justifiable after failing to do so when the trial court previously ruled biological father's consent was not required. Appellant is the step-father of the minor child and is now appealing the trial court's dismissal of his stepparent adoption petition. Clinton County Children Services previously recommended approval of stepfather as an adoptive parent but amended that recommendation because appellant had previously been convicted of a drug-related felony. The trial court summarily dismissed stepfather's petition without a hearing and without complying with the appellate court's remand instructions to determine if biological father's lack of contact had been justifiable. Appellate court found that an agency's recommendation does not relieve the probate court of its statutory duty to perform the required process, nor does it undermine the probate court's discretion in an adoption matter. Judgment reversed and remanded.

TOPIC: **Justifiable cause for lack of de minimis contact exists when the totality of the circumstances is supported by competent and credible evidence.**
TITLE: **In re Adoption of D.W.-E.H., 2022-Ohio-528**
COURT: **Eighth Appellate**
COUNTY: **Cuyahoga**
DATE: **February 24, 2022**

Child was born as a result of an affair between mother and father while mother was married to petitioner. Father admittedly did not have de minimis contact with the child during the one-year look back period, but the trial court found that justifiable cause existed for the lack of de minimis contact. Petitioner appealed. Appellate court affirmed the trial court, finding that a totality of the circumstances— the fact that the lower court was in the best position to determine the credibility of witnesses and weigh the evidence; the novelty of the global COVID-19 pandemic, father's medical conditions, loss of work and transportation, exhaustion of father's resources in the prior litigation to determine paternity and establish visitation, mother and father's prior history of only communicating via text message, and the age of the child all

demonstrated that the trial court's justifiable cause finding was supported by some competent and credible evidence. Judgment affirmed.

TOPIC: **When a biological parent proves all of the factors under R.C. 3107.161(B), their consent is required for an adoption to proceed.**
TITLE: **In re Adoption of M.R.P., 2022-Ohio-1631**
COURT: **Twelfth Appellate**
COUNTY: **Warren**
DATE: **May 16, 2022**

Child was born to biological mother and father who ended their relationship several months after she was born. Biological father continued have regular visits with the child until biological mother started dating petitioner, child's step-father. Biological mother and petitioner ended biological father's visits after witnessing what they claimed to be biological father acting "aggressively", but the event was actually symptoms of multiple sclerosis. Biological mother essentially cut off all contact between biological father and child and repeatedly threatened and sent derogatory messages to biological father. Biological mother only reached out to biological father again when she asked him to consent to the adoption; biological father said no and continued to ask to see and speak with the child. Biological father failed to timely object to the adoption petition, but the trial court found that the adoption was not in the child's best interest. Petitioner appealed.

Appellate court found that biological father presented evidence in support of all relevant factors under R.C. 3107.161(B), and that the additional evidence of biological mother's interference with and obvious disdain for biological father supported the finding that the adoption was not in the best interest of the child; judgment affirmed.

ESTATES

TOPIC: **Although a trial court does not normally have to hold a hearing on a motion to stay pursuant to R.C. 2711.02, it must be satisfied that the action is or is not referable to arbitration.**
TITLE: **In Re Estate of Battle-King v. Heartland of Twinsburg, 2021-Ohio-2267**
COURT: **Eighth Appellate District**
COUNTY: **Cuyahoga**
DATE: **July 1, 2021**

Family of decedent filed a complaint against the defendant, a skilled nursing facility, alleging negligence, recklessness, and wrongful death in the death of the decedent. The defendant claimed they had to arbitrate the dispute based on an agreement the decedent signed. The decedent's family claimed that the defendant forged the decedent's signature; the defendant denied these allegations but also claimed the arbitration agreement would stand with no signature. Trial court was incorrect in ruling in finality when there were pending issues and disputing evidence in play. Reversed and remanded.

TOPIC: **Political subdivision immunity creates a genuine issue of material fact concerning whether R.C. 2744.03(A)(5) provides a defense to immunity. The decedent's estate presented evidence that created fact questions concerning whether nursing staff exercised its discretion in a reckless manner and whether such recklessness resulted in decedent's injury and death.**
TITLE: **Estate of Jennings Fleenor v. County of Ottawa**
COURT: **Sixth Appellate District**
COUNTY: **Ottawa**
DATE: **June 30, 2021**

Decedent was a bilateral leg amputee who required the use of a number of medical devices, including a Hoyer lift and shower chair. Decedent had an accident in the shower that resulted in him falling to the shower floor while in the shower chair. Decedent was assessed a number of times after the fall and nothing remarkable was noted; decedent's health deteriorated and he died six days later. Decedent's estate filed negligence and wrongful death claims, and alleged violations of R.C. 3721.13 (Ohio Nursing Home Patients' Bill of Rights). The nursing home moved for summary judgment and the trial court granted, finding that the nursing home was entitled to political subdivision immunity and was protected from liability.

The estate appealed and the appellate court reversed finding that genuine issues of material fact concerning if the nursing home's immunity existed, specifically citing whether the nursing home's nursing staff exercised discretion in a reckless manner, and if that recklessness resulted in the decedent's injury and subsequent death.

TOPIC: **Beneficiary's incarceration during estate administration does not create exception to statute of limitations to bring breach of fiduciary duty claims against estate administration 21 years after estate was closed.**
TITLE: **Smith v. Smith, 2021-Ohio-1955**
COURT: **Eighth Appellate District**
COUNTY: **Cuyahoga**
DATE: **June 17, 2021**

Decedent died intestate in 1990. One of the beneficiaries of his estate was his son Andre, who was incarcerated from 1991-1998, which was all or part of the time that the decedent's estate was administered. In 2019, Andre sued the administrator of the estate, alleging breach of fiduciary duties owed to Andre; the claims stemmed from real estate sales and other estate administration errors. Andre claimed the statute of limitations was tolled due to his disability, citing his drug dependency and his period of incarceration. The administrator filed for summary judgment, arguing that Andre's claims were way beyond the statute of limitations and that the doctrine of laches barred any claims. Andre counter argued that he did not learn of the executor's errors until 2019 and cited the discovery rule as the tolling entity. The trial court dismissed Andre's complaint; Andre appealed.

