

The Law & You

A Legal Handbook

For Ohio Consumers and Journalists

14th Edition



Prepared by the Ohio State Bar Association
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table of contents

<i>Acknowledgements</i>	v
<i>Introduction</i>	viii
Part I The Sources of Law	1
Constitutional Law	1
Statutory Law	2
Administrative Law	3
Common Law	4
Different Legal Systems in the World	5
For Journalists: Covering the News in a Global World	10
Part II The Courts	13
Ohio Trial Courts	13
Ohio Courts of Appeals	15
The Supreme Court of Ohio	17
The Federal Courts	18
For Journalists: Working with the Courts	19
Part III Legal Procedure	26
Procedure in Civil Actions	26
Procedure in Criminal Actions	31
For Journalists: Reporting on Procedure	41
Part IV Criminal Law	44
What Constitutes an Offense?	44
Types of Crimes	44
Penalties and Sentencing	46
Criminal Law and Constitutional Rights	52
Victims' Rights	57
For Journalists: Covering Criminal Trials	59
Part V Torts	62
Civil (vs. Criminal) Wrongs	62
What Is Negligence?	62
How Tort Rules Apply	64
Torts That Are Crimes	65

Part V Torts (continued)	
Tort Cases: Negligence	65
Traffic Accidents	66
Other Tort Lawsuits	68
Liability for the Acts of Others	70
Defenses in Tort Actions	71
Remedies for Tort	72
Workplace Torts	72
Resolving Disputes Without a Trial	73
For Journalists: Covering Torts	74
Part VI Contracts	77
What Is a Contract?	77
Basic Requirements for a Contract	77
Performance of Contracts and the Consequences of Breach	80
Excuses for Nonperformance or Breach of Contract	82
Remedies for Breach of Contract	83
For Journalists: Covering Contract Cases	84
Part VII Business Transactions and Organizations	87
Business Transactions in General	87
Commercial Paper	87
Consumer Transactions in General	89
Credit Cards	92
Retail Installment Sales	94
Home Solicitation Sales	95
Other Consumer Credit Transactions	96
Bankruptcy	98
Common Sense in Business Transactions	101
Business Organizations	102
Nonprofit and Tax-Exempt Organizations	104
For Journalists: Covering Business Transactions and Organizations	105
Part VIII Property Law	109
Kinds of Property	109
Types of Real Property Ownership	110
How Real Property Ownership Is Transferred	114
Land Records	117
Purchase and Sale of Real Estate.....	120
Landlord and Tenant	123

Part VIII Property Law (continued)	
Other Real Property Issues	125
For Journalists: Covering Property Law.....	128
Part IX Probate Law	133
Wills	134
What Happens When There Is No Will?	137
Administration of Estates	140
Estate, Health and Financial Planning	142
Other Duties of the Probate Court	146
For Journalists: Covering Probate Law	148
Part X Family Law	151
Marriage	151
Family Rights and Obligations	154
Minors and Their Rights	156
Juvenile Delinquency, Unruly Children and Juvenile Traffic Offenders	159
Neglected, Dependent and Abused Children	163
Divorce and Related Matters	165
For Journalists: Covering Family Law	172
Part XI Workplace Law	176
The Relationship between State and Federal Workplace Laws	176
Major Workplace Laws: Statutory and Case (or “Common”) Law	176
Labor Law	182
Government Employment	183
Wages and Hours	184
Workplace Safety	186
Workers’ Compensation	187
Pension and Welfare Laws Affecting Employment	188
Privacy On and Off the Job	190
Whistleblowing and Retaliation	192
When the Job Ends	193
For Journalists: Covering Workplace Law	196

Part XII Education Law	200
Public Education in Ohio	200
Alternatives to Public Education	203
Student Rights	204
Special Education	208
Federal Legislation and Education	211
For Journalists: Covering Education Law	214
Part XIII Online Law	217
Online Law As It Affects Individuals	217
Online Law As It Affects Businesses	222
Journalists and Online Law	225
Part XIV The Lawyer	229
The Legal Profession	229
Legal Ethics and Discipline	231
When and How to Locate an Attorney	236
How Lawyers Charge for Their Services	238
The Attorney-Client Relationship	241
Bar Associations and Related Organizations	245
Journalists and Lawyers	247
Part XV Media Law and Legal Resources for Working	
Journalists	250
Section I: Libel, Privacy & Journalist’s Privilege	250
Section II: Media Access to Courts, Meetings and Public Records.....	262
Section III: Internet and Journalism	276
Section IV: Legal Contacts and Resources for Reporters	283
Glossary	288
Index	325
Postscript	349

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introduction

The law is an integral part of our lives. We are born, live, and die under the law. Marriage, the care of children, education, how we earn our daily bread, our relations with others, our conduct, what becomes of our property when we die—all are governed by the law.

Ours is a government of laws, not of individuals. Good citizenship requires everyone to have at least a basic knowledge of the law. This may seem an impossible task, because a modern law library (with even modest pretensions to being complete) must contain thousands of volumes. Most of the literature of the law is written by and for attorneys, and the layperson is understandably repelled by the prospect of wading through mountains of technical language for information. Further, the layperson risks becoming so bogged down in detail that the fundamental principles are lost.

This book was written to help fill the need for a survey of law for the non-lawyer. It is written, as much as possible, in non-technical terms and it avoids detail in favor of main principles. It makes a determined attempt to aid understanding of legal principles by explaining, where appropriate, what the law is and how it got that way. Many illustrations are used to explain the operation of the law in commonplace terms. The basic subjects covered are the sources of law, organization and operation of the courts, legal procedure, criminal law, torts, contracts, business transactions and corporations, property law, probate law, family law, workplace law, school law, online law and media law. A glossary explains many technical terms the layperson is likely to encounter.

The reader should bear in mind that this book is not a definitive work on the law. Some areas of the law are not discussed at all, and most others are not discussed in great detail. The discussions that are included touch only the high spots. The inclusion of too much material or detail would defeat the book's main purpose. Further, some interpretations of the law contained in this book may be unintentionally misleading or erroneous. The law is constantly changing; the law today may not be the law tomorrow.

Even assuming that such a work could be written, this book is not intended as a complete, how-to manual on the law. Neither the Ohio State Bar Association nor the Ohio State Bar Foundation provides legal or other professional services. This book attempts to provide a simplified overview of the law. Readers *should not* and *cannot* rely on this book when faced with a real-life legal or law-related issue. They must obtain their own information and make their own decisions. Readers should contact a lawyer when they are faced with real-life legal problems.

Note to journalists: This 14th edition of *The Law & You* includes a four-section chapter on media law that replaces the *Legal Handbook for Ohio Journalists*. In addition, all other chapters include short sections regarding journalists' coverage of legal matters.



Part I

the sources of law

“The Constitution of the United States was made not merely for the generation that then existed, but for posterity—unlimited, undefined, endless, perpetual posterity.”

– Henry Clay

Think of the law as a collection of broad principles and specific rules concerning freedom, conduct and property that establishes rights and duties designed to help people live together in communities, states and nations. The law didn’t appear overnight, but evolved over centuries from the human desire for order. As people began living closer together, this desire gave rise to customs that became accepted by the larger group and eventually became law.

The law is really not as mysterious as some people perceive, and the law that governs Ohio and the United States can be broken down into four classifications:

- constitutional law—the fundamental law of the land as spelled out in the Constitution of the United States and state constitutions;
- statutory law—laws adopted by legislative bodies such as the U.S. Congress, the Ohio General Assembly or a city council;
- administrative law—written rules adopted by (and legal interpretations issued by) various government agencies under limited authority granted by legislative bodies; and
- common law—a large body of law that has grown out of previous court decisions, customs, and usage, rather than resulting from specific legislation (statutory law).

Constitutional Law

The U.S. Constitution outlines the federal government’s structure and powers and establishes basic law in the United States. Similarly, the Ohio Constitution establishes basic law for the people of Ohio. Should a conflict arise between the state and federal constitutions, the U.S. Constitution takes precedence.

The U.S. Constitution

Our federal government is a union of 50 separate states. The basic purposes of the U.S. Constitution are to effectively govern the entire nation while preserving a measure of state sovereignty, to promote the general welfare, and to protect the individual rights of all citizens. To achieve these ends, the U.S. Constitution defines the powers granted by the people to the federal government, reserves all other powers to the states and spells out how the states relate to each other and to the federal government. It establishes three branches of the federal government: the legislative, or lawmaking branch (Congress); the executive branch (the president and the president’s subordinates), whose duty is to see that the laws made by Congress are carried out; and the judicial branch (the national court system headed by the U.S. Supreme Court), whose duties are to interpret the laws and to administer justice.

The first 10 amendments to the Constitution, known as the Bill of Rights, guarantee individual rights and liberties such as the right to free speech or to gather freely. The U.S. Constitution is the standard against which all other laws are judged and administered.

The Ohio Constitution

The Ohio Constitution is the supreme law of the state and is like the U.S. Constitution in many respects. It establishes the government of Ohio and provides for legislative, executive and judicial branches; spells out the powers of state government; and lists fundamental individual rights. The Ohio Constitution, however, addresses more issues than the U.S. Constitution. For example, it establishes the right of *referendum*, whereby the people can adopt and repeal laws by direct vote;

contains detailed provisions for financing public works and various state programs; and establishes the organization and operation of local government. Still, the Ohio Constitution is subordinate to the U.S. Constitution. Thus, it would not be possible, for example, to amend the Ohio Constitution to require criminal defendants to testify at their trials, because the Fifth Amendment to the U.S. Constitution specifically states that no person shall be compelled to testify against himself or herself.

Statutory Law

Laws written by federal and state legislative authorities are known as *statutes*. The U.S. Congress enacts those statutes affecting the entire nation, while the Ohio General Assembly enacts Ohio's statutes. City or village councils enact local laws called *ordinances*.

Federal laws are compiled in the *United States Code*. Ohio's state statutes are compiled in the *Ohio Revised Code*, and each individual city and village maintains a code of municipal ordinances.

Federal Statutes

Federal laws are enacted by the Congress and affect the entire country. They are compiled in the *United States Code*, which, like the *Ohio Revised Code*, is arranged according to subject matter. Under the U.S. Constitution, only the U.S. Congress may deal with certain subjects, such as the armed forces, bankruptcy, patent law and interstate commerce. In other areas, federal law might govern some parts of an activity and state law might govern other parts.

Sometimes both the state and federal government have similar laws covering the same subject. Usually, state law governs a particular activity within the state, and federal law governs the same activity in interstate and foreign commerce.

For example, Ohio handles how firearms, explosives and drugs are bought, sold and controlled within the state, while federal law steps in to handle how firearms, explosives and

drugs are bought, sold and controlled in interstate and foreign commerce.

In some areas, states may create laws only so long as they fit within a federal outline of law. For example, generally speaking, a state may create laws to govern over its land and waterways within its territorial boundary as long as the activities are within the state boundary. However, Congress may pass laws or the Environmental Protection Agency (EPA) may make rules with the force of laws that govern over that same land or waterway for an interstate commerce activity. There are some instances where a law of Congress may trump a state law, especially if both laws address the same subject at the same time. In other instances state and federal laws may be applied together in areas where they do not overlap to cancel each other out.

State Statutes

Ohio statutes (or laws) are enacted by the General Assembly and affect the entire state. Generally, Ohio statutes take precedence over city ordinances, the regulations of government agencies and the common law of the state.

Ohio statutes are compiled in the *Ohio Revised Code* and cover a wide range of subjects including:

- the organization and operation of state and local governments
- agriculture
- financial institutions
- commercial transactions
- natural resources
- business organizations
- courts and procedures
- criminal law and procedure
- family law
- education
- elections
- health and safety
- insurance
- labor and industry
- licensing of drivers
- liquor control
- motor vehicles and traffic

- occupations and professions
- protection of incompetents and children
- public utilities
- public welfare
- real estate
- roads
- taxation
- veterans and military affairs
- water and sanitation

Municipal Ordinances

Under the Ohio Constitution, municipalities (incorporated cities and villages) may adopt laws for their own self-government. These local laws are called *ordinances* and are adopted by the village or city council, which is the legislative branch of municipal government. Municipal ordinances are effective only within the municipality enacting them and are valid only if they do not conflict with state law.

The relationship between municipal ordinances and state law requires some explanation. Ordinances may duplicate or overlap state law, but ordinances can neither permit anything prohibited by state law, nor prohibit anything state law specifically permits.

Like state law, municipal ordinances may deal with a wide range of subjects, including the organization and operation of police and fire departments, housing, sanitation, licensing and inspection of various businesses, and many other matters.

Municipal ordinances commonly contain a traffic code, which is similar to, or even a duplicate of, the state traffic code. Further, municipal ordinances generally have many provisions similar to those of the state criminal code. This is allowed as long as the violation of a municipal traffic ordinance is not classified as a felony (whose potential penalties may include imprisonment for more than six months or even a death sentence) and provided a municipality does not try to attach felony penalties to any of its ordinances. The only penalties that can be imposed for violation of a municipal ordinance are a fine or a term

of not more than one year in the local jail or workhouse, or both.

Administrative Law

It's deer-hunting season in Ohio, so you traipse off into the woods and bag a 10-point buck. Feeling like frontiersman Simon Kenton, you begin hauling the deer away, when a park ranger asks to see your hunting license.

Oops. Forgot to buy yours? The ranger issues you a citation for violating a state administrative rule that requires you to purchase a hunting license issued by the Ohio Department of Natural Resources (ODNR). The fee to purchase the license was established by ODNR according to its authority to set rules for conserving Ohio's natural resources. The authority to establish the fee and adopt other rules was granted to ODNR by state statute.

Many activities governed by statutes or ordinances are so technical, or change so often or so fast, that they cannot effectively be regulated by statute or ordinance alone.

Adoption and Effect of Rules

The authority to adopt administrative rules is a limited legislative power given to an administrative agency by the legislative body. It is a power granted by both the U.S. and Ohio constitutions. Administrative rules supplement statutes and are useful because activities regulated by statutes and ordinances are numerous, technical and change so often that they cannot be effectively enforced by statute or ordinance alone. Administrative rules can cover only the specific subjects authorized by the statute or ordinance.

Our state's administrative rules are found in the *Ohio Administrative Code* and cover activities such as hunting, fishing, wildlife management, development of natural resources, public recreation, pollution control, health, sanitation, liquor control, insurance, housing, building construction, land use and industrial safety.