Appellate court found that Andre's claim that time was tolled because of his incarceration was incorrect. By 1998, Andre was not incarcerated and the estate was closed in the same year;

the appellate court found that the latest the statute of limitations was tolled until was 1998. The laches defense was not considered by the appellate court; case dismissed.

TOPIC: **When a claim does not strictly comply with the parameters of R.C. 2117.06, a party cannot prevail on such a claim. However, this does not automatically bar a party from seeking relief under other relevant and pertinent statutes.**
TITLE: **Doczi v. Blake, 2021-Ohio-3433**
COURT: **Fourth Appellate**
COUNTY: **Meigs**
DATE: **September 30, 2021**

Appellant and decedent were involved in a car accident in which appellant was seriously injured and in which decedent passed away. Appellant attempted to present a claim against decedent's estate but failed to provide any relevant details until over a year later and only after the decedent's executor asked for more details on the claim. Appellant filed a negligence suit against the decedent's estate (and other defendants) and discovery occurred for over a year. The estate moved for summary judgment, arguing that the appellant's complaints were time barred and that appellant could not seek a judgment against the estate through insurance coverage either; trial court granted the motion for summary judgment and barred all lawsuits against the estate.

Appellant appealed; appellate court found that appellant could not proceed with a claim against the estate as his original complaint failed to strictly comply with the parameters of R.C. 2117.06. However, the appellate court found that appellant could seek recovery from the decedent's insurance, as an untimely and incorrect claim under R.C. 2117.06 did not preclude the appellant from seeking relief under other statutes.

TOPIC: **When a mortgage holder fails to provide evidence that estate property is worth more than the proposed sale price, the sale may proceed as in the best interest of the estate.**
TITLE: **Urban v. Folan, 2021-Ohio-3452**
COURT: **Ninth Appellate**
COUNTY: **Summit**
DATE: **September 30, 2021**

A piece of estate property was delinquent on its mortgage and the administration filed an appraisal of $100,000 and a land sale action to sell the property. The original mortgage holder assigned the mortgage to a new company during the pendency of the land sale action. The new mortgage company intervened in the land sale and filed a foreclosure complaint. The foreclosure action was dismissed and the case was returned to the probate court where the administrator filed a motion to accept the appraised value and approve the private sale, which the trial court did. The administrator did not serve notice of either of the pleadings on the new mortgage company; they were made aware of it when they received a check for significantly less than was owed on the property. The new mortgage company filed a Civ.R. 60(B) motion to set aside the private sale order and submitted a broker's price opinion valuing the property at $155,000. The trial court found that the administrator undisputedly failed to properly notify the new mortgage company of

the sale, but that there was no meritous defense for the new mortgage company because their value was not credible since it was a BPO, not an actual appraisal; appellant appealed.

Appellate court found that while the new mortgage company was unfairly surprised by the sale and not afforded the right to object, they also failed to show that the property was worth more than it was valued for and that the new mortgage company's BPO was not credible as to value; judgment affirmed.

TOPIC: **When a decedent does not actually sign a deed and no evidence of them giving a directive to someone to sign on their behalf exists, the deed is not valid or effective.**
TITLE: **Byars v. Byars, 2021-Ohio-3940**
COURT: **Second Appellate**
COUNTY: **Montgomery**
DATE: **November 5, 2021**

Decedent died intestate and was survived by her five children; appellee produced a quitclaim deed after decedent's death asserting that the decedent had executed the deed and given him her home. The trial court found that the quitclaim deed was validly executed because the signatory requirement does not require the signer themselves to affix their signature on the document. The appellate court overruled, finding that although the signatory requirement does not require the signer to sign the document themselves, there must be evidence the signer authorized the other person to sign on their behalf and any evidence of such intent was lacking in the present case; reversed and remanded.

TOPIC: **Under the plain language of R.C. 2107.52(A)(3) and (B)(2)(a), the testamentary gift from the testator to his predeceased brother is not one of the types of testamentary gifts entitled to the protections of the anti-lapse statute.**
TITLE: **Diller v. Diller, 2021-Ohio-4252**
COURT: **Third Appellate**
COUNTY: **Mercer**
DATE: **December 6, 2021**

Testator gave a gift to his brother that predeceased the testator. The trial court concluded that R.C. 2107.52 applied to the gift to the predeceased brother and that the testator's will did not contain any expression of a contrary intent, and that the gift was protected by the anti-lapse statute and as a result, should be distributed in equal shares as a substitute gift to the next generation of heirs. Appellants appealed, raising errors about the trial court's interpretation of the definition of "devise" in R.C. 2107.52(A)(3) and "contrary intent" in R.C. 2107.52(B)(2). The appellate court found that the definition of "devise" in R.C. 2107.52(A)(3) and R.C. 2107.52(B)(2 as intended by the legislature includes only the types of gifts listed in the statutory section and therefore, the trial court erred by finding that a substitute gift is created in favor of the predeceased brother's surviving descendants. Judgment reversed and remanded.

TOPIC: **When an attorney signs an acknowledgement agreeing to be bound by the arbitration provision stated in an agreement entered into by a client, the attorney is bound by the arbitration provision.**
TITLE: **Estate of Campbell v. US Claims OPO, L.L.C., 2022-Ohio-711**
COURT: **Fifth Appellate**
COUNTY: **Stark**
DATE: **March 10, 2022**

Attorney Wells-Niklas represented a client's legal interests after the death of the client's son. The client entered into an agreement with a limited liability corporation ("LLC") that advances money to plaintiffs during the course of a personal injury action in exchange for purchasing a portion of the potential proceeds of the action. During the pendency of the wrongful death action, the client passed away. The wrongful death action eventually settled for $325,000 and LLC was not notified and did not receive any proceeds. LLC filed a motion to demand arbitration to which Attorney Wells-Niklas objected. The trial court found that Attorney Wells-Niklas was bound by the arbitration clause. Attorney Wells-Niklas appealed; appellate court affirmed the trial court finding that while Attorney Wells-Niklas may arguably not be a party to the agreement, she is contractually bound to participate in arbitration based on the plain and unambiguous language of the acknowledgment.

TOPIC: **An attorney serving as the administrator filing a memorandum explaining an item on the estate's final accounting was deemed to be a waiver of hearing on the account.**
TITLE: **In re Estate of Zeak, 2022-Ohio-951**
COURT: **Tenth Appellate**
COUNTY: **Franklin**
DATE: **March 24, 2022**

An attorney entered into an agreement with the decedent's family for a finder's fee in order to discover estate assets. The same attorney was appointed as administrator and submitted a final accounting that included the "finder's fee"; the final account was set for a hearing and the attorney was ordered to appear, but the hearing was continued. The attorney submitted a memorandum with the accounting and alleged that a clerk told him doing so excused his appearance from the hearing. The magistrate found the attorney waived his right to attend a hearing on the accounting by filing the memorandum, found that the finder's fee was improper, rejected the accounting, and ordered the attorney to submit an accounting that showed no payment of the finder's fee. The attorney objected; the trial court adopted the magistrate's decision and the attorney appealed.

The appellate court found that the attorney had notice of the hearing and simply chose to submit the memorandum in lieu of attendance; the appellate court also noted that the attorney did not actually challenge the propriety of the decision to reject his accounting but sought only to find a procedural defect in the account hearing requirement.

TOPIC: **A contract made by the decedent during their lifetime that was not fulfilled prior to their passing is enforceable against the decedent's estate when the last will and testament specifically states an intent to honor the contract.**
TITLE: **In re Estate of Stover, 2022-Ohio-989**
COURT: **Third Appellate District**
COUNTY: **Wyandot**
DATE: **March 28, 2022**

Decedent contracted with her son to sell him a piece of family farmland for $75,000, with a $1,000 down payment and the remainder to be paid in monthly installments. The decedent reflected the contract in her will and stated that her son could purchase the property from the estate for the full remaining purchase price. The son sent the decedent's estate a check for the remaining $74,000 but the executor, the decedent's daughter, refused to accept the check; a lawsuit ensued and the executor argued that the contract was not performed in the decedent's lifetime and too much time had passed to make the contract enforceable. The trial court agreed. Appellant appealed and the appellate court found that the will terms were unambiguous, the contract itself had clear terms, and that the decedent incorporated the contract into her will and the son attempted to do what was outlined in order to purchase the land. Judgment reversed and remanded.

TOPIC: **R.C. 2117.02 is the controlling statute for claims against the estate by administrators, not R.C. 2117.06.**
TITLE: **In re Estate of Gates, 2022-Ohio-1091**
COURT: **Fifth Appellate**
COUNTY: **Stark**
DATE: **March 30, 2022**

Appellant was appointed executor of decedent's estate. Some 41 days after her appointment, appellant filed a claim against the estate in the amount of $35,010 pursuant to R.C. 2117.02 for reimbursement for repairs, improvements, and maintenance to decedent's property. The trial court denied the application, finding the application was untimely filed pursuant to R.C. 2117.06(B). Appellant appealed; appellate court found that since appellant was the executor of the estate, she had three months from the date of appointment to raise her claims against the estate pursuant to R.C. 2117.02 and that the trial court erred by holding the executor to the statute of limitations for creditor claims as outlined in R.C. 2117.06(B). Judgment reversed and remanded.

TOPIC: **When attorney's fees are in excess of the trial court's fee schedule and the attorney fails to file an application for extraordinary fees, the trial court does not abuse its discretion by reducing attorney's fees.**
TITLE: **In re Estate of Dickens, 2022-Ohio-1543**
COURT: **Twelfth Appellate**
COUNTY: **Brown**
DATE: **May 9, 2022**

Attorney Mezher was hired to assist the decedent's daughter and executor with the administration of decedent's estate. Attorney Mezher filed a final account at the conclusion of the estate which included approval of $5,970 in attorney's fees, billed at $300 per hour. The Brown County Probate Court's attorney fee schedule allowed for attorney's fees in the amount of $1,605.18 for an estate the size of the decedent's. The decedent's beneficiaries neither objected nor contested to the attorney fee application. The trial court held a hearing on the matter pursuant to a local rule and issued a judgment entry reducing the requested attorney's fees from $5,970 to $1,605.18. Attorney Mezher appealed.

The appellate court found that the fee agreement between Attorney Mezher and the estate executor did not support the attorney fee application; the fee agreement explicitly stated that the executor agreed to pay attorney fees pursuant to the trial court's fee schedule and there was no application for extraordinary fees filed nor were extraordinary circumstances identified to justify the request of excessive fees. Judgment affirmed.

GUARDIANSHIPS

TOPIC: **Awarding of attorney's fees after an expert reviewed and testified to their validity was not improper.**
TITLE: **In re Guardianship of Bakhtiar, 2021-Ohio-2163**
COURT: **Ninth Judicial District**
COUNTY: **Lorain**
DATE: **June 28, 2021**

Three attorneys submitted applications for attorney's fees and costs to the court after the trial court determined that the opposing side and opposing counsel had engaged in frivolous conduct (and the Ninth District had affirmed the finding of frivolous conduct, *See In re Guardianship of Bakhtiar*, 2021-Ohio-2162). Attorney Taylor was asked to review the attorney's fees and costs, was recognized by the court as an expert and even made some reductions to the fees after reviewing all the records. Trial court adopted the expert's findings.