It is important to note that many of these activities are also governed by federal administrative rules. Most of these rules are published in the *Code of Federal Regulations*. Federal income taxation is the best known of these activities and is governed by a long list of rules adopted by the Internal Revenue Service, commonly called tax regulations.

The adoption of administrative rules in Ohio involves a detailed set of procedures, which include multiple public hearings. Once adopted, administrative rules carry the same force of law as statutes and can be enforced by the courts. Violating an administrative regulation may be a crime if the corresponding statute or ordinance says it is a crime and creates a penalty. If you fail to buy a hunting license, for example, you may be found guilty of a fourth degree misdemeanor. Because agencies do not have full legislative power, they cannot create new criminal classifications and criminal penalties. Limiting the power of the bureaucracy keeps the lawmaking functions of the state in the hands of the legislature, which is the intent of the Ohio Constitution.

Common Law

The common law is a large body of law that has grown out of society's customs and usage, and out of previous court decisions, rather than resulting from specific legislation (statutory law). Because it is (and was) created by the courts, common law is a product of judicial rather than legislative power. It fills the gaps, interprets ambiguities and helps unify constitutional, statutory and administrative law. Based on generations of the natural development of human experience, common law gives continuity and consistency to the law. It also allows the law to respond to the changing needs of society.

Case Law as Common Law

The common law is believed to have originated in England following the Norman Conquest (1066) and was brought to North America by

English colonists, along with numerous English statutes. It owes its present vitality to the custom, begun in the 17th century, of recording judicial proceedings and decisions, as well as the principles and reasoning behind them. When a court decides a case and records its decision in a written opinion, that opinion, or case, becomes a *precedent*. That is, the principles on which the case was decided may be used to decide future cases with similar factual situations.

The following example illustrates how we deal with the concept of precedence on a daily basis: Let's say your immediate work supervisor issues an order about how to stack boxes. This order remains the precedent unless your supervisor's boss issues another order about stacking boxes, which replaces the first order and becomes the new precedent. Precedent might also change, for example, if a new system of packaging makes the old way of stacking boxes obsolete.

The impact of a case as precedent depends mainly on the court in which it is decided. A higher court is not bound to follow the precedents established by the lower courts in its jurisdiction. Lower courts, however, are bound to follow the precedents of all higher courts having jurisdiction over them. Courts of equal rank *may* use each other's precedents, just as the courts of one state may borrow from the precedents of another state or federal court. Courts often use the precedents of equal or lower courts, the courts of other states, and the federal courts when such precedents are well reasoned or address new problems or create new or better solutions to old problems. (*See Part II, "The Courts," for more information on the ranking of courts.*)

Scope of the Common Law in Ohio

Many major divisions of Ohio law are governed almost entirely, or in significant respects, by the common law. One important subject governed almost entirely by common law is *torts*. The common law of torts deals with civil remedies for injuries or damages caused by negligence, or other wrongful acts or omissions by others. It overlaps substantially with what is thought of as "personal

injury” law. For example, most of the law governing the question of liability for injuries suffered in automobile accidents is based on the common law of torts.

Contract law is covered partly by the common law and partly by statutes. Some areas of the law are based almost entirely on statute, such as conduct that is considered a crime, and benefits available under workers’ compensation. However, the common law retains its importance even in the parts or divisions of the law based on statute. For example, common law principles and concepts are used to decide if, or how, a statute, ordinance or regulation applies to a particular situation. Further, when a statute, ordinance or regulation is interpreted in a certain way, the interpretation itself becomes part of the common law and is thus entwined with the written law.

The Importance of Common Law

The common law can prevent a casual dismissal of society’s established principles. At the same time, it forces society to look at outdated principles and replace or reshape them to address contemporary issues.

The landmark U.S. Supreme Court case of *Brown v. Board of Education* is a good example of how the law can change with time. In its 1954 decision, the high court ruled that separate educational facilities for white and black students were unconstitutional. That decision (which reflected changes in our society’s views on race) overruled another decision rendered nearly 60 years earlier that found separate but equal facilities *were* constitutional. It can be argued that this particular decision illustrates the flexibility our founding fathers consciously built into the U.S. Constitution.

Different Legal Systems in the World

Different countries around the world have diverse legal systems and legal cultures. Legal

systems differ in the development and use of substantive laws, procedures, remedies and enforcement mechanisms. Therefore, the same legal problem may be resolved using different remedies depending on the legal system applied to the particular problem.

People living in a globalized world must have a basic understanding of how culture and diverse legal systems affect the realization of justice. For example, even though courts exist in China, they are used as a last resort according to Chinese culture and legal tradition. In China, it is considered preferable to follow a step-by-step approach starting with negotiation, mediation, and, if necessary, going to litigation in court as the last step.

Different countries in the world use common law, civil law, religious law, traditional law, tribal customary law, or a combination of these legal systems. In the United States of America all states except Louisiana operate under the common law system. Louisiana’s system of law is considered a hybrid between civil law based on French and Spanish codes and the common law used by other states in the United States. While courts elsewhere in the United States tend to rule based on precedents developed from common (case) law, Louisiana judges generally rule based on their own interpretations of the law, although Louisiana’s civil law does acknowledge established precedents.

Comparison of Common Law and Civil Law Systems

Brief History

The civil code or civil law system is based on the foundation laid by Roman law. Civil law is the most common type of legal system in the world, either in its pure form or in combination with another legal system such as religious law or tribal customary law. Civil law is governed entirely by statutes, which aim to cover every area of the law.

Initially, colonial expansion spread the civil law system. Today, European civil law has been adopted in all of Central and South America, parts

of Asia including China, parts of Africa and even some areas of the common-law world (Louisiana in the United States, Quebec in Canada, and Puerto Rico). There are certain major differences between civil and common law systems of government. The major differences include the codification process in the civil law tradition, the role of the judge, the application of evidentiary rules, the inquisitorial vs. adversarial nature of the two systems, and the remedies allowed by the two systems.

The goal in the civil law system is to find and apply a relevant statute to solve the legal problem. This is done in an *inquisitorial* fashion, where the judge asks questions and takes an active role in the process.

In a common law system, the goal is, rather, to find a case that is similar in facts to the case at hand. The way in which the earlier case was decided creates a legal “precedent,” which can be used to solve the legal problem in the current case. The attorneys generally try to find legal precedents from older cases on behalf of their clients, while the judge functions as a “referee.” The attorneys are responsible for representing their own parties, whose interests generally oppose each other, so their role is adversarial in nature. That is why the common law system is considered *adversarial* rather than inquisitorial. In countries that rely heavily on the common law, courts may base decisions on precedent developed through case (common) law, but they are still bound to follow the statutory (written) law if there is a conflict between common and statutory law.

Codification in Civil Law Systems

The legislative branch (such as the parliament) is today the principal source of law in civil law countries. The concept of enacted law covers legal rules adopted by the legislative branch, executive decrees, administrative regulations and local ordinances issued by the executive branch (such as the president or government agencies). A distinguishing feature of a civil law system is its codification of laws enacted by the legislative

branch and its heavy reliance on its codified laws to decide cases.

Civil law countries have authoritative, comprehensive and systematic collections of general clauses and legal principles called *codes* that define the law in a logical fashion.

The codes in a civil system cover many legal topics, sometimes treating separate areas of law in different codes, such as the criminal code or the commercial code. A specific code, *e.g.*, the commercial code, aims to lay down the whole area of commercial law in one document to provide a coherent and consistent set of rules. The commercial code is then applied to solve all disputes in the area of commercial law.

The use of codes in a civil system is similar to the use of statutes in a common law system. However, statutes in a common law system cover only certain areas of the law, whereas in civil law systems, *all* areas of law are regulated by comprehensive statutes that even incorporate judicial decisions. In a common law system, judicial decisions established from earlier cases form precedents that are used to decide future cases, but these are not included in the statutes.

The Judge’s Role in Civil and Common Law Systems

The judge’s duties and career path are quite different in civil and common law systems. Civil law judges must follow written codes and take care to administer them in a technically correct manner when reaching judicial decisions. There is little room for creativity; rather, the judge must apply the written law in the specific code to reach a decision. The judge is expected to interpret the statute until a new statute is enacted to address a particular legal problem, which means that courts may struggle to apply an existing solution to a new problem. In a civil law system, consistency and predictability within the written law is valued more than innovation when attempting to solve legal problems.

In systems that draw largely on the common law, judges may use precedents established by

earlier cases to resolve a legal problem. Because the facts in one case are never exactly identical to those of another, the judge must confirm the similarity between the cases before applying the precedent. Although the judge must abide by the demands of written law, the process of resolving a question where the precedent does not exactly match the current issue allows the judge to exercise some creativity. This is why common law is sometimes called judge-made law.

In civil law countries, a new lawyer may become a judge immediately rather than first spending time as a practicing attorney or a prosecutor. There is a specific exam and training generally set by the ministry of justice for career-path judges. After having completed the exam and the training, the judge is assigned to a specific court and post by the ministry of justice. In countries that rely on the common law, a new lawyer must spend a significant amount of time in the private practice of law or, perhaps, as a government attorney or law professor before becoming a judge. Judges are appointed or elected to office in common-law countries, and there is no competitive examination.

Trials in Civil and Common Law Systems

In civil law systems, judges have broader authority and more control regarding evidentiary rules than in common law systems. A civil law judge is specifically trained to administer a trial and can enforce the rules of evidence and exercise a great deal of control in directing the timing and flow of a case.

The judge defines the issues as the proceedings continue and decides which witnesses will be examined at trial, what questions will be asked of them and how to evaluate their testimony. In a civil system, there is no real counterpart to the common law practice of pre-trial discovery and motions, and there is no genuine “trial” in the sense of a single major event. A civil law action is a continuous process of meetings, hearings,

and written communication during which evidence is introduced, testimony is taken, and motions are made and decided. Settlements are encouraged throughout the course of the legal action.

During this process, the judge plays an active role by questioning witnesses and seeking to reframe or define the issues, although lawyers also may submit questions to witnesses. The judge also may introduce new legal theories and factual issues during the proceedings, and can even obtain expert opinions on his or her own motion. The admission of documents into evidence is not a formal process. Parties themselves may introduce evidence or the court may ask for evidence. One party must notify the other party that evidence will be introduced, and give the other party an opportunity to inspect the documents for authenticity. The judge determines what weight should be given to the evidence, and there are no rules governing “hearsay” evidence provided by those who are not first-hand witnesses. Because civil law systems do not use juries, there is no need for elaborate exclusionary rules of evidence.

In the common law system, the judge has some ability to direct the timing and flow of a case. However, the lawyers for each party are generally responsible for moving the case forward, producing evidence and questioning witnesses. In representing their parties, the lawyers are allowed to argue about what evidence should be allowed at trial, although the judge is responsible for applying and enforcing the appropriate rules of evidence. The lawyers are largely responsible for questioning witnesses, and the judge acts as more of a referee during this process, although the judge also may question witnesses. A system grounded in the common law is client-centered, and the primary duty of the lawyer is always to the client, although the lawyer is still bound to uphold the statutory law. The judge’s job is to make sure the lawyers follow the law governing the trial procedure.

Inquisitorial vs. Adversarial Nature of Civil and Common Law Systems

Both civil and common law systems seek to uncover the truth, but they do so from different perspectives.

Civil law systems tend to be *inquisitorial*, meaning that the emphasis is upon discovering the truth by asking questions and then finding the appropriate statute to apply to the case. In a civil law system, the court is not necessarily seen as a forum where the plaintiff and defendant battle to demonstrate to a judge or jury who is right and who is wrong. Rather, judges are actively involved in questioning witnesses, directing investigations and challenging evidence.

Common law systems tend to be *adversarial*, meaning that the truth is expected to be revealed through a vigorous debate between two opposing points of view as presented by the parties' lawyers. In the common law system, the judge generally serves as an impartial observer of this debate, but must make sure the lawyers follow statutory rules at trial when (for example) presenting evidence or questioning witnesses. If the trial does not involve a jury, the judge will determine the "truth" based on the evidence presented and will apply the law in making a final judgment. In a jury trial, the judge must tell the jury how to apply the law to the evidence presented by the opposing parties. In a common law system, the judge also may recommend alternatives to trial. For example, in the United States, an adversarial trial is increasingly used as a last resort, and judges frequently recommend mediation and negotiation before allowing a case to come to trial.

Juries in Civil and Common Law Systems

The jury was developed to give accused people the option to be tried by their "peers" rather than by the country's rulers or decision-makers. However, trial by jury is not the norm in civil law systems, where the judge is generally responsible for finding the truth and deciding cases by applying the appropriate statutes. Juries are sometimes used in some civil code countries

such as France, Norway, Spain and Brazil, but they are generally used for a limited range of offenses that are mainly criminal.

In the United States' common law system, accused people have a right to a trial by jury in certain cases. Even so, many cases are not tried before a jury, especially when the case does not involve a crime. In some countries that make use of the common law, such as Papua New Guinea and India, trial by jury is not common, largely because, in these countries, tribal or clan loyalties make it difficult to find people who can reach an objective judgment when evaluating the parties at trial (such as the accused or the alleged victim). In such a society, it likely will not be in the parties' best interest to be tried by a jury of "peers."

Remedies in Civil and Common Law Systems

At the end of a case, in both civil and common law systems, the court typically determines a remedy to compensate for whatever harm it finds a party has suffered. However, remedies can be quite different in civil law and common law systems. For instance, courts in the United States sometimes award punitive damages (in addition to "damages" to compensate for losses) in order to "punish" a party for outrageous conduct. In most civil law countries, the notion of punitive damages is not common except in certain criminal cases. Punitive damages awarded by a court in the United States in a non-criminal case likely could not be enforced in a country that uses a civil law system.

Civil law systems favor providing the injured party with only compensatory damages to make up for the harm that was done. In a common law system, punitive damages are awarded most often in tort cases. In a civil law system, however, torts are included in the criminal codes, which address punishment of those causing harm in tort actions. Any matter that is included in the criminal codes must be decided only by courts that render judgments on criminal matters.

As globalization has increasingly required civil law systems and common law systems to work together, civil law countries are beginning to allow for punitive damages in an increasing number of cases that originate from the civil courts of common law countries.

Different Understandings about Particular Areas of Law

In certain areas of the law, rules and principles differ greatly from one legal system to another. Labor and employment law is a good example. In the United States, all states except Montana generally presume that employment is “at will,” meaning that either the employer or the employee may terminate the employment relationship without notice or cause.