Appellant claims that the trial court erred in awarding the attorney's fees without the necessary qualified legal expert testimony to support the decision. Appellant did not raise any issues to Attorney Taylor's expertise during the trial court proceedings; judgment affirmed.

TOPIC: **A probate court errs when it excludes relevant evidence during a natural parent's application to terminate guardianship.**
TITLE: **In re Guardianship of E.M., 2022-Ohio-862**
COURT: **Sixth Appellate**
COUNTY: **Sandusky**
DATE: **March 18, 2022**

The ward's guardianship was established in July 2013 when her paternal grandparents applied for guardianship and the ward's biological parents consented to the guardianship. The ward's mother, Appellant, filed an application to terminate the guardianship in July 2014. The

trial court denied Appellant's application to terminate, citing that the ward's circumstances that necessitated a guardianship had not changed and there was no evidence presented that the guardians were no longer fit to serve. Appellant appealed. On appeal, Appellant argued that the trial court erred when they refused to consider evidence surrounding the inception of the guardianship. The appellate court agreed, finding that the trial court needed to determine whether good cause exists to terminate the guardianship by examining all the relevant evidence and that the trial court improperly limited evidence during the hearing. Judgment reversed and remanded.

JURISDICTION

TOPIC: **When a court of appeals mandate does not expressly restrict or specifically limit the proceedings on remand, a trial judge does not lack the ability to exercise jurisdiction over outstanding issues.**
TITLE: **Durkin v. Williams, Slip Opinion No. 2022-Ohio-1416**
COURT: **Supreme Court of Ohio**
COUNTY: **N/A**
DATE: **May 3, 2022**

Decedent passed away in 2015 and her estate was subsequently opened. The administration of the estate became contentious when the decedent's grandson, Daniel, alleged that the decedent's son and executor, John, had abused his power of attorney during the decedent's lifetime and that John had concealed estate assets. The trial court heard the issues and issued a judgment entry stating that John would remain the executor of the estate and that the estate accounting was accepted. Daniel appealed this decision, which was affirmed in part and reversed in part. The new trial court decision vacated a contempt finding against Daniel and required John to file an amended inventory that was reflective of the previous trial court ruling that ordered the inclusion of specific retirement accounts of the decedent. Daniel once again filed objections and sought to have the probate judge removed for bias; the probate judge voluntarily recused herself and Judge Williams was assigned to the case.

Judge Williams appointed a special master commissioner pursuant to R.C. 2101.06 to investigate and make a report to the trial court as to whether any additional assets should be included in the estate after examining the executor's actions from when he held power of attorney. John appealed the appointment of the special administrator, which was dismissed for lack of final appealable order. A writ of prohibition was subsequently filed. The Supreme Court found that the appellate court's ruling in *Durkin I* (the first appeal of this matter) did not clearly and explicitly restrict the probate court's actions on remand regarding John's use of the power of attorney and that Judge Williams did not patently and unambiguously lack jurisdiction to appoint the special master commissioner to conduct further investigation. Furthermore, the Supreme Court of Ohio found that it was necessary to adhere to the principle that the law-of-the-case doctrine will not be applied to achieve an unjust result; writ of prohibition denied.

TOPIC: **Where probate settlement agreement involved guardianship, it was improper for party to agreement to seek enforcement of a right under the agreement in common pleas court even after the Ward had passed away.**

TITLE: **Hoffman v. Arthur, 2021-Ohio-2318**
COURT: **Fifth Appellate District**
COUNTY: **Coshocton**
DATE: **July 7, 2021**

Decedent's son, Douglas, improperly made cash withdrawals from her accounts in the amount of $408,162.69; the probate court issued a final judgment and a certificate of judgment for lien upon lands and tenements. Douglas sold acreage that belonged to the decedent through estate proceedings and requested that the court forgive the lien against him. Probate court denied his motion for summary judgment; Douglas filed a complaint in the common pleas general division against the executor of the decedent's estate. General division granted Douglas's motion. Decedent's other son, Philip, appealed citing the Probate Court retaining jurisdiction over all matters related to this situation. Appellate court agreed; reversed and remanded.

MENTAL HEALTH

TOPIC: **The trial court found by clear and convincing evidence that the appellant was a mentally ill person subject to court ordered commitment; appellate court affirmed.**
TITLE: **In re A.C., 2021-Ohio-2116**
COURT: **Tenth Appellate District**
COUNTY: **Franklin**
DATE: **June 24, 2021**

Appellant allegedly kidnapped her neighbor and the neighbor's children, reported that several of her neighbors were "out to get her", claimed that she had a public Facebook page for her "modeling career", and claimed that she was being attacked in the hospital at night by unnamed and unidentifiable people. Appellant had previously been committed to a mental health facility and prescribed anti-psychotic medications, but denied being psychotic. A licensed social worker filed an affidavit of mental illness with the probate court and the trial court found that there was clear and convincing evidence that the appellant was a mentally ill person subject to court ordered commitment not to exceed a term of 90 days.

Appellant appealed, claiming that the trial court erred in adopting the magistrate's decision finding that appellant required hospitalization for their mental illness. The appellate court affirmed, citing that although the trial court determined by clear and convincing evidence that appellant is a mentally ill person, they did not believe clear and convincing evidence was presented at the evidentiary hearing to support a finding that appellant is subject to court order pursuant to R.C. 5122.01(B)(3).

TOPIC: **When a mental-illness affidavit is sufficient to establish probable cause, the probate court has jurisdiction over the matter.**
TITLE: **In re N.E., 2022-Ohio-1184**
COURT: **First Appellate District**
COUNTY: **Hamilton**

DATE: **April 8, 2022**

Appellant was taken via police to the University of Cincinnati Medical Center Psychiatric Emergency Services for an emergency hospitalization due to multiple police contacts during which the appellant made incoherent, unintelligible statements and publicly displayed behaviors that caused people to be alarmed and call 911. An Application for Emergency Admission was submitted to the probate court along with an affidavit of mental illness and a motion for forced medication. The trial court heard testimony and took evidence on the issue and found that the appellant was a mentally ill person subject to court ordered hospitalization and after testimony from the treating physician, granted the motion for forced medication. The appellant objected, alleging that the probate court lacked jurisdiction and the proceedings were never properly commenced because the affidavit failed to establish probable cause that the appellant was a mentally ill person subject to court order.

Appellate court found that the trial court adhered to the involuntary commitment procedures as outlined in R.C. 5122 and that the supporting affidavit was sufficient to establish probable cause to believe that appellant was a mentally ill person who because of his illness would benefit from treatment for his mental illness and was in need of such treatment as manifested by evidence of behavior that created a grave and imminent risk to the substantial rights of others or himself. The affidavit included sufficient factual allegations to establish probable cause pursuant to R.C. 5122.11; judgment affirmed.

NAME CHANGES

TOPIC: **Probate court did not abuse discretion in denying minor name change; a claim of a father's last name being "customary" is not a fact that legally supports a name change.**
TITLE: **In re Name Change of O.B.A., 2021-Ohio-2212**
COURT: **Fourth Appellate District**
COUNTY: **Scioto**
DATE: **June 23, 2021**

Appellant filed an application to change his three-year-old son's surname from Lore (appellee-mother's last name) to Andronis (appellant-father's last name). At a hearing before the trial court, appellant testified that he and appellee have a very negative relationship, but that he sees the minor child six days a month and both he and appellant's family have a "very good" relationship with him. Appellant testified that he wanted to change the minor child's last name because it was "customary." Appellee testified that she also has family support, was concerned the name change would be confusing for the child, and that she had been there from the beginning so he "deserved" her last name. Trial court issued a ruling walking through the factors from *Willhite* and found that it was not in the best interest of the child to have his surname change; appellant appealed.

In reviewing the trial court's application of the facts against the *Willhite* factors, the only error the appellate court found was the trial court inconsistently applied the child's age to his

ability to choose what he wanted and the effect it would have on him, arguing both for and against considering the child's age. However, the appellate court did not find this to be a reversible error and instead ruled that the court's weighing of the factors and in denying appellant's application was not unreasonable, unconscionable, or arbitrary; judgment affirmed.

TOPIC: **The word "resides" in former R.C. 2717.01(A)(1) should be afforded a liberal construction and it is possible under former R.C. 2717.01(A)(1) for a person to "reside" somewhere other than where their legal domicile makes them a "resident."**
TITLE: **In re Name Change of Davis, 2021-Ohio-3879**
COURT: **Third Appellate**
COUNTY: **Marion**
DATE: **November 1, 2021**

Appellant was convicted in Hamilton County, OH of murder and aggravated robbery and was sentenced to a term of 24 years to life in prison. Appellant filed an application to change his name in Marion County and the trial court denied the application, concluding that "involuntary incarceration in Marion County does not confer residency status." Appellant appealed; appellate court found that while the case law that the trial court cited to support their denial was similar, it was not dispositive of the appellant's case. The appellate court held that the word "resides" as in former R.C. 2717.01(A)(1) should be afforded a liberal construction and that it is possible under former R.C. 2717.01(A)(1) for a person to "reside" somewhere other than where their legal domicile makes them a "resident" and that a person can "reside" in the county of their involuntary incarceration; judgment reversed and remanded.

PROCEDURE

TOPIC: **Entering a settlement at any point in trial waives defects up to that point, even if the settlement is based on a misinterpretation of a jury's compensatory damage award.**
TITLE: **Morris v. Morris, 2021-Ohio-2677**
COURT: **Eighth Appellate District**
COUNTY: **Cuyahoga**
DATE: **August 5, 2021**

Appellant's mother, Amy, passed away when appellant was 17-years-old; she established a pour-over will and trust with appellant as the sole beneficiary. Her Last Will and Testament left all the tangible personal effects of her estate to appellant. The intangible assets of the estate, including Amy's business interests (500 outstanding shares in a business she had acquired and improved), were left through the will's residual clause for care and management by the trustees of the trust. Appellant's aunt and grandparents (appellees) were nominated as co-executors of the estate. Appellant's aunt only accounted for one stock certificate of 125 shares in Amy's estate, valued at approximately $26,000; aunt resigned as trustee, "assumed" the debts of the business, and became the owner of the company. Appellant found out about her mother's will and trust

seven years after her passing through documents she discovered in one of appellee's homes that detailed her mother's estate plans. Appellant sued appellees for fraudulent concealment, fraud, civil conspiracy, breach of fiduciary duty, interference with an expectancy inheritance, negligence with respect to Amy's Last Will and Testament, and the Amy A. Morris Family Trust, and conversion of property. The matter proceeded to a jury trial with a visiting judge, where the jury verdict form awarded appellant $62,000 in compensatory damages for fraud and breach of fiduciary duty; $1 was awarded to appellees for their claim against appellant in the taking of the records. Before the punitive damages hearing, the parties entered into a settlement of $120,000. The trial judge interpreted the jury award to be $62,000 in total and did not consult the jury to confirm this interpretation. The jury foreperson contacted appellant's counsel and informed them the jury intended to award $62,000 per claim, for a total of $310,000. Appellant argued the settlement was void because of mutual mistake; trial court disagreed and found that appellant settled the case and there was no settlement agreement in the record and no jurisdiction for the court to enforce it; appellant appealed.