In Germany, employees are entitled to receive a written statement of the main terms and condi-

tions of employment within one month of the start date. Employees who have been employed for more than six months by employers with more than 10 regular employees enjoy protection against termination under the Unfair Dismissal Act. Under this act, the employer cannot end the employment contract without giving one of the three statutorily defined reasons for termination.

In China, Article 16 of the labor law requires an employment contract to be signed before an employment relationship can exist. It is generally accepted that an employment relationship exists if a person is on another’s payroll.

Such differences in whole areas of law lead to different applications and different remedies throughout the world.

Comparison chart between countries based in common law and civil law		
	Common law	Civil law
Cultural sources	Anglo-American, English	Continental, Romano-Germanic
Sources of law	Case law, legislative statutes and administrative codes	Codes, statutes, legislation
Lawyers’ role	Primary; debate and oppose	Secondary; advise and inform
Judge’s role	Referee and instruct	Direct and examine
Juries	Provided at trial level	Used in some criminal cases
Examples	United States, England, Australia	Germany, France, Turkey China, Mexico

For Journalists: Covering the News in a Global World

United States journalists often assume—wrongly—that the First Amendment follows them abroad when they report news events. That is, they are not critically aware that our constitutional commitment to a free press is still uniquely American. The U.S.-centric presumption of press freedom is more likely than ever to place American journalists in trouble, especially when they engage in online news reporting that defies geographical boundaries.

In recent years freedom of speech and the press has become more widely accepted as a human right around the world, but when it comes to freedom of the press, the United States is more different from than similar to the rest of the world.

For example, “actual malice” epitomizes the preferred position of free expression in American law over reputation. Similarly, hate speech is not a crime in America, but it is a crime outside the United States with few exceptions. The absolute Internet Service Provider immunity from liability under Section 230 of the Communications Decency Act is another case in point that makes the United States stand out from other countries.

Also, while contempt of court is not the rule in news reporting on trial proceedings in the United States, it is frequently invoked by foreign courts when balancing free press with fair trial. Prior restraint (a government’s prohibition of speech in advance of publication) is no different. In American law, prior restraint generally is presumed to be an unconstitutional affront on free speech, but in foreign and international law this is not necessarily the case. That is, defamatory statements are rarely subject to pre-publication injunctions in the United States, while defamation and invasion of privacy can be a ground for prior restraints in foreign countries. Indeed, defamation of government officials or important public

figures can entail serious consequences abroad, while it is less consequential in the United States, where seditious libel is a non-issue.

Freedom of information (FOI) is probably one of the valuable exports of the United States to foreign countries, especially in the past 20-plus years. Significantly, some countries are now more actively engaged in practicing open government than the United States is. But foreign FOI laws are not as accommodating as the United States’ Freedom of Information Act (FOIA) is to non-citizen requests for access to government records. The American FOIA makes no distinction between American citizens and foreigners.

American journalists should develop a working knowledge of foreign press law and regulations before they engage in international reporting, whether at home or abroad.

Resources for journalists engaging in international reporting:

Richard N. Winfield, “Globalization Comes to Media Law,” *1 Journal of International Media & Entertainment Law* 109-116 (2006).

Charles J. Glasser Jr., ed., *International Libel & Privacy Handbook* (2d ed. 2009).

Mark Warby et al., eds., *The Law of Privacy and the Media* (2d ed. 2011).

Cameron Doley & Alastair Mullis eds., *Carter-Ruck on Libel and Privacy* (6th ed. 2010).

Eric Barendt, *Freedom of Speech* (2d ed. 2005).

Matthew Collins, *The Law of Defamation and the Internet* (3d ed. 2010).

Andrew B. Ulmer ed., *Media, Advertising & Entertainment Law Throughout the World* (2011 ed., 2011).

Chapter Summary

- The U.S. and Ohio constitutions outline the powers given to federal and state government, respectively. When there is a conflict between the two, the U.S. Constitution is the supreme authority and takes precedence over the state constitution.
- The law in the United States is divided into constitutional law, statutory law, administrative law and common law.
- State law in Ohio is made up of statutes created by the Ohio General Assembly. Local laws are ordinances adopted by incorporated villages and cities.
- Administrative law in the United States establishes governmental agencies with the authority to regulate activities and adopt rules.
- In the United States, common law has evolved over time and continues to do so. It unifies the gaps between constitutional, statutory and administrative law, while providing the flexibility to adapt to societal changes.
- Different countries in the world use common law, civil law, religious law, traditional law, tribal customary law, or a combination of these legal systems.
- The civil law system, the most common type of legal system in the world, is governed entirely by statutes, which aim to cover every area of the law.
- The legislative branch (such as the parliament) is the principal source of law in civil law countries today. Civil law countries have authoritative, comprehensive and systematic collections of general clauses and legal principles called *codes* that define the law in a logical fashion.
- Civil law systems tend to be *inquisitorial*, meaning that the emphasis is on discovering the truth by asking questions and then finding the appropriate statute to apply to the case. Common law systems tend to be *adversarial*, meaning that the truth is expected to be revealed through a vigorous debate between two opposing points of view as presented by the parties' lawyers. The United States operates largely under a common law system.
- While accused people have a right to a trial by jury in certain cases in the United States, trial by jury is not the norm in civil law systems and is generally used for only a limited range of (mainly criminal) offenses.

Web Links:

International Resources:

www.juriglobe.ca/eng/index.php

From the University of Ottawa, World Legal Systems

Features a world map that uses color to indicate nations that operate under civil law, common law, customary law, Muslim law and mixed legal systems. Briefly describes each type of legal system.

www.loc.gov/law/help/guide/nations.php

Law Library of Congress, Guide to Law Online: Nations of the World

Links to websites for constitutions and the executive, judicial and legislative branches of government for hundreds of countries. Some foreign country websites provide an English-language version but many do not.

Examples of specific civil codes:

English translation of the German Civil Code:

www.gesetze-im-internet.de/englisch_bgb/index.html

English translation of specific portions of the Turkish Civil Code:

www.tusev.org.tr/userfiles/image/turkey%20tr%20civil%20code%20provisions.pdf

Indonesian Civil Code:

www.unhcr.org/refworld/category,LEGAL,,,IDN,3ffbd0804,0.html

Examples of civil law around the world prepared by Louisiana State University:

www.law.lsu.edu/index.cfm?geaux=clo.view&cid=3B4BB9B5-1372-69E5-F769BEC6C6509622

Description of legal systems and laws in the countries where European Bank for Reconstruction and Development operates:

www.ebrd.com/pages/sector/legal/cla.shtml

Canada as country of common and civil law:

www1.canadiana.org/citm/specifique/lois_e.pdf



Part II

the courts

“Law has become utilitarian. It can be what the majority conceives as law, or it can be what an elite says it is. There is no absolute. In the end, it is always what a court or judge says it is.”

– William H. Seward (1850)

The courts oversee and administer the law. They resolve disputes under the law and strive to apply the law in a fair and impartial manner.

Like other states, Ohio is served by separate state and federal court systems organized into trial courts, intermediate courts of appeals and a supreme court in each system. State courts deal primarily with cases arising under state law and federal courts deal primarily with cases arising under federal law.

Ohio Trial Courts

In Ohio, most cases begin and are resolved in trial courts, which are the workhorses of the state’s judicial system. Ohio has several kinds of trial courts and each has *venue* and *jurisdiction* over cases. Simply stated, venue is the geographical location where a case is heard. Jurisdiction is the power and authority to hear and decide certain kinds of cases. Ohio’s trial courts include:

- common pleas courts that have countywide venue and jurisdiction to decide all levels of civil and criminal cases;
- municipal and county courts that have more limited jurisdiction than common pleas courts, and authority to decide only less serious civil and criminal cases;
- mayor’s courts that do not have civil jurisdiction and have only limited authority to hear minor criminal matters that occur within a city or village;
- Ohio’s court of claims, which handles suits against the state of Ohio and claims for state compensation that are filed by crime victims.

Unlike the other trial courts that are both authorized by the Ohio Constitution and estab-

lished by statute, the court of claims is entirely created by statute.

Common Pleas Courts

The common pleas court is the most important of Ohio’s trial courts. It is Ohio’s court of general jurisdiction, which means that it has the authority to hear almost any civil or criminal matter, and that most serious civil or criminal cases *must* be heard in common pleas court. Each of the state’s 88 counties has a common pleas court.

It is also the only trial court with the power to deal with certain matters. For example, the common pleas court generally has exclusive jurisdiction over felonies, or crimes whose potential penalties may include a prison term or even a death sentence. In civil matters, the common pleas court has exclusive jurisdiction in lawsuits seeking certain extraordinary remedies, such as injunctions and restraining orders, or monetary compensation. When monetary damages are sought, the common pleas court usually hears cases claiming more than \$15,000, although in counties without county courts, the minimum amount that can be sought in common pleas court is \$500.

The common pleas court has no authority to hear appeals from lower trial courts, although it can hear appeals from rulings made by government administrative agencies. In lesser civil and criminal cases, the common pleas court shares the power to handle certain matters with other trial courts; that is, it has concurrent jurisdiction with municipal and county courts.

Probate/Domestic Relations/Juvenile Divisions

One or more separate divisions of the common pleas court handle probate, domestic relations, and juvenile matters, and it is through

these divisions that most people have direct contact with the court. At one time or another, you or someone in your family probably will have some sort of contact with the probate division of the common pleas court. This is because many matters of everyday life are handled in this court, and its function is extensive. For example, if your neighbor dies, his or her will is likely to be administered through the probate division. The probate division handles wills, estates, adoptions and guardianships, and issues marriage licenses. It also supervises the activities and accounts of people in positions of trust (generally called *fiduciaries*), such as estate executors or administrators, guardians and trustees.

The domestic relations division deals with divorce, marriage dissolution, annulment, legal separation, spousal support, parental rights, child support, parenting time, visitation and companionship.

The juvenile division has jurisdiction over delinquent, unruly, or neglected children; juvenile traffic offenders; and adults who neglect, abuse or contribute to the delinquency of children. When a juvenile (any person under age 18) is accused of an offense, whether serious or minor, the juvenile division has exclusive jurisdiction over the case. When a juvenile is accused of a particularly serious crime, he or she may be transferred from the juvenile division to an adult court for trial and sentencing. Once the child is transferred, the juvenile division no longer has jurisdiction over the case. The juvenile court also has jurisdiction over matters involving paternity, child custody, child support and visitation when the child's biological parents are unmarried.

Court Operations/Common Pleas Judges

Depending on a county's size, the common pleas court is overseen by a judge or several judges and divided into divisions. Larger counties may have several judges in the general division plus separate judges for the probate, domestic relations and juvenile divisions. Counties with smaller populations might have a single judge handling all cases coming before the court.

To qualify for election, common pleas judge candidates must be licensed attorneys with at least six years of experience. Once elected, they serve six-year terms.

Municipal and County Courts

You find yourself running late for class or a job interview, so you push the speed limit, hoping to make up some time. As fate would have it, you're stopped by a police officer and ticketed for speeding. To make matters worse, you forget to pay the fine, remembering only when a court summons arrives. Most likely, you will settle the matter before a municipal or county court judge. Mayor's courts also may handle such matters. (See "*Mayor's Courts*" on the next page.)

Municipal and county courts are authorized by the constitution and established by statute, and may serve a single city or an entire county. The territories of county courts include only those areas not covered by a municipal court. Traffic cases involving minor injuries and damage, minor criminal cases, minor civil cases, collection cases and real estate evictions are heard in either municipal or county courts.

The jurisdiction of municipal and county courts is similar, although there are some important differences. Municipal courts have jurisdiction in civil cases not exceeding \$15,000, while county courts have jurisdiction in cases not exceeding \$500.

Both municipal and county courts are authorized to hear special types of cases, such as landlord-tenant disputes and misdemeanor cases (those classified as minor offenses under state law). Both courts can try misdemeanor cases, and both courts can hold preliminary hearings in more serious felony cases to determine if there is probable cause to believe a felony was committed. If probable cause is found, the accused is bound over to the common pleas court, since neither a municipal nor county court can try a felony case.

Small Claims/Mediation

Every municipal and county court maintains a small claims division that hears claims for money

only (not exceeding \$3,000). Although someone going to small claims court may employ a lawyer, it is not necessary for a couple of reasons. First, the procedure is simple and informal and does not require a jury. Second, the cost of hiring an attorney may exceed the \$3,000 monetary limit for small claims cases. However, corporations must be represented by a lawyer even in small claims court because corporations are considered to be separate from their individual owner and therefore need a lawyer to represent the corporation's interest.

In many communities, courts now provide mediation services to help plaintiffs and defendants resolve their differences before the case actually goes before a judge or magistrate in small claims court.

Court Territorial Jurisdiction/Municipal and County Court Judges

The territorial jurisdiction of municipal and county courts is established by state law. A municipal court has jurisdiction over a single incorporated city (and sometimes over unincorporated portions of the county in which it is located), while a county court's jurisdiction is those areas of the county that are not covered by a municipal court.

To qualify for election, municipal court judge candidates must be attorneys with at least six years' experience. Once elected, they serve six-year terms. County court judge candidates must be licensed attorneys with at least two years of experience. They also serve six-year terms.

Mayor's Courts

A mayor's court handles misdemeanors and traffic violations in communities with no municipal court of record and populations of more than 100 people. Mayor's courts are the trial courts with the most limited authority. Mayors must take training and become qualified to hear cases; even then, they can hear only "guilty" and "no contest" pleas and only minor, non-jury cases involving violations of municipal ordinances or moving traffic violations under state law. They

cannot hear any contested issues ("not guilty" pleas); those cases are transferred to municipal court. Each mayor has the option to hold court and serve as presiding judge in these minor cases even if he or she is not an attorney, or the mayor may appoint a magistrate, who must be an attorney with at least three years of experience, to hear the case.

Mayor's courts generally hear cases involving violations of municipal ordinances, covering such issues as animal control, city income tax, zoning, building codes, vendors and public safety, as well as cases involving state traffic law violations.

If someone whose case has been heard in a mayor's court is unhappy with the outcome, he or she may file a notice of appeal with the mayor's court within ten days of the court's judgment. The case then will be transferred to the municipal court or county court in the county of that person's residence, and will be heard by a judge. The judge will not consider the previous decision of the mayor's court when hearing the case.