Appellate court affirmed the trial court, finding that it was undisputed that appellant entered into a settlement agreement, the settlement agreement was never put into the record so there was no information that the settlement agreement incorporated the jury verdict into the agreement or if it stood alone, and that settling a case at any point during a trial results in waiver of defects up to that point. Appellant's appeal did not ask the appellate court to interpret the settlement agreement to determine if it was valid and enforceable; judgment affirmed.

TOPIC: **When an appellant fails to satisfy its burden to prove fraudulent intent and fraudulent conveyance on the part of the appellee, dismissal is required.**
TITLE: **Montefiore Home v. Fields, 2021-Ohio-3734**
COURT: **Eighth Appellate**
COUNTY: **Cuyahoga**
DATE: **October 21, 2021**

Decedent made her goddaughter her financial power of attorney. After decedent entered an assisted living facility, her goddaughter ran errands, paid bills, and withdrew cash from decedent's bank accounts allegedly for the benefit of decedent. Decedent privately paid for her nursing home costs and had a remaining balance of $22,000 at the time of her death. The nursing home sued the goddaughter, alleging that she misused the POA and that there was fraudulent conveyance of the decedent's assets that led to her being unable to pay her nursing home bills. The goddaughter transferred $12,000 of the decedent's money into her personal bank account and did not have receipts for the transactions she allegedly made on behalf of the decedent. The trial court found that there was no evidence of fraudulent intent by the goddaughter and ruled in her favor; the nursing home appealed.

The appellate court found that the nursing home did not meet its burden of proving fraudulent intent by the decedent's goddaughter, and further found there was credible evidence the goddaughter acted in good faith because she demonstrated a non-fraudulent intent; judgment affirmed.

TOPIC: **R.C. 2108.83 does not absolve a cemetery organization from any and all liability and does not shield a cemetery organization from being required to participate in discovery.**
TITLE: **In re Disinterment of Glass, 2022-Ohio-28**
COURT: **Second Appellate**
COUNTY: **Montgomery**
DATE: **January 7, 2022**

The son of two decedents sought to have his parents disinterred; one sister consented and one sister opposed. The opposing sister issued subpoenas duces tecum to the cemetery seeking extensive documentation. The cemetery intervened as a nonparty in order to file motions to quash subpoena and notice to take Civ.R.30(B)(5) depositions of representatives of the cemetery. The cemetery further alleged that it had no duty to comply with authority based on statutory immunity and protection, and that the requested information would unduly burden the cemetery.

The trial court denied the motions to quash and found that R.C. 517.23 and R.C. 517.24 did not provide any basis for the cemetery's refusal to participate in discovery of a contested disinterment action. The trial court further found that there was no evidence that the discovery requests would unduly burden the cemetery. The cemetery appealed; appellate court found that the correct statute was R.C. 2108.83, but that the cemetery still did not have any protections that would preclude it from participating in discovery of the case; appellate court also found that there was no indication that the limited type of inquiry asked of the cemetery would excessively burden them; judgment affirmed.

TOPIC: **A trial court abuses its discretion when it denies a motion to vacate default judgment on the grounds of improper service without holding a hearing.**
TITLE: **Progressive Direct Ins. Co. v. Williams, 2022-Ohio-887**
COURT: **Third Appellate**
COUNTY: **Marion**
DATE: **March 21, 2022**

Plaintiff-appellee filed a motion for default judgment after defendant-appellee failed to file an answer to the complaint for negligence with a damages amount of $109,585.47. Defendant-appellee filed a motion requesting that the trial court vacate the default judgment, alleging the trial court did not have personal jurisdiction over him, and requested a hearing. The trial court denied the motion and did not hold a hearing. Defendant-appellee appealed. The appellate court reversed, finding that the trial court erred when it failed to hold a hearing to determine if service was properly accomplished on the defendant-appellee when a certified mailer was returned to the court marked "C-19." The appellate court notes its sympathies to trial courts and the USPS attempting notice during the COVID-19 pandemic, but notes that the importance of developing a full and complete record to best serve the interests of justice is never suspended. Judgment reversed and remanded.

TOPIC: **A trial court abuses its discretion in overruling a motion for relief from judgment when service is not perfected and when the trial court incorrectly applies Civ.R. 60(B) to the motion.**

TITLE: **Brookville Ents., Inc. v. Kessler Estate HCF Mgt., Inc., 2022-Ohio-1420**
COURT: **Second Appellate District**
COUNTY: **Montgomery**
DATE: **April 29, 2022**

Plaintiff-Appellee asked the trial court to hold Defendant-Appellant personally responsible for an outstanding balance of $27,188.43 plus interest that Defendant-Appellant's father owed the skilled nursing facility in which he resided prior to his death. Plaintiff-Appellee alleged that Defendant-Appellant improperly used a power of attorney to withdraw money from the decedent's accounts, leaving the estate insolvent. Plaintiff-Appellee attempted service on Defendant-Appellant through personal service via the sheriff's office and it was unsuccessful. Plaintiff-Appellee next attempted service by certified mail. Before receiving confirmation or return of the certified mail, Plaintiff-Appellee requested that the clerk issue regular mail service, which was not returned to the trial court. Plaintiff-Appellee filed a motion for default judgment, alleging service had been perfected, and the default judgment was granted. The clerk received a copy of the certified mail envelope six months after it was sent indicating it could not be delivered. Defendant-Appellant subsequently filed a motion from relief from judgment and alleged that he had repeatedly been out of town during the time the notices were sent and was therefore unaware of them. The trial court denied the motion and Defendant-Appellant appealed.