Court of Claims

The court of claims is a special court located in Columbus that hears tort and contract claims against state agencies, and victim of crime claims. Ohio's court of claims hears claims on behalf of Ohio citizens who suffer injury as a result of crimes committed anywhere and on behalf of non-residents who suffer injury as a result of crimes committed in Ohio. The court of claims has limited appellate jurisdiction in civil actions and extensive appellate jurisdiction in victim of crime claims. (Some claims against governmental entities smaller than the state [counties and cities] may be brought in common pleas court.)

Ohio Courts of Appeals

The goal of every judicial system is to achieve complete and equal justice with every trial, but the world is imperfect. Trial courts sometimes make

mistakes or parties may disagree about the outcome of a particular case, which is why the courts of appeals were established.

Ohio's appeals court system is divided into 12 districts. The number of judges in each district varies based on population. Cases challenging decisions made by a lower trial court located within its district are heard by a panel of three of the district's judges. Although many cases end with a decision by a district court of appeals, such courts are not the last resort but an intermediate step from the trial courts to the Supreme Court of Ohio.

Appellate Jurisdiction

The most important duty of Ohio's courts of appeals is to review questions brought from common pleas courts, municipal courts and county courts. Only a final judgment or order can be appealed, and appeals generally must be on questions of law and not the facts of a case.

Court of appeals judges generally do not hear new testimony. They review transcripts from the lower court's hearings to determine if the law was correctly interpreted and applied. An attorney writes a brief, arguing the client's position. Then the attorney may make oral argument, at which time the judge can raise questions about the case before making a decision.

After reviewing the trial court's decision, appeals judges can take one of several actions: affirm the lower court's ruling; overturn its decision; send it back for additional proceedings; or modify the decision.

In some instances, the appeals court judges may agree mistakes were made by the trial court but choose to uphold the initial decision because the errors weren't severe enough to affect the rights of—or to have created prejudicial error for—those who lost in the lower court. If the mistakes substantially affect a party's rights, they constitute prejudicial error, and the court of appeals may then take whatever action is necessary to bring about justice.

A court of appeals may reverse the trial court's decision and give final judgment to the party who should have had it in the first place. It might reverse and send the case back for a new trial, or it might simply send the case back for whatever further proceedings are needed. It can modify the trial court's judgment or order in any way.

Original Jurisdiction

Certain types of cases cannot be brought before a regular trial court, but must begin in a district court of appeals or the Supreme Court of Ohio.

These cases are often based on what are known as *extraordinary writs*. These writs include:

- *quo warranto*, which tests a person's title to a public office;
- *mandamus*, which is a means to compel government officials to perform their duty;
- *prohibition*, which is a means to prevent a lower court from proceeding in a particular case; and
- *procedendo*, which is a means to compel a lower court to proceed in a particular case.

Another writ, *habeas corpus*, tests the legality of imprisonment and may be initiated in a court of appeals, the Supreme Court of Ohio, or in a common pleas court.

An example of a case based on an extraordinary writ would be the case of a workers' compensation claimant who was denied a claim for workplace injuries by the Industrial Commission. If the claimant believes state law required the Commission to honor the claim based upon the facts of the case, the claimant could file a *writ of mandamus* in a court of appeals, asking that the Commission be ordered to perform its duty and change its decision to match the demands of state law.

Consider another scenario where an extraordinary writ could be implemented: An individual

is convicted of a crime by a trial court and sentenced to a prison term. Not willing to accept the court's decision, the convicted individual files a petition for post-conviction relief in the lower court that tried the case, but the court refuses to act on the petition. Undeterred, that individual's next step would be to file a *writ of procedendo* in a court of appeals, asking that the trial court be compelled to rule on the petition.

Organization of the Courts of Appeals

Ohio's counties are organized into 12 appellate districts, and each district is served by a court of appeals. To qualify for election, courts of appeals judges must be licensed attorneys with at least six years of experience. Once elected, they serve six-year terms.

The Supreme Court of Ohio

The Supreme Court of Ohio is the highest and most powerful court in the state, and its primary purpose is to serve as a court of appeals and Ohio's court of last resort. It has original (trial) jurisdiction in the same types of extraordinary cases as the courts of appeals. The Supreme Court of Ohio also has other important duties. These duties include prescribing rules of procedure for and supervising the operation of all lower courts as well as controlling the practice of law.

Appellate and Original Jurisdiction

The appellate jurisdiction of the Supreme Court of Ohio is similar to that of the courts of appeals. The Supreme Court is empowered to review final judgments and orders of lower courts; to affirm, reverse, remand (send back to a lower court), or modify judgments; and to do whatever is necessary to render a just and final determination of a case. Appeals to the Supreme Court

of Ohio are generally from the district courts of appeals rather than from the trial courts.

The Supreme Court is required to hear some types of cases (cases involving the death penalty, some appeals from state agencies, cases involving state constitutional issues, and others), but most of its jurisdiction is discretionary and it selects cases of great public interest to resolve.

Prescribing Rules of Procedure

The Supreme Court of Ohio is charged by the Ohio Constitution to adopt rules governing practice and procedure in all Ohio courts and to oversee the activities of all courts. The Supreme Court of Ohio has adopted complete sets of rules for civil, criminal, appellate, juvenile and traffic procedures, as well as rules for the admission of evidence in all courts.

Supervision of the Courts

The Supreme Court of Ohio oversees the activities of all Ohio courts and publishes rules governing court conduct and procedure to ensure the fair, effective and efficient administration of justice.

Supervision of the Practice of Law

The Supreme Court of Ohio also regulates the admission of attorneys to practice in Ohio, sets standards for the practice of law, and disciplines attorneys who do not abide by the strict ethical rules of their profession. (*See Part XIV, "The Lawyer."*)

Organization of the Supreme Court of Ohio

The Supreme Court of Ohio is located in Columbus and consists of a chief justice and six justices. To qualify for election, candidates must be licensed attorneys with at least six years of experience. Once elected, they serve six-year terms.

The Federal Courts

The federal court structure is similar to Ohio's court structure, with trial courts, courts of appeals and a Supreme Court. The federal courts are primarily concerned with administering the federal law, and they function independently of state courts.

District Courts

The trial courts in the federal system are the U.S. District Courts. The district courts are courts of general jurisdiction and correspond to Ohio's common pleas courts, meaning they handle all types of criminal cases (felonies as well as misdemeanors) that arise under federal statutes, as well as many kinds of civil cases. For example, district courts handle:

- cases governed solely by federal law (bankruptcies; patents, copyrights and trademarks; and admiralty, the branch of law that governs shipping and navigation on the oceans, seas and navigable inland waterways);
- cases under the U.S. Constitution or federal statutes (cases involving interstate commerce, claims by one state against another, civil rights or antitrust claims); and
- diversity cases (claims by a citizen of one state against a citizen of another state where the amount of the claim is \$75,000 or more). For example, a diversity case might be a claim by an Ohio resident against a Kentucky resident for injuries sustained in an auto accident that occurred in Ohio. If the amount involved was \$75,000 or more, this case could be heard in a federal district court located in Ohio. Because the federal system does not have a common law of its own, the law of Ohio would be applied in such a case.
- Bankruptcy cases require an additional explanation. District courts have the power to handle bankruptcy cases, but have referred them in the past to bankruptcy courts. Technically, the bankruptcy court is part of the

district court, although it operates as an independent court and handles almost all aspects of bankruptcy cases. (*See Part VII, "Business Transactions," for more information on bankruptcy courts.*)

Ohio has two federal district courts, the U.S. District Court for the Northern District of Ohio, and the U.S. District Court for the Southern District of Ohio. The Northern District has a western division, based in Toledo, and an eastern division, based in Cleveland, with separate courts in Akron and Youngstown. The Southern District has a western division, based in Cincinnati, with a separate court in Dayton, and an eastern division, based in Columbus. There is a bankruptcy court for the Northern District, as well as the Southern District. There are bankruptcy court offices and courtrooms in Akron, Canton, Cleveland, Toledo, Youngstown, Cincinnati, Columbus and Dayton.

Judges of the U.S. District Court are appointed for a life term by the president of the United States, with confirmation by the U.S. Senate. Judges of the bankruptcy court are appointed for 14-year terms by the judges of the U.S. Court of Appeals for the circuit where the district court is located.

U.S. Courts of Appeals

The United States and its territories are divided into 13 "circuits," with a court of appeals for each circuit. Ohio is in the Sixth Circuit, along with Michigan, Kentucky and Tennessee. The U.S. Court of Appeals for the Sixth Circuit is based in Cincinnati.

The U.S. courts of appeals are intermediate appeals courts. The U.S. courts of appeals hear appeals from the district courts and their decisions may be appealed to the U.S. Supreme Court. The U.S. appeals courts correspond to Ohio's courts of appeals and function in much the same manner.

The president of the United States, with confirmation by the U.S. Senate, appoints all judges on the U.S. courts of appeals for life terms.

The U.S. Supreme Court

Just as the Supreme Court of Ohio is the highest court in the state, the U.S. Supreme Court is the highest court in the nation and the court of last resort. It consists of the chief justice and eight associate justices, who are appointed for life terms by the president of the United States with confirmation by the U.S. Senate.

The U.S. Supreme Court is the ultimate authority on many of the nation's most important issues. Over the years, those decisions have desegregated our nation's public schools, compelled a president to produce evidence in a pending criminal case, extended the rights of persons accused of crime, established equal voting rights and resolved a disputed presidential election.

For Journalists: Working with the Courts

Many journalists working with both state and federal courts stress the importance of building

relationships with court clerks. The clerk is responsible for administering oaths, evidence and exhibits and assisting the judge in a case. The clerk can provide journalists with calendar information, documents, names, addresses and phone numbers of court participants and other tips for coverage. The bailiff may also be helpful and can assist the journalist with seating and issues of entering or leaving a courtroom. In some cases, a courtroom may have a public information officer assigned to help the press with these issues and other concerns.

Journalists are reminded to address a judge with respect, using the terms "Your Honor" and "The Court." Journalists can be cited for contempt during proceedings if they cause a disruption. Showing up on time, following calendars, conducting good research and double-checking names, facts and other details can all go a long way toward gaining the court's helpful hand.

DIRECTORY of OHIO COMMON PLEAS COURTS

*Names and telephone numbers of clerks of court, by county
(for additional information and links to court websites, go to www.occaohio.com)*

County	Clerk	Phone Number
Adams	Gary Gardner	(937) 544-2344
Allen	Margie Miller	(419) 223-8513
Ashland	Annette Shaw	(419) 282-4242
Ashtabula	Carol Mead	(440) 576-3642
Athens	Ann C. Trout	(740) 592-3242
Auglaize	Jean Meckstroth	(419) 739-6765
Belmont	Cindy McGee	(740) 695-2169
Brown	Clark Gray	(937) 378-3100
Butler	Mary Swain	(513) 887-3278
Carroll	William R. Wohlwend	(330) 627-4886
Champaign	Penny S. Underwood	(937) 484-1047
Clark	Ron Vincent	(937) 521-1680
Clermont	Barbara A. Wiedenbein	(513) 732-7560
Clinton	Cynthia R. Bailey	(937) 382-2316
Columbiana	Anthony J. Dattilio	(330) 424-7777
Coshocton	Janet S. Mosier	(740) 622-1456
Crawford	Sheila Lester	(419) 562-2766
Cuyahoga	Gerald E. Fuerst	(216) 443-7950
Darke	Cindy Pike	(937) 547-7335
Defiance	Amy M. Galbrath	(419) 782-1936
Delaware	Jan Antonoplos	(740) 833-2500
Erie	Luvada Wilson	(419) 627-7705
Fairfield	Deborah Smalley	(740) 687-7030
Fayette	Evelyn A. Pentzer	(740) 335-6371
Franklin	Maryellen O'Shaughnessy	(614) 462-3600
Fulton	Paul MacDonald	(419) 337-9231
Gallia	Noreen Saunders	(740) 446-4612, Ext. 222
Geauga	Denise M. Kaminski	(440) 279-1960
Greene	Terri A. Mazur	(937) 562-5290
Guernsey	Teresa A. Dankovic	(740) 432-9232
Hamilton	Tracy Winkler	(513) 946-5656
Hancock	Cathy Prosser Wilcox	(419) 424-7039
Hardin	Carrie Haudenschild	(419) 674-2278
Harrison	Leslie Milliken	(740) 942-8863
Henry	Connie Schnitkey	(419) 592-5886
Highland	Ike Hodson	(937) 393-9957
Hocking	Sharon Edwards	(740) 385-2616
Holmes	Ronda Steimel	(330) 674-1876
Huron	Susan S. Hazel	(419) 668-5113
Jackson	Seth I. Michael	(740) 286-2006
Jefferson	John A. Corrigan	(740) 283-8583
Knox	Mary Jo Hawkins	(740) 393-6788

County	Clerk	Phone Number
Lake	Maureen G. Kelly	(440) 350-2657
Lawrence	Michael P. Patterson	(740) 533-4356
Licking	Gary R. Walters	(740) 670-5791
Logan	Dottie Tuttle	(937) 599-7275
Lorain	Ron Nabakowski	(440) 329-5624
Lucas	Bernie Quilter	(419) 213-4491
Madison	Renae Zabloudil	(740) 845-1683
Mahoning	Anthony Vivo	(330) 740-2104
Marion	Julie M. Kagel	(740) 387-8128
Medina	David B. Wadsworth	(330) 725-9722
Meigs	Diane Lynch	(740) 992-5290
Mercer	James J. Highley	(419) 586-5826
Miami	Jan A. Mottinger	(937) 440-6010
Monroe	Beth Ann Rose	(740) 472-0761
Montgomery	Gregory A. Brush	(937) 225-4512
Morgan	Carma Harlow	(740) 962-4752
Morrow	Vanessa Mills	(419) 947-2085
Muskingum	Todd A. Bickle	(740) 455-7104
Noble	Karen Starr	(740) 732-5604
Ottawa	Jennifer Wilkins	(419) 734-6755
Paulding	Ann E. Waldman Pease	(419) 399-8210
Perry	Timothy J. Wollenberg	(740) 342-1022
Pickaway	James Dean	(740) 474-5231
Pike	John E. Williams	(740) 947-2715
Portage	Linda K. Fankhauser	(330) 297-3644
Preble	Christopher B. Washington	(937) 456-8160
Putnam	Teresa J. Lammers	(419) 523-3110
Richland	Linda Frary	(419) 774-5549
Ross	Ty D. Hinton	(740) 702-3010
Sandusky	Tracy M. Overmyer	(419) 334-6161
Scioto	Lisa D. White	(740) 355-8218
Seneca	Mary K. Ward	(419) 447-0671
Shelby	Michele K. Mumford	(937) 498-7221
Stark	Nancy S. Reinbold	(330) 451-7622
Summit	Daniel M. Horrigan	(330) 643-2211
Trumbull	Karen Infante Allen	(330) 675-2557
Tuscarawas	Jeanne Stephen	(330) 365-3243
Union	Teresa L. Nickle	(937) 645-3006
Van Wert	Cindy Mollenkopf	(419) 238-1022
Vinton	Lisa Gilliland	(740) 596-3001
Warren	James L. Spaeth	(513) 695-1120
Washington	Brenda Wolfe	(614) 373-6623
Wayne	Tim Neal	(330) 287-5589
Williams	Kimberly L. Herman	(419) 636-1551
Wood	Cindy Hofner	(419) 354-9286
Wyandot	Ann K. Dunbar	(419) 294-1432