The appellate court found that the trial court abused its discretion in overruling Defendant-Appellant's motion for relief from the default judgment, which was based on Defendant-Appellant's claim that he had not been properly served with the complaint. The appellate court found that the trial court incorrectly analyzed the motion by referring to Civ.R. 60(B). The appellate court further found that there were deficiencies and inconsistencies relating to service, mainly that Plaintiff-Appellee allegedly mistook the summary of the attempted personal service to be that of the certified mail service which in turn led them to proceeding incorrectly in the notification procedures as outlined in the civil rules. Defendant-Appellant claimed to have never received any of the notices; due to the disputed evidence, a hearing could be beneficial to determine whether service was actually achieved. Judgment reversed and remanded.

TOPIC: **Trial court does not abuse its discretion in determining decedent's testamentary intent pursuant to permissible extrinsic evidence and testimony.**
TITLE: **Skalsky v. Bowles, 2022-Ohio-1568**
COURT: **Fifth Appellate District**
COUNTY: **Holmes**
DATE: **May 10, 2022**

Decedent passed away and his will named appellee, his longtime girlfriend, as executor and sole beneficiary. Decedent's brother, appellant, filed a complaint for declaratory relief against appellee, due to conflicting provisions in the decedent's will— Item II bequeathed the decedent's estate to appellee, Item III bequeathed decedent's estate to ". . . next-of-kin, by the laws of descent and distribution." Decedent's attorney testified at the hearing that decedent directed the attorney to remove Item III and that it was inadvertently left in the version provided

to the decedent for his signature by the attorney's secretary. Witnesses testified at the hearing that decedent had discussions with them about his estate planning and that decedent was very clear he did not want appellant to have anything and wanted everything to go to appellee. Trial court found that items II and III were incompatible and that the decedent's testamentary intent was to leave the remainder of his estate to appellee; nothing was to pass to appellant. Appellant appealed.

Appellate court found that the trial court's analysis that given the evidence presented, the evidence was clear as to the decedent's intent and that there was a genuine explanation for the mix-up with the language in Item III; decedent's intent was for appellee to receive the entirety of the estate proceeds; judgment affirmed.

TRUSTS

TOPIC: **Trust beneficiary does not have standing to challenge prior trust transactions before having vested interest.**
TITLE: **Campbell v. Donald A. Campbell 2001 Trust, 2021-Ohio-1731**
COURT: **Eighth Appellate District**
COUNTY: **Cuyahoga**
DATE: **May 20, 2021**

The trial court issued four judgment entries: denial of plaintiff-appellant's motion for leave to amend his complaint; dismissal of plaintiff-appellant's motion to exclude matters outside the complaint as moot; denial of plaintiff-appellant's motion to dismiss; granting of the defendant's joint motion to dismiss because the trial court found that the plaintiff-appellant lacked standing to pursue any of the claims set forth in his complaint. Plaintiff-appellant appealed.

The appellate court found that the trial court did have jurisdiction because the jurisdictional-priority rule does not apply when cases are transferred within the same court. Additionally, plaintiff-appellant lacked standing to bring claims for trustee actions that occurred before his vested interest was triggered, which occurred at the time of his mother's death; judgment affirmed.

TOPIC: **Current trust beneficiaries can sue for accounting of transactions that occurred during time where they were vested but not-yet-current beneficiaries.**
TITLE: **Yeager v. U.S. Bank, 2021-Ohio-1972**
COURT: **First Appellate District**
COUNTY: **Hamilton**
DATE: **June 11, 2021**

Decedent had a trust account with U.S. Bank who was also the Trustee of the Trust. At some point in 2011 while the decedent was the beneficiary, U.S. Bank discovered at least one of its trust officers embezzled funds out of multiple trusts, including the decedent's trust; the

embezzled funds were returned by U.S. Bank to the Trust account later in 2011. Decedent passed away in 2017 and his three sons became the beneficiaries of the Trust. In 2018, decedent's sons demanded an explanation of the reimbursed funds from 2011; they later amended the demand to include a full accounting of the Trust. U.S. Bank never provided an accounting or explanation; decedent's sons sued demanding an accounting. Decedent's sons amended their complaint to include breach of fiduciary duty, conversion and civil theft. U.S. Bank sought to dismiss the Complaint for lack of standing, arguing that decedent's sons were not beneficiaries at the time and were not in privity with U.S. Bank; trial court granted U.S. Bank's motion to dismiss pursuant to Civ.R. 12(B)(6), with prejudice.

Appellate court found that the sons' demand for an accounting triggered U.S. Bank's duty as trustee under R.C. 5808.13 to respond to the beneficiaries' request for information related to the administration of the trust unless the request is unreasonable; appellate court found the request to be reasonable and therefore the claim was proper. Appellate court also found that the trust was an irrevocable generation skipping trust and the sons' interest in the trust was vested upon the creation of the trust, so there was no lack of privity. Finally, the appellate court found that the claims of conversion and civil theft were improperly pled, but could have been pled properly and should have been dismissed without prejudice. Judgment affirmed in part as modified and reversed in part and cause remanded.

TOPIC: **When a settlor of a revocable trust defaulted on a personal guaranty obligation, the settlor's creditor had the legal right to seize funds from a trust bank account.**
TITLE: **Zipkin v. FirstMerit Bank, N.A., 2021-Ohio-2583**
COURT: **Eighth Appellate District**
COUNTY: **Cuyahoga**
DATE: **July 29, 2021**

In the 1970s, Zipkin created a revocable trust to hold real estate. Said bank changed names, but Zipkin continued to open personal and trust bank accounts at these banks and financed many of his real estate transactions there. In 2012, Zipkin signed as a guarantor for a friend on a loan from the bank. The terms of the personal guaranty provided that the bank had setoff rights to any account that Zipkin held at the bank, individually or jointly, but the bank's setoff rights did not include "any trust accounts for which setoff would be prohibited by law." Zipkin's friend defaulted on the loan, and the bank used its setoff rights in two of Zipkin's accounts. Zipkin sued the bank as an individual and trustee for breach of contract and other claims, alleging that the bank improperly exercised its setoff rights against Zipkin's revocable trust account. The trial court agreed with Zipkin, finding that the trust was not a guarantor of the loan and the setoff from the trust account was otherwise prohibited by law, which breached the guarantee agreement. The bank appealed.