FEDERAL TRIAL AND APPELLATE COURTS SERVING OHIO

Court/ Divisions	Location	Phone	Website Address	Counties Served
U.S. District Court for the Southern District of Ohio			www.ohsd.uscourts.gov	Total of 48 counties; see breakdown below. (<i>NOTE: Cases are generally, but not always, assigned by county of origin.</i>)
Eastern Division (Columbus)	U.S. Courthouse 85 Marconi Blvd., Rm. 121 Columbus, OH 43215	(614) 719-3000	www.ohsd.uscourts.gov	Athens, Belmont, Coshocton, Delaware, Fairfield, Fayette, Franklin, Gallia, Guernsey, Harrison, Hocking, Jackson, Jefferson, Knox, Licking, Logan, Madison, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Perry, Pickaway, Pike, Ross, Union, Vinton, Washington
Western Division (Cincinnati)	U.S. Courthouse 100 East Fifth Street Rm. 103 Cincinnati, OH 45202	(513) 564-7500	www.ohsd.uscourts.gov	Adams, Brown, Butler, Clermont, Clinton, Hamilton, Highland, Lawrence, Scioto, Warren
(Dayton)	Federal Building 200 West Second Street, Rm. 712 Dayton, OH 45402	(937) 512-1400	www.ohsd.uscourts.gov	Champaign, Clark, Darke, Greene, Miami, Montgomery, Preble, Shelby
U.S. District Court for the Northern District of Ohio			www.ohnd.uscourts.gov	Total of 40 counties, see breakdown below. (<i>NOTE: Cases are generally, but not always, assigned by county of origin.</i>)
Eastern Division (Cleveland)	U.S. Courthouse 801 W. Superior Avenue Cleveland, OH 44113	(216) 357-7000	www.ohnd.uscourts.gov	Ashland, Ashtabula, Crawford, Cuyahoga, Geauga, Lake, Lorain, Medina, Richland
(Akron)	U.S. Courthouse Two South Main Street, Rm. 568 Akron, OH 44308	(330) 252-6000	www.ohnd.uscourts.gov	Carroll, Holmes, Portage, Stark, Summit, Tuscarawas, Wayne
(Youngstown)	U.S. Courthouse, 125 Market Street Rm. 337 Youngstown, OH 44503	(330) 884-7400	www.ohnd.uscourts.gov	Columbiana, Mahoning, Trumbull
Western Division (Toledo)	U.S. Courthouse, 1716 Spielbusch Avenue, Rm. 114 Toledo, OH 43604	(419) 213-5500	www.ohnd.uscourts.gov	Allen, Auglaize, Defiance, Erie, Fulton, Hancock, Hardin, Henry, Huron, Lucas, Marion, Mercer, Ottawa, Paulding, Putnam, Sandusky, Seneca, Van Wert, Williams, Wood, Wyandot
U.S. Court of Appeals for the Sixth Circuit	U.S. Courthouse 100 East Fifth Street Ste. 540 Cincinnati, OH 45202	(513) 564-7000	www.ca6.uscourts.gov	Hears federal appeals from the district courts in Ohio, Michigan, Kentucky and Tennessee

OHIO DISTRICT COURTS OF APPEALS

District	Address	Phone/Fax	County(ies) Served
1st District	Court Administrator 230 East Ninth St., 12th Floor Cincinnati, OH 45202	Phone (513) 946-3500 Fax (513) 946-3412	Hamilton
2nd District	Court Administrator 41 N. Perry, P.O. Box 972 Dayton, OH 45422	Phone (937) 225-4464 Fax (937) 496-7724	Champaign, Clark, Darke, Greene, Miami and Montgomery
3rd District	Court Administrator 204 N. Main Street Lima, OH 45801	Phone (419) 223-1861 Fax (419) 224-3828	Allen, Auglaize, Crawford, Defiance, Hancock, Hardin, Henry, Logan, Marion, Mercer, Paulding, Putnam, Seneca, Shelby, Union, Van Wert and Wyandot
4th District	Court Administrator 14 South Paint Street, Suite 38 Chillicothe, OH 45601	Phone (740) 779-6662 Fax (740) 779-6665	Adams, Athens, Gallia, Highland, Hocking, Jackson, Lawrence, Meigs, Pickaway, Pike, Ross, Scioto, Vinton and Washington
5th District	Court Administrator 110 Central Plaza S. #320 Canton, OH 44702	Phone (330) 451-7765 Fax (330) 451-7249	Ashland, Coshocton, Delaware, Fairfield, Guernsey, Holmes, Knox, Licking, Morgan, Morrow, Muskingum, Perry, Richland, Stark and Tuscarawas
6th District	Court Administrator One Constitution Avenue Toledo, OH 43604	Phone (419) 213-4755 Fax (419) 213-4844	Erie, Fulton, Huron, Lucas, Ottawa, Sandusky, Williams and Wood
7th District	Court Administrator 131 W. Federal Street Youngstown, OH 44503	Phone (330) 740-2180 Fax (330) 740-2182	Belmont, Carroll, Columbiana, Harrison, Jefferson, Mahoning, Monroe and Noble
8th District	Court Administrator Cuyahoga County Courthouse 1 Lakeside Avenue #202 Cleveland, OH 44113	Phone (216) 443-6350 Fax (216) 443-2044	Cuyahoga
9th District	Court Administrator 161 South High Street, #504 Akron, OH 44308	Phone (330) 643-2250 Fax (330) 643-2091	Lorain, Medina, Summit and Wayne
10th District	Court Administrator 373 South High Street 24th Floor Columbus, OH 43215	Phone (614) 462-3580 Fax (614) 462-7249	Franklin
11th District	Court Administrator 111 High Street, NE Warren, OH 44481	Phone (330) 675-2650 Fax (330) 675-2655	Ashtabula, Geauga, Lake, Portage and Trumbull
12th District	Court Administrator 1001 Reinartz Boulevard Middletown, OH 45042	Phone (513) 425-6609 Fax (513) 425-8751	Brown, Butler, Clermont, Clinton, Fayette, Madison, Preble and Warren

Chapter Summary

- State and federal court systems have trial, appeals and supreme courts.
- Ohio's trial courts include common pleas, municipal, county and mayor's courts, and a court of claims, all with varying degrees of authority.
- Common pleas courts may be subdivided into probate, juvenile and domestic relations divisions.
- Municipal and county courts are established by statute and hear cases ranging from traffic violations to minor criminal and civil cases.
- Courts of appeals review questions brought to them from common pleas courts, municipal courts and county courts.
- The Supreme Court of Ohio is the highest and most powerful court in the state and is primarily a court of appeals and Ohio's court of last resort.
- The federal court structure is similar to Ohio's, consisting of district courts, courts of appeals and the U.S. Supreme Court. Federal courts administer federal law and function independently from state courts.

Web Links:

From the OSBA's Law Facts pamphlet series:

www.ohioabar.org/lawfacts (search by title)

"Ohio's Courts"

From the OSBA's "Law You Can Use" column:

www.ohioabar.org/lawyoucanuse (search by title or topic)

"Bailiffs and Court Officers: What to Do When They Tell You What to Do"

"Deaf or Hard-of-Hearing Individuals Can Receive Help to Communicate in Court"

"Magistrates' Service Is Widespread in Ohio Courts"

"Mayor's Courts Hear Misdemeanor Criminal Cases in Ohio"

"Mental Health Court Can Save Time, Money and Lives"

"Ohio Courts Work to Improve Access to Justice"

"Precedents Affect Judges' Decisions"

"Preserving Legal Testimony: Court Reporters or Electronic Recording?"

"Reentry Courts Aim to Reduce Offender Recidivism"

"What Is a Drug Court?"

"What To Expect in Traffic Court"

"What You should Know about Funding Ohio Courts"

"Why You Should Know Your Ohio Clerk of Courts"

From the Supreme Court of Ohio:

www.supremecourt.ohio.gov

From the Ohio Judicial Conference:

www.ohiojudges.org

From the U.S. Supreme Court of the United States:

www.supremecourt.us.gov

From National Center for State Courts (portal to state and federal courts):

www.ncsc.org

Choose "Information and Resources" and then "Court Web Sites"

Federal judicial websites:

www.ohsd.uscourts.gov

www.ohnd.uscourts.gov

www.uscourts.gov

From Cornell Law School Legal Information Institute:

www.law.cornell.edu (choose "legal encyclopedia" and type key words in Wex toolbox)



“Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence.”

– John Adams

The law of legal procedure differs from what is known as substantive law. *Substantive law* (such as criminal law and the law of torts, contracts, probate law, family law, etc.) defines our rights and obligations. *Procedural law* establishes procedures for enforcing those rights and obligations fairly and efficiently.

Rules of procedure are provided for criminal actions, which are prosecuted by a governmental entity (such as the state of Ohio) or its representative (such as the county prosecutor). In criminal actions, the prosecution usually will ask the court to order the defendant to pay a fine or be imprisoned.

Different rules of procedure are provided for civil actions, also called civil suits or civil cases. In such actions, the *plaintiff* (the person or entity bringing the action or suit) typically asks the court to order the *defendant* (the person against whom the action is brought) to pay damages to the plaintiff, or to obey an *injunction* (an order to do something or refrain from doing something), or to perform a legal obligation to which the defendant has agreed by contract.

Because the procedural rules governing civil actions and criminal cases are different, the two types of cases are discussed separately in the remainder of this chapter.

Procedure in Civil Actions

Procedure in a civil action is best understood by analyzing the following 11 stages, although the stages may overlap. It is important to note that plaintiffs and defendants agree to settle more than 90 percent of all civil actions before reaching trial (*see Stage 8*) and that only a very small percentage of civil actions continue through all 11 stages.

Stage 1: The plaintiff selects a court

The first step in filing a civil action is to select a court in which to file the action. The plaintiff-to-be (and attorney representative) must select a court that satisfies three conditions: 1) subject-matter jurisdiction; 2) personal jurisdiction; and 3) venue.

Subject-matter jurisdiction is simply the power to hear a particular type of case. As explained in Part II, “The Courts,” both federal (national) and state courts sit in Ohio. The rules governing subject-matter jurisdiction are found primarily in federal and state constitutions and statutes (legislative acts).

Sometimes, a plaintiff-to-be can choose to file in federal court or in state court. For example, a citizen of Ohio who contemplates filing a major personal injury action against a citizen of another state can choose to file in state or in federal court. Sometimes, a plaintiff-to-be will be required to file in one system or the other. For example, civil actions for divorce or dissolution are properly filed only in state court, while civil actions seeking damages for patent infringement are properly filed only in federal court.

Personal jurisdiction is the power to decide the rights of the parties to the civil action. The plaintiff who chooses to file a civil action in a particular court has agreed or consented to the power of the court to decide the plaintiff’s rights. A court must also have the power to decide the rights of the defendant or defendants in a civil action. Earlier in our country’s history, a state court could exercise jurisdiction over a defendant only if the defendant:

- was served with process (*see Stage 2*) in the state;
- consented to have the court determine the defendant’s rights; or
- was considered a legal resident of the state in which the court was located.

Now, most states have adopted “long-arm” provisions that permit a state court to exercise jurisdiction over an out-of-state defendant based merely on the defendant’s having certain contacts with the state. Under Ohio’s long-arm provisions, for example, an out-of-state manufacturer that markets products to Ohio residents is likely to be subject to an Ohio court’s jurisdiction if one of its products proves defective and injures someone in Ohio. For statutory reasons, the personal jurisdictional reach of each federal court has, for many types of civil actions, been limited to the reach of the state courts in that state. For some civil actions, however, Congress has provided for nationwide (even worldwide) *service of process* (official notice to a defendant that an action has been started).

The rules of *venue* attempt to ensure that a court that has subject-matter and personal jurisdiction is relatively convenient for the defendant. They do so by limiting a plaintiff’s choices to specified locations, such as the county or judicial district in which the defendant lives or does business, or in which events key to the civil action occurred.

Stage 2: Service of process

State and federal constitutions require that a defendant be given fair notice of the filing of a civil action. Controlling procedural rules typically require that two documents (“process”) be transmitted to (“served on”) the defendant. One document is a *complaint* that the plaintiff files, which provides details about the plaintiff, the relief sought by the plaintiff and the court in which the action has been filed. The second is a *summons*, which informs the defendant that, unless the defendant files a response (a document called an *answer* [see Stage 3]) by a certain date, the court will enter *default judgment* in favor of the plaintiff for the relief sought in the complaint. The threat of a default judgment against a defendant helps to ensure that the defendant will not ignore the action (just as a sports team will make every effort to show up at a game if it risks a loss by forfeit for failing to appear).

Service of process is commonly made by certified or express mail addressed to the defendant as specified by the relevant rules. Service is sometimes accomplished by handing the documents to the defendant or by leaving them at the defendant’s home or place of business.

Stage 3: Further pleadings and motions

As noted above, a defendant in a civil action must answer the summons and complaint by filing an official document with the court. In this document (the *answer*), the defendant either admits or denies the allegations of the complaint. The defendant also may provide certain *defenses* or reasons why the court should not decide in favor of the plaintiff. For example, the defendant may point out that the plaintiff’s claim has expired in accordance with the statute of limitations (for example, a claim for an auto collision that occurred more than two years before the plaintiff filed the case). If the defendant also has a claim against the plaintiff, then the defendant may be permitted (even required) to enter a *counterclaim* against the plaintiff, either in the defendant’s answer or in a separate pleading. For example, let’s say Ms. Black and Mr. Simms are involved in an auto accident, causing personal injury as well as damage to both vehicles. Ms. Black (the plaintiff) files a civil action against Mr. Simms (the defendant) for these injuries and/or property damage. If Mr. Simms believes he also has a claim against Ms. Black for injuries and/or property damage resulting from the same accident, then he must file a counterclaim. The plaintiff (in this case, Ms. Black) then will be required to file a *reply* to respond to the allegations of the counterclaim and raise any applicable defenses.

If a plaintiff files a civil action against more than one defendant, one of the named defendants may be permitted to assert a cross-claim against another defendant. For example, let’s say Mr. Rivera was injured while using a chain saw that he bought at a retail hardware store. He files a civil action for damages against both the manu-

facturer of the chain saw and the hardware store. If the store believes the responsibility for injury is ultimately the manufacturer's, the store may assert a cross-claim against the manufacturer.

Under limited circumstances, a defendant may be permitted to file and serve a *third-party complaint* on a person who is not a party to the original civil action. Let's say Mr. Rivera (the man in the example above) decides to file a civil action against only the retail hardware store. If the store believes the chain saw manufacturer should bear this responsibility, then the store may file a third-party complaint against the manufacturer. In the third-party complaint, the store will ask the manufacturer to reimburse the store for any damages it may have to pay to Mr. Rivera.

Before, during, or after the pleading stage of a civil action, parties may file various *pre-trial motions* asking the court to take various actions. For example, a defendant may move to dismiss a civil action because the court lacks subject-matter jurisdiction or because the court lacks personal jurisdiction over the defendant. If a defendant believes that the plaintiff does not have a valid legal claim, even if every fact alleged by the plaintiff is true, then that defendant may move to dismiss a civil action. By making such a motion, the defendant logically argues to the court that the action need go no further because, even if the plaintiff can prove the alleged facts, the plaintiff will not be entitled to any legal relief. (For example, a court would likely dismiss a plaintiff's claim that the defendant was rude and disrespectful).

Stage 4: Pre-trial discovery

The discovery process allows the parties to a civil action to get relevant factual information from each other and from other persons before trial. Ordinarily, parties send each other discovery requests without court participation, but the court will enforce proper discovery requests if the opposing party fails to comply. One of the ways a party can gain this information is through a scheduled *deposition* of another person. The person called on to provide information at a

deposition may be another party to the legal action, a witness, a medical expert, or any other person who has information that may be useful in the case. At the deposition, the person being "deposed" is placed under oath by the stenographer (called a *court reporter*) who is also a notary public, and parties or their attorneys ask the person questions. The party who requests the deposition must pay for the reporter's time there, but any party can pay the reporter for a transcript of the deposition testimony.

Another way a party can gain information is by requiring other parties to the legal action to respond under oath to written questions known as *interrogatories*. Court rules limit the number of interrogatories, so they usually ask for specific information without follow-up questions that oral depositions permit.

A party also may require other parties to produce documents or permit inspection of property through a *request for production*. A party may obtain similar information from other persons who are not parties in the case through use of the *subpoena*, a court order to produce documents or to permit inspection of property. A party also may require another party to respond to *requests for admission*, in which the other party is asked to admit certain facts. The judge may decide that a party who fails to respond has admitted those facts. Further, the judge may decide that a party who declines to admit facts that were not fairly disputable must reimburse the requesting party's expense to prove them. If the physical or mental condition of a party is questionable, another party may request that he or she submit to a physical or mental examination by a physician or other appropriate professional.

In the federal courts, each party to a civil action must disclose certain basic information to other parties even if the other parties do not request it.

Stage 5: Pre-trial conferences

In many civil actions, the court holds one or more *pre-trial conferences* after filing and before trial. While the purposes vary from judge to judge

and depending on when the conference is held, the parties or their attorneys and the court may meet to accomplish such tasks as: 1) simplifying the issues in the action; 2) attempting to resolve the matter by arbitration or other alternative to litigation; 3) preparing and organizing the action for trial; 4) controlling discovery (*see Stage 4 on the previous page*); 5) scheduling the trial and any pretrial proceedings; and 6) settling the action.

Stage 6: Motion(s) for summary judgment

After a reasonable time for discovery, a party (most commonly a defendant) sometimes makes a *motion for summary judgment*. In an action scheduled for trial by jury (*see Stage 7*), the defendant's motion must make two arguments to the court: 1) based on affidavits or the evidence produced through the discovery process, no reasonable person could find in favor of the plaintiff; and 2) the defendant is entitled to judgment as a matter of law. If the court is persuaded by both arguments, the court will conclude that no trial is needed and will enter final judgment for the defendant. For example, in a "product liability" civil action brought by Mr. Rivera (the plaintiff) against the chain saw manufacturer (the defendant), the court might enter summary judgment against Mr. Rivera if the court determines on motion that no reasonable person could find that the manufacturer's product was legally defective, so the manufacturer is entitled to win the case without consideration of any other issues.

Stage 7: Jury selection

State and federal constitutions and statutes provide for a right to trial by jury in many types of civil actions, particularly those seeking damages. Jury trial is not, however, automatic. Any party may demand a jury trial if such a right exists, but if a jury trial is not requested, the case will be decided at a *bench trial* in which the judge rather than a jury decides the facts.

The process of jury selection is known as *voir dire*. In many courts, the parties have access to

brief questionnaires completed by prospective jurors. The judge often asks preliminary questions designed to determine whether any juror should be excused for *cause* (such as relationship to a party or admitted inability to be fair in arriving at a verdict). Each party has an unlimited number of challenges for cause, which are based on mandatory reasons not to seat a person as a juror for the particular civil action and which must be approved by the judge. Also, each side is usually entitled to make three *peremptory* challenges to excuse prospective jurors without having to provide a reason. After all challenges for cause have been made and ruled upon and after peremptory challenges have been made or waived, a jury (usually consisting of eight persons and one or more alternate or substitute jurors) is impaneled and sworn.

Stage 8: The trial

If the civil action has not been settled, a trial is held. The trial begins with *opening statements* by the attorneys representing the parties, or, in some cases, by the parties themselves (in cases where they are not represented by counsel). Each party's attorney summarizes the legal position of his or her client and how the evidence to be presented will support that position.

The parties then proceed with the presentation of witnesses and of documentary and other physical evidence. The plaintiff traditionally goes first and bears the burden of proving every element of any claim asserted by a *preponderance of the evidence*. A preponderance of the evidence is the greater weight of the evidence and must be enough to convince a juror that, in light of all the evidence, the plaintiff's position is, more likely than not, correct. Thus, in a *product liability* action, the plaintiff may be required to convince the jury (or judge in a non-jury trial) that, more likely than not, the defendant's product was defective and that the defect caused physical injury to the plaintiff's person or property.

In a jury trial, after the opponent's evidence has been presented, or after all evidence has been

presented by both sides, a party is permitted to make a *motion for directed verdict* (now called *motion for judgment* as a matter of law in federal court). In such a motion, the moving party asks the court to issue an immediate decision in its favor, without allowing the jury to deliberate, on the basis that a reasonable jury would have to agree with that party's position. For example, in the case above involving Mr. Rivera and the chain saw, the chain saw manufacturer's representative may move for a directed verdict on the ground that, based on the evidence presented, no reasonable jury could find the chain saw to be defective. Or, similarly, Mr. Rivera's representative may move for a directed verdict on the ground that, based on the evidence presented, a reasonable jury must find that the manufacturer marketed a defective chain saw that, in turn, caused Mr. Rivera's injuries.

If the motion or motions for directed verdict are denied, the attorneys then present their *closing arguments*. Before then, the lawyers may ask the judge to instruct the jury about specific matters. By that time, the judge has let them know which of their requests will be part of later jury instructions to be given, so that each attorney can use the relevant law and evidence to demonstrate that his or her client deserves a favorable verdict. If an improper argument is made and is objected to, the judge may instruct the jury to disregard the argument or may even declare a mistrial.

The court then *instructs* or *charges* the jury, mainly about what laws apply to the case. The court reminds the jurors of their obligations and describes what each party must prove. Some judges give parts of those instructions at earlier times in the trial.

The jury then retires to deliberate and to reach a verdict. Once inside the jury room, the jury members select a foreperson who makes sure that discussion is orderly and who reports to the judge in the courtroom. In most civil actions, the jury returns a general verdict (for example, "For the defendant" or "For the plaintiff x in the amount of \$y"). Occasionally, at a party's request, the judge will ask the jury to answer certain specific

questions that are relevant to the verdict (for example, "Do you find that the product manufactured by the defendant y was defective?").

Stage 9: Post-trial motions

A party who is dissatisfied with the jury's verdict can make two post-trial motions. The first motion, traditionally known as a *motion for judgment notwithstanding the verdict* (now called *motion for judgment* as a matter of law in federal court), is similar to the motion for directed verdict that may be made during trial. The party making the motion (the "moving" party) asks the judge to determine that a reasonable jury could not have reached the verdict that this particular jury has reached; therefore, the judge should rule in favor of the moving party "notwithstanding" or contrary to the jury verdict.

A dissatisfied party also may make a *motion for new trial*. In such a motion, the moving party alleges that, even if a judgment notwithstanding the verdict is not appropriate in this case, one or more legal errors were made during trial that entitle the moving party to a new trial.

Stage 10: Final judgment

The trial judge ultimately enters a *final judgment*, typically either granting (in whole or in part) or denying the relief sought by the plaintiff and by any other involved parties.

Stage 11: Appealing the court's decision

A losing or dissatisfied party is entitled to take one appeal without getting permission from either the trial judge or the appellate court. Such a party ordinarily has only 30 days from entry of the final judgment of the trial court to initiate an appeal. The appealing party must pay the court reporter for a transcript of the trial, unless some other record satisfactorily reports any claimed errors.

In deciding civil appeals, appellate courts have the power primarily to act based on errors of law and not to retry questions of fact already

decided by the jury. Appellate courts make their determinations based on the written record of the trial, the briefs (written legal arguments) of the parties, and oral argument by the attorneys for the parties. A decision on a first appeal can be taken to a higher court (such as the Supreme Court of Ohio or the U.S. Supreme Court), but the higher court usually decides which appeals it will consider and which appeals it will decline even to hear.

Procedure in Criminal Actions

Like civil actions, criminal cases follow clearly established procedural rules. However, constitutional and statutory provisions have more control over criminal cases than civil cases, even though both use court-made rules. Here again, several separate stages define the progress of criminal cases.

Stage 1: The government begins the case

Unlike civil actions, a private person cannot begin or control a criminal case. A private person can and should report a crime to the proper federal, state or local government. However, the government decides whether to pursue the case, regardless of how any private person may feel about the matter. The victim of a crime is an important witness with important rights, but the government can prosecute or decline to prosecute, despite the victim's contrary wishes. A civil action usually seeks to enforce the plaintiff's rights to money or property. A criminal case seeks to punish an alleged offender for violating the government's criminal laws.

A criminal case usually begins with an arrest. If a police officer satisfies a judge or other qualified court official that an alleged offender probably violated that government's criminal law, the court can issue a warrant directing the officer to arrest that person.

A police officer has authority to arrest a person without a warrant if the officer has probable cause to believe that person committed a *felony* (a serious crime potentially punishable by at least six months in prison).

Police officers also can arrest a person without a warrant for any *misdemeanor* (generally, a less serious offense usually punishable only by a fine or local jail time for six months or less) if the misdemeanor was committed in their presence, or if they have reasonable cause to believe the suspect committed a certain misdemeanor, such as theft, assault, menacing, domestic violence or public indecency.

A person who is not a police officer can lawfully detain an alleged offender with a *citizen's arrest* only if the person has reasonable cause to believe that the alleged offender committed a felony offense. However, the person who makes a citizen's arrest should promptly deliver the alleged offender to a law enforcement officer. For example, an ordinary citizen who sees a cashier being robbed has the authority to arrest the robber. However, a citizen who attempts to make an arrest is putting himself or herself in great jeopardy. Ordinarily, the non-officer citizen should not intervene at the scene, but should inform the police as soon as possible. Only a police officer can make an arrest for a misdemeanor.

When the officer believes that the alleged offender will appear for court proceedings without an arrest, the officer can issue a summons or citation that directs the person to appear in court. In minor misdemeanor cases (offenses punishable by a fine of no more than \$150), including minor traffic violations, an officer must issue a *citation* instead of arresting the accused, except where the person fails to show evidence of his or her identity or has failed to appear in court in a previous case, or requires medical care and cannot provide for his or her own safety, or if the person refuses to sign the citation. A citation (a traffic ticket is an example) is a form of combined complaint and summons, and it informs the defendant of the

violation, and when and where he or she must appear in court.

When a person is arrested, or served a summons or citation in lieu of arrest, the arresting officer must file a complaint with a court without delay. In citation cases, the citation itself is filed because it includes the complaint. Filing the complaint after the arrest (or service of the summons) is necessary because it formally begins the criminal case in court.

Usually a grand jury hears a criminal case after the police have arrested the alleged offender and a court has conducted a preliminary hearing to decide whether there is enough evidence to hold that person until the grand jury considers the case (*see Stage 3: Bindover and indictment in felony cases*). However, a grand jury can begin a criminal case by indicting an alleged offender without any previous arrest or other proceedings.

A grand jury is made up of citizens who review the information given to them and determine whether a certain individual should be formally charged with committing a certain offense or offenses. An *indictment* is a formal accusation charging a named person with a specific crime. The grand jury examines evidence about the crime and the evidence allegedly involving the suspect in the crime, and determines whether the evidence warrants formally indicting the person for the offense. The indictment is the formal charge. The grand jury itself does not decide whether the alleged offender has committed any crime. Rather, it investigates information and decides whether a person should be formally accused of an offense.

When a grand jury indicts someone without a previous arrest, the indictment begins the criminal case. As in cases begun by an arrest and the filing of a complaint, the indictment must be served to the defendant through a warrant or arrest, or summons and delivery of the summons.

In a few relatively rare cases, the prosecutor can begin a criminal case by filing in court a *bill of information*, a formal accusation made by the county prosecutor, that may be used instead of an indictment by a grand jury. Because a person has

a constitutional right to indictment by grand jury in serious cases, the suspect can be tried on a bill of information only with his or her consent. Consequently, bills of information usually are filed as part of a plea bargain agreement between the prosecutor and the defendant.

Stage 2: Arraignment and bail

Arraignment

Whether a criminal case begins with an arrest, a summons, or an indictment, the court begins the case with an arraignment. An *arraignment* is a (usually) brief proceeding at which the court confirms that the accused person understands the charge and his or her rights as a defendant. Usually a court arraigns the defendant very shortly after his or her arrest. An arraignment follows an indictment, even if another court has previously arraigned the defendant after his or her arrest and before a grand jury has considered the case. For an arraignment after an indictment, the judge should read the indictment (or state the substance of the charge) to the defendant. Copies of the indictment are provided to the accused.