Appellate court reversed, citing that R.C. 5805.06 permitted the bank to exercise its setoff rights in this case. That statute provides, among other things, that a creditor of a settlor of a revocable trust may reach the settlor's interest in the trust during his/her lifetime, which Zipkin was. There was no evidence Zipkin's trust account was a spendthrift trust, which could prevent

creditors from attaching a beneficiary's interests and prevent a setoff; Zipkin's trust account was not protected by law and the bank could reach it through setoff rights.

TOPIC: **Summary judgment in favor of Agent under POA Instrument was improper where Agent did not show, and court did not analyze, that Agent acted in good faith.**
TITLE: **Ailbrando v. Miner, 2021-Ohio-2827**
COURT: **Fifth Appellate District**
COUNTY: **Licking**
DATE: **August 17, 2021**

Decedent executed a last will and testament that named his longtime girlfriend as executrix; he bequeathed her $100,000 with the remainder of his estate going to his two sons. Decedent also added his longtime girlfriend to his checking account and executed a durable power of attorney authorizing appellee to sell any real estate in his name and to deposit and/or withdraw funds from any of his bank accounts, including the joint checking account. The longtime girlfriend sold the decedent's home for over $200,000, placed those funds in the joint checking account, and after his death withdrew the funds and deposited them in her personal savings account. Decedent's sons filed exceptions to the final accounting and a complaint alleging concealment of assets pursuant to R.C. 2109.50. Trial court granted longtime girlfriend's motion for summary judgment, denied the sons' motion for partial summary judgment, and denied the sons' motion to substitute the executrix and amend their complaint. The decedent's sons appealed.

Appellate court found that the trial court erred in granting appellee's motion for summary judgment because issues of material fact such as: Did appellee's actions constitute good faith? Did she act in accordance with the decedent's reasonable expectations? Did she attempt to preserve the decedent's estate plan which was to bequeath her $100,000 with the remainder to appellants? The appellate court also vacated the trial court's denial to remove appellee as executrix and remanded the issue for reconsideration and decision. The remaining appeals were denied; judgment reversed in part, vacated in part, and remanded.

TOPIC: **Successor trustee's claims for fraud and breach of duty against former trustee were time-barred as successor trustee knew (or reasonably should have known) of the alleged fraud within the relevant statute of limitations.**
TITLE: **Bonner v. Delp, 2021-Ohio-3772**
COURT: **Sixth Appellate**
COUNTY: **Lucas County**
DATE: **October 22, 2021**

The decedent created a trust that was funded with a life insurance policy, an investment account, and shares of The Delp Company ("TDC"). Prior to the initial trustee's resignation, he transferred the investment account and the TDC stock from the original trust to a trust for one of the decedent's stepchildren's benefit; two of her three stepchildren consented to the transfers. The decedent's third stepchild became the Successor Trustee (the appellant) by written acceptance; she later claimed she did not assume the role of Trustee until a year after the writing

was executed. She also claimed that it was not until 2014 that she learned the investment account and the TDC stock had been transferred away from the original trust in 2010. The successor trustee sued the decedent's other stepchildren for various claims of breaches of trust, fraud, conversion, and conspiracy, and sought the return of the property to the original trust. The other stepchildren argued the claims were time barred under R.C. 5810.05(C)(1) and R.C. 2305.09(B) and barred by res judicata as they had been previously adjudicated in a 2014 federal case. The probate court granted summary judgment as to the claims against the initial trustee and dismissed the claims by the Successor Trustee against the other stepchildren; appellant appealed.

The appellate court found that the appellant acted as trustee beginning in 2010, had allowed one of the other stepchildren to act as a "de facto trustee", and that there was merit to the res judicata claim from the federal case because it was a final decision on the merits, involving the same parties and arising from the same transaction or occurrence. The appellate court further found that the appellant knew or should have known about any fraud by 2010, and that any claims brought after 2014 were time barred under R.C. 2305.09(B); judgment affirmed.

TOPIC: **The general division of the common pleas court had jurisdiction over a trust dispute when the trust property was located within that court's county.**
TITLE: **Wisehart v. Wisehart, 2021-Ohio-3649**
COURT: **Twelfth Appellate**
COUNTY: **Preble**
DATE: **October 12, 2021**

Appellant sued his father ("appellee") regarding the administration of his grandmother's trust. The appellant and his sibling sought to have the appellant made the trustee and attempted to prevent the appellee from selling trust real estate. The appellant also sought a trust accounting and alleged breach of fiduciary duty against the appellee. The appellee attempted to sell the trust property despite an injunction and was found in contempt of court. The appellee attempted to assert that the Ohio courts did not have jurisdiction, there was no actual controversy, and that the appellant lacked standing due to the death of the decedent. The trial court granted summary judgment in favor of the appellant and awarded $134,374.22 in attorney fees against appellee; appellee appealed.

The appellate court found that the appellee's appellate brief was, "rambling, incoherent, and rife with irrelevant legal concepts and legal authority." The appellate court noted that the appellant was an income beneficiary and the trust allowed a majority of income beneficiaries to appoint a successor trustee, which they did. The appellate court also found that the trial court had jurisdiction over the dispute; judgment affirmed.