At the time of the arraignment, the judge is required to ensure that the defendant understands the following:

- the nature of the charges;
- the right to retain counsel and to a reasonable continuance of the arraignment proceedings to secure counsel, regardless of how the defendant intends to plead;
- the right to have the court appoint counsel if the defendant cannot afford counsel;
- the right to bail if the offense allows it;
- the right to refuse to make a statement at any point in the proceeding; and
- that any statement made can and may be used against the defendant by the prosecution.

For any arraignment, the judge will ask the accused to enter a plea. There are several pleas an accused can make during arraignment or at any later stage of the case:

- *Not guilty* – The accused denies the charges.
- *Not guilty by reason of insanity* – While the accused may have committed the criminal act, the defendant is not subject to criminal liability because, at the time the offense was committed, the person did not know the wrongfulness of his or her act due to a severe mental disease or defect. It is also true that a defendant may not be brought to trial if he or she is incapable of understanding the nature of the criminal case proceedings or assisting in his or her own defense. In such cases, the court may order treatment, and the probate court may issue civil commitment orders. The plea must be made in writing.
- *No contest* – The accused does not admit guilt, but admits the truth of the facts in the accusation (the no contest plea is sometimes used where the accused realizes that a guilty plea could be used against the accused in a civil suit).
- *Guilty* – The accused admits he or she committed the crime.

The court will not accept pleas of guilty or no contest unless it is satisfied that the plea is voluntary, that the accused is aware of his or her rights and fully understands the possible consequences of the plea. A defendant has the right to waive the reading of the indictment and enter a plea without a formal reading.

In some cases, the accused may offer to plead guilty to a lesser offense through a process called *plea bargaining*. A defendant may accept a plea bargain agreement when he or she has some doubts about his or her chances of winning at trial. The defendant hopes, by pleading guilty to a less serious offense, to secure a lesser sentence that might involve some form of community control rather than prison, in return for saving the state the time, expense and uncertainty of a trial. The prosecution may accept a plea bargain if it has some doubts that it can obtain a conviction on the offense charged in the indictment, or if it believes that it is more economically feasible and in the interest of justice to accept a lesser plea. If a

guilty plea is the result of a plea bargain, information supporting that agreement must be filed with the court or read into the transcript of the proceeding.

At the arraignment, the judge will also set bail to ensure the defendant's appearance at any later proceedings, including a later trial.

Bail

When a person 18 or older is arrested (or when a juvenile court transfers a person under 18 for trial in adult court), he or she is usually entitled to be free on bail pending trial, provided he or she satisfies any conditions imposed by the court. In general, *bail* is a deposit of money or property with the court, or a promise to pay or forfeit money or property to the court, designed to guarantee that the accused will appear at court for all proceedings. Often, bail is provided through a kind of insurance policy called a *bail bond*. An arrested person who qualifies for bail must be given the opportunity to be free on bail as soon as possible, although different bail terms or guarantees of appearance in court may be required. Bail is set by the court in one of these forms:

- *Personal recognizance* – A defendant's written promise to appear.
- *Unsecured bail bond* – A defendant's promise to appear, coupled with a personal, unsecured promise to pay a certain amount of money if he or she does not appear.
- *A 10-percent bond* – A deposit of 10 percent of the face amount of the required bond plus a written promise to forfeit the deposit and pay the remainder of the bond if the defendant fails to appear. For example, if the bond were \$2,000, the defendant would deposit \$200 and promise to forfeit and pay the entire \$2,000 if he or she fails to appear. If the defendant appeared throughout the case, 90 percent of the \$200 deposit, or \$180, would be returned to him or her.
- *A surety bond* – A bond secured by real estate, securities, or cash, sometimes provided by a bail bondsman.

The amount of a bond or bail for misdemeanors is usually set by the court and published in a bail schedule. In such cases, bail can be paid at the police station without a hearing before a judge. In felony cases, the accused is usually held until the initial appearance in court, at which time the judge sets bail and the conditions of release pending trial. These conditions may include house arrest, restrictions on travel, orders not to contact a victim plus any other conditions the judge believes are required to ensure the public safety and the defendant's appearance in court.

It is important to remember that bail is not a substitute for trial. If a person does not appear as required by the court, he or she forfeits any deposit, is liable on any promise to pay bail and is subject to re-arrest and detention until trial. Additionally, failure to appear on a personal recognizance not only subjects the accused to re-arrest and detention, but is also a separate offense in itself.

Stage 3: Bindover and indictment in felony cases

A person arrested for a felony is entitled to a preliminary hearing within a short time period. This hearing is held before a municipal court or county court judge or magistrate, unless the person waives the right to a hearing in writing. The preliminary hearing is not a trial. Its purpose is to allow the court to examine the evidence against the accused and determine if it is sufficient to warrant further proceedings. (*Editor's note: Generally, under Ohio law, a magistrate has the authority to act as a judge under limited circumstances. The term "judge" will be used hereafter to denote both judge and magistrate.*)

If there is no probable cause to believe any offense was committed, or no probable cause to believe the accused committed the offense (even though an offense was committed by someone), then the case against the accused will be dismissed. A finding of probable cause must be based on credible evidence.

If the judge finds probable cause to believe both that a felony was committed and that the

accused committed it, the judge must *bind over the accused* (transfer the case) to the grand jury for further action. If the judge finds the evidence supports only a misdemeanor charge, the case will stay in that court.

The accused can waive the preliminary hearing, in which case he or she is automatically bound over to the grand jury. The judge will set bail to ensure the defendant's appearance in the event that the grand jury hands down an indictment.

When a person accused of a felony is bound over to the grand jury, the evidence against the accused is presented by the county prosecutor and examined by the grand jury. If the grand jury finds insufficient evidence to believe a crime was committed or, if one was committed, that the accused did not commit it, then it will return a *no bill*, meaning the case is dismissed.

A grand jury is composed of nine jurors and up to five alternates who have the power to inquire into any criminal offense committed in their county. The regularity with which grand juries are convened varies from county to county. In some larger counties, one or more grand juries may be in continuous session.

If at least seven members of the grand jury find enough evidence to believe that a crime was committed and that the accused committed it, then the grand jury will return a *true bill*, meaning it will return an indictment against the accused. The grand jury may indict for any offense the evidence warrants, regardless of the charge for which the case was bound over. Even though the accused was bound over for a felony, the grand jury may indict for a misdemeanor if the evidence supports only a misdemeanor offense, and vice versa. For example, if the evidence only shows that the defendant stole property worth only \$25, he or she can be indicted for the misdemeanor offense of *petty theft*. If, on the other hand, the defendant stole property worth more than \$500, he or she can be indicted for the felony offense of *theft*.

In essence, the preliminary hearing and the grand jury are screening devices. The purpose of

each is to ensure trials are held on well-grounded accusations. Indictment by a grand jury in serious offenses is a right guaranteed by both the U.S. and Ohio constitutions. A preliminary hearing is a right given by state statute.

Stage 4: Pleadings, motions, discovery, and pre-trial in criminal cases

Unlike civil cases, the defendant in a criminal case does not file a written pleading (an *answer*) in response to the charge; the defendant's oral plea in court serves the same function. However, when the defendant intends to rely on the defense of *alibi*, the defendant must file written notice with the court of the place the defendant claims he or she was when the offense occurred. In essence, the defense of *alibi* states, "I was somewhere else, so I couldn't have committed the crime."

There are several requests, challenges and objections the accused can make by filing a written motion asking for relief. For example, a defendant can ask for a *bill of particulars*, which is a more detailed statement of the facts of the alleged offense; or the defendant may object that the accusation does not properly charge an offense or is otherwise defective; or he or she may ask that certain evidence be suppressed on the grounds that it was obtained in violation of the defendant's constitutional rights. For example, the defendant may challenge the basis upon which a police officer searched his or her home, vehicle or person. Many other defenses, objections or requests can be made by motion.

Criminal discovery is more limited than the discovery in civil cases. In a criminal case, the defendant can (but is not required to) initiate discovery by asking the prosecutor to provide:

- statements made by the defendant or a co-defendant to the police;
- the defendant's prior criminal record, if any;
- documents and other tangible evidence, which may be used during the trial;
- reports of photographs, examinations and tests;

- the names and addresses of witnesses, unless the court bars such disclosures because the information may subject the witness to harm; and
- evidence that is favorable to the defendant.

When the defense makes such a request, the prosecution is then permitted to ask for corresponding disclosure from the defense. The prosecution may not initiate discovery requests unless the defense has first made similar discovery requests.

Under certain rare circumstances, the deposition of a witness may be taken.

It is important to point out that a defendant's deposition cannot be taken because defendants cannot be forced to give testimony. Defendants and witnesses have the constitutional right (under the Fifth Amendment to the federal Constitution and Article 1, Section 10 of the Ohio Constitution) to refuse to say anything that might tend to incriminate them.

Pre-trial conferences are used in criminal cases for discussion of potential evidence problems, for possible plea negotiations, and to confirm the trial date. In a criminal case, the pre-trial conference generally involves a review of the evidence, time necessary for trial, whether the indictment charges the correct offense, defenses raised, a schedule for the trial and any proceedings before the trial, and the possibility of a plea.

Stage 5: The trial

Like civil trials, the main steps in criminal trials include:

- selection of a jury;
- opening statements by the attorneys;
- presentation of witnesses and evidence (in a criminal trial, the state always goes first, and the defense follows; the state then may offer rebuttal evidence if the prosecutor wishes to do so);
- closing arguments by the attorneys;
- instructions on the law by the judge to the jury; and
- deliberation and decision (verdict) by the jury.

The goal of any trial is to find the truth. The theory is that, when each party in a dispute presents evidence and argument about his or her side of an issue before a judge and jury, the truth will be discovered. To this end, parties act as “adversaries” or opponents during the trial. The role of an attorney in a trial is to represent his or her own client’s interests as fully as possible. When “opposing” attorneys on both sides do this, it is assumed that the truth of the matter will become clear to the judge and jury. The role of the judge is to control the trial as a neutral referee and to rule on questions of law. The role of the jury is to decide who to believe and what happened. Each party present has the right to present evidence and argument.

Burden and standard of proof

In a criminal case, the state must prove the defendant’s guilt *beyond a reasonable doubt*. This is a much more stringent burden of proof than in a civil case. *Reasonable doubt* is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. “Proof beyond a reasonable doubt” is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs. If the jurors believe that the defendant is probably guilty, but they have a reasonable doubt, they must find the defendant not guilty. Every defendant is presumed to be innocent until the state proves, beyond a reasonable doubt, that the defendant committed the offense.

Jury and non-jury cases

While the right to trial by jury applies in many situations, it does not apply in all cases.

Persons accused of minor misdemeanor offenses are not entitled to a jury trial.

In criminal cases involving “serious offenses” where a jail sentence may be imposed, a trial by jury is automatically provided unless the accused waives the right to a jury in writing. Serious offenses include all felonies and those misdemeanors punishable by more than six months’ imprisonment. If the offense is a *petty offense* that could be punished by no more than six months’ confinement, the defendant must demand a jury trial within certain time limits.

When a civil or criminal case is tried without a jury, it is tried to the judge alone. This is commonly called a *bench trial*. In capital cases (criminal cases in which death is a potential penalty) a three-judge panel tries the case if a jury is waived.

Juries in criminal cases consist of 12 jurors in felony cases and eight jurors in misdemeanor cases.

At the beginning of the trial, a *bailiff*, a court official who acts as an aid to the judge, opens court. The bailiff will ask everyone to stand when the judge enters the court and to be seated when the judge sits.

The judge then calls the case by name (*State v. Blue*, for example) and asks the attorneys for each side if they are ready to proceed. In jury trials, the first step is the selection of the jurors.

Jury selection

The process of choosing jurors is called *voir dire*. During *voir dire*, attorneys for both the plaintiff and the defendant interview potential jurors. In many courts the judge begins a preliminary interviewing process before permitting the attorneys to question prospective jurors. The purpose of *voir dire* is to select individuals for the jury who can be fair and impartial. Each side in a case can reject potential jurors through a *challenge for cause* or a *peremptory challenge*.

Prospective jurors may be challenged for cause for any of a number of specific reasons. For example, a prospective juror may be challenged for cause if he or she:

- has been convicted of a crime, usually a felony, which is an automatic disqualification;
- has served as a member of a petit jury in the same case (usually a situation where a new trial has been granted);
- has been subpoenaed as a witness in the case;
- has a relationship by blood or marriage to either party, or to the attorney for either party;
- has a legal proceeding pending with one of the parties to the case;
- does not speak or understand English well enough to follow the proceedings;
- discloses information showing that he or she is unable to be a fair and impartial juror.

There is no limit to the number of prospective jurors who may be challenged for cause. Each time a prospective juror is excused, another will be interviewed.

When each side has no more challenges for cause, each side may exercise a limited number of peremptory challenges. No reason is needed for peremptorily excusing a juror, but neither a prosecutor nor a defense attorney may ask to excuse a juror for an improper reason, such as race.

In criminal cases the number of peremptory challenges allowed each party is six in capital cases, four in all other felony cases and three in misdemeanor cases.

If the prosecutor or defendant does not use a particular peremptory challenge, he or she loses or waives that peremptory challenge, thus reducing the number of peremptory challenges at his or her disposal.

When all challenges are used or waived, the jury is complete and takes an oath to perform its duty to render a true and just verdict.

Opening statements

After the jury is selected and sworn in, the attorneys for each party make their opening statements, beginning with the prosecutor and followed by the defendant's attorney. The opening statement is an outline of the facts of the

case, what the party expects to prove, and the evidence by which the party expects to prove it.

Witnesses and evidence

The prosecution then presents its evidence, after which the defendant may present any additional evidence. If the defendant presents any evidence, the prosecutor may present rebuttal evidence.

A defendant in a criminal case has no duty to present any evidence. Rather, the state is obligated to prove that the defendant is guilty, whether or not the defendant presents any evidence.

Evidence is almost always presented through witnesses. In fact, witnesses are so important that they can be compelled to attend the trial by means of a *subpoena*. A subpoena is a court order commanding a witness to appear in court and provide testimony. Anyone who disobeys a subpoena is in contempt of court, and may be fined or jailed, or both.

Witnesses testify about events they saw or heard, report on the tests or investigations they conducted, or testify about other relevant matters. *Expert witnesses* sometimes are used to give professional opinions about elements of a case. For example, a coroner may testify that a gunshot at close range caused the victim's death in a murder case. Even tangible evidence, such as a murder weapon or a document, must be introduced through the testimony of a witness.

Evidence may be direct or circumstantial. *Direct evidence* is evidence that was seen, touched or heard by a witness directly. For example, if a witness sees rain coming down, he or she has direct evidence that it is raining. *Circumstantial evidence* comes from a reasonable conclusion of fact that a witness infers from direct evidence. An example of circumstantial evidence is the testimony of a witness who noted that, upon exiting a building, everything was wet and water was running down the street into the gutters. The testimony offers circumstantial evidence that it recently rained, even though the witness did not

see or feel the actual rain. The other side in the case could introduce evidence to rebut this circumstantial evidence. They could call a city street maintenance supervisor to testify that the operator of a city water tanker sprayed the entire area while preparing the street for a street-cleaning machine. The jury will draw its own conclusions based on testimony of the witnesses and can choose to ignore all or part of the testimony of any witness. Contrary to popular opinion, circumstantial evidence is often reliable evidence and can be more persuasive than direct evidence. Even criminal convictions can be based on circumstantial evidence.

The parties are not free to present any evidence in *any way* they please, but must abide by the *Ohio Rules of Evidence* as published by the Supreme Court of Ohio. The main purpose of the Rules of Evidence is to ensure that evidence is competent, relevant and material to the case being tried to prevent a jury from considering unreliable or unfairly misleading evidence.

An example of evidence that usually cannot be presented would be a defendant's prior criminal record. Such evidence offers no proof that the defendant committed the particular crime for which he or she is standing trial and may only serve to prejudice the jury against the defendant. Similarly, a witness generally cannot testify to what another person said he or she saw. This kind of testimony is called *hearsay*. Hearsay is not reliable since there is no opportunity for the opposing party to examine the person who allegedly made the statement.

The court will not permit the jury to consider evidence that has nothing to do with the case at hand. For example, in a rape case where the defendant denies any sexual contact with the victim, the court will not permit evidence that the victim was sexually promiscuous with others. The issue is whether the defendant forcibly engaged in sexual relations with the victim, regardless of whether the victim willingly engaged in sexual activity with others. Similarly, in a trial for murder committed in the course of a robbery, the judge would not permit the jury to hear evidence

that the victim had terminal cancer and probably would have died in a month even if the victim had not been shot and killed during the robbery.

One of the judge's most important functions in a trial is to rule on whether certain evidence is admissible. Generally, a judge will not keep evidence from being heard unless one of the party's attorneys objects and asks that the evidence be excluded. The judge carefully considers matters such as this, since the improper admission or exclusion of evidence may be so prejudicial as to affect the outcome of the trial, and cause an appeal to the court of appeals. In criminal cases, the failure by defense counsel to object to improper evidence may result in the reversal of a conviction, based on counsel's incompetence.

For each witness, the side that calls that witness conducts *direct examination*. When that side concludes its questions, the other side has a right to *cross-examine* that witness. The side that called the witness may ask *redirect examination* questions after any cross-examination, and the other side may then ask re-cross examination questions. The judge may then permit either side to ask further questions. The right of cross-examination is considered so important that it is guaranteed in both the U.S. and Ohio constitutions.

The chief purposes of a cross-examination are to place a witness's testimony in perspective, to test its accuracy, and to bring out information not offered during direct examination.

For example, if woman who is a credible witness in a murder case testifies that she saw the defendant shoot the victim, her testimony would, on its own, be very damaging to the defense. However, her testimony takes on a different light when, upon cross-examination, this witness testifies that she was a city block away from the shooting, it was 11 p.m., and that she regularly wears glasses for night and distance vision, but was not wearing them that night.

Closing arguments

Once all the evidence has been presented, the attorneys deliver their *closing arguments* to the jury. The prosecutor goes first, because the

prosecution has the burden of proving the case. When the prosecutor is finished, it is the defense attorney's turn. The prosecutor may reserve part of his or her time for rebuttal after the defense attorney is finished.

In general, each attorney uses the closing argument to summarize the evidence, commenting on it in a way that shows his or her client in the most favorable light. Each attorney may talk about the facts and all the inferences that can properly be drawn from them. An attorney may not talk about evidence that was not presented, or argue about points that do not apply to the case. If an attorney uses improper material in a final argument, the opposing attorney may object and the judge may instruct the jury to disregard what was said. If the offending material is seriously prejudicial, the judge may declare a mistrial.

Jury instructions

When the attorneys have completed their closing arguments, the judge instructs or *charges* the jury. This means the judge explains to the jury their duties as members of a jury and the law applicable to the case.

Before the closing arguments, the attorneys may ask the judge to give specific instructions on the law as it applies to the evidence. If these instructions are proper and would not have been covered by the judge in his or her charge to the jury, the judge will include them. The charge may take minutes or, in complicated cases, it may take hours.

Verdict

After the judge charges the jury, the jurors are escorted to the jury room to make their decision or *verdict*. Once inside the jury room, the jury selects a *foreperson* to make sure that the discussions are orderly and that each juror gets ample time to speak, and to report to the judge in the courtroom. Once a foreperson is selected, the jury begins deliberations about the facts of the case.

The bailiff is outside the jury room and allows no one to enter or leave the room without the express permission of the judge. Sometimes the jury's deliberations go on for several days. In such cases, the jurors may be allowed to go home for the night with an order to return the following day to resume deliberations. Or, in certain high-profile cases, the jury may be *sequestered*, that is, housed at a local hotel under the supervision of the court bailiff, with security provided by deputy sheriffs. In a capital murder case, the jurors will be sequestered if they are unable to reach a verdict by the end of the day. In all cases, the jurors are told not to discuss the case with anyone until after the verdict is announced in court. Even then, the jurors have no obligation to discuss the case with anyone else.

Usually, the court will give jurors written forms for each of the possible verdicts in the case. In a criminal case, the verdict must be unanimous. In many cases, the court may give the jury detailed information about specific questions (known as *interrogatories*) pertaining to the case.

On rare occasions, the jury becomes hopelessly deadlocked when the jurors cannot agree on a decision. This is called a *hung jury*, and if the judge is convinced that the jurors will not be able to reach a verdict, the judge declares a mistrial. The case may have to be retried with a new jury, unless the prosecutor decides to dismiss it. If the jurors agree on a decision, they will sign the appropriate verdict form and return to the courtroom where the verdict is announced either by the judge, by the jury foreperson, by the clerk of the court or by the court bailiff.

Attorneys for the prosecution or the defendant may ask that the jurors be polled individually to determine if the announced verdict really is each one's verdict. If each juror agrees with the verdict, the verdict is accepted, the jury is dismissed and the trial is over.

Stage 6: Sentencing and motions after the trial

Sentencing in criminal cases

In criminal cases, the sentence is part of the judgment. In minor criminal cases, sentencing usually takes place immediately following a jury verdict of guilty or the judge's finding that the offender is guilty. In serious criminal cases, sentencing is often deferred pending a pre-sentence investigation to gather information on the case and on the offender's background. The judge can then determine the proper sentence according to sentencing guidelines established by the Ohio legislature. A person convicted of or pleading guilty to a felony will not be considered for probation (now called *community control sanctions*) without a pre-sentence investigation completed by the adult probation department of the court. (See Part IV, "Criminal Law," for a schedule of Ohio's felony and misdemeanor sentencing guidelines.)

Proceedings after the trial

Following a conviction, the defendant may file a motion for a new trial or for *judgment notwithstanding the verdict*, that is, a judgment that sets aside the jury's guilty verdict in favor of a judgment for the defendant. The judge should deny the motion for judgment notwithstanding the jury's verdict unless no reasonable person could find that the prosecution proved the charge beyond a reasonable doubt, when viewing the evidence in the light most favorable to the prosecution. The judge should deny the motion for a new trial unless a serious error denied the defendant a fair trial, the verdict is clearly contrary to the evidence, or the defendant provides newly discovered evidence that was unavailable at the trial and that would probably change the result.

Appeal

In criminal cases, a person who is convicted may appeal, but the state's (prosecution's) right of appeal is very limited because of the consti-

tutional protection against *double jeopardy*. In general, double jeopardy means a person cannot be tried or punished more than once for the same offense. (See "Double Jeopardy" in Part IV, "Criminal Law.")

Appeals are generally made on questions of law rather than questions of fact. (The trial process, not the appeal process, is best equipped to determine facts.) Appellate courts usually accept the factual determinations of trial courts unless they are clearly not supported by credible evidence, concentrating instead on whether the trial court incorrectly interpreted or applied the law.

For a trial court decision to be appealed, the decision must be known as a *final order*. This prevents what might be the continual interruption of the trial process if any and all court decisions before and during the trial could be appealed. In a criminal case, an appeal could be made only after the filing of the judgment journal entry that imposes sentence upon the defendant. However, in certain circumstances, a pre-trial ruling by a court that excludes evidence offered by the state may be appealed, and the trial suspended pending an appellate court decision.

Generally, a party has 30 days from final judgment or order to file an appeal. Appeals filed after that time are allowed only in criminal cases with the appellate court's permission (called *leave of court*). Permission to file a late appeal is granted only when the *appellant* (the party filing the appeal) can show a good reason for failing to meet the regular deadline. The right to appeal is lost if the appeal is not filed within the time allowed or leave to file a late appeal is not granted.

Other post-trial proceedings

In criminal cases, there are a number of other proceedings that may be held months or years after the trial.

If an offender is placed on community control sanctions, but then violates one of the conditions of the sanctions, the court may hold a hearing to

determine if the sanctions should be revoked and the offender sent to jail or prison.

Similarly, when a person is released on parole from prison and violates the parole conditions, a hearing may be held to determine if the parole violator should be returned to prison.

Also, the trial court may hold a post-conviction relief proceeding to determine the validity of later claims that the offender's constitutional rights were violated.

For Journalists: Reporting on Procedure

Reporting on cases requires understanding the exact case stage so that readers/viewers are not misled. There are distinct subtleties in the process that may confuse some readers/viewers. For instance, some readers/viewers may think someone who has been arrested is necessarily guilty of the crime he or she is charged with committing if the journalist omits important information about procedure. The selection of terms used to describe the various points in the legal process are critical

and may require the writer to define for readers/viewers the exact nature of a pre-trial hearing, for instance, and how that is different from an actual jury trial, or why it is that a case is being decided without a jury.

While journalists may worry that reporting such detail may risk burdening readers/viewers with too much "legalese," these important subtleties in the law reflect on the parties involved and the accuracy of the journalist's endeavor. Without an explanation of the process and the stages of procedure, a reader/viewer may be left with the wrong impression as to a defendant's guilt in a criminal case or a judge's ruling in civil case, for example.

Worse yet, journalists who ignore procedural issues do so at their peril. Such writers may create a picture of a defendant (or plaintiff)—or of the court itself—that is incorrect. In some cases, reports may border on libelous because they are erroneously more definitive about who is "winning or losing" than is actually the case. More than any other part of court reporting, defining the stages and procedures of a case is one of the court journalist's most important responsibilities to reflect accurately what has happened in the courtroom.

Chapter Summary

- The law defines our rights and obligations as citizens, while legal procedure provides the means for enforcing those rights and obligations fairly and effectively.
- Legal procedures identify where, when and how legal action is to be started, conducted and concluded.
- *Jurisdiction* refers to the power and authority of a court. Different courts have different powers, and a case can be brought only in a court with authority to deal with it.
- *Venue* refers to the place where a case must be tried.
- *Statutes of limitations* provide time limits for beginning legal actions to discourage unreasonable delay in bringing civil lawsuits and criminal prosecutions.

Continued on page 42

Chapter Summary *continued*

- A civil case begins when the claimant, or plaintiff, files a written pleading, or *complaint*, with the proper court. The defendant in a lawsuit is entitled to know he or she is being sued and why, and given time to answer the lawsuit. The parties to any civil lawsuit can challenge each other's pleadings by means of *motions*, or written requests filed with the court.
- *Discovery* is the process whereby the parties to a civil lawsuit obtain information or evidence from each other, often in written question or oral deposition form.
- A criminal case can begin when a proper arrest is made (followed by the filing of a complaint); when a grand jury returns an indictment; when a private citizen files a complaint; or when a summons or citation is issued.
- *Bail* is the pre-trial release of an accused, provided the court is satisfied that the accused will attend all court hearings. An arrested person who qualifies for bail must be given the opportunity to be free on bail as soon as possible, although different guarantees of appearance in court may be required.
- A person who is arrested for a felony must be given a *preliminary hearing* without delay. The purpose of a preliminary hearing is to look at the evidence against the accused, and determine if it is sufficient to warrant further proceedings.
- An *indictment* is a formal accusation made by a grand jury, charging a named person with a specific crime.
- An *arraignment* follows an arrest or indictment. The purpose of an arraignment is to inform the defendant of the nature of the charge, advise the defendant about his or her rights, and obtain his or her plea to the charge.
- Unlike civil cases, the defendant in a criminal case does not file a written pleading (an *answer*) in response to the charge; the defendant's oral plea in court serves the same function.
- Criminal discovery is more limited than the discovery in civil cases and can be initiated by the defendant.
- Pre-trial conferences are used in criminal cases for plea negotiations and for the same purposes as civil pre-trial conferences.
- A trial is a contest between adversaries. The role of the judge is to control the contest as a neutral referee and to rule on questions of law. The role of the jury is to decide questions of fact.
- The main steps in civil and criminal trials include selection of a jury, opening statements by the attorneys, presentation of witnesses and evidence, closing arguments by the attorneys, instructions by the judge to the jury, and deliberation and decision (*verdict*) by the jury.
- The right to trial by jury applies in many, though not all, situations. The process of choosing jurors is called *voir dire*.
- A number of legal proceedings may be conducted after the trial is over. Any party may file an appeal in civil cases. However, because of *double jeopardy* provisions in the U.S. and Ohio constitutions, the prosecution's right to appeal in criminal cases is more limited.

Web Links:

From the OSBA’s “Law You Can Use” column:

www.ohiobar.org/lawyoucanuse (search by title or topic)

“Civil Trials: How Are Jurors Selected?”

“Expert Witnesses Help Judges and Juries Find the Truth”

“How Does a Grand Jury Operate?”

“Know How to Answer a Complaint”

“Perjury Can Lead to Prison”

“What You Should Know about Evidence Rules and Hearsay”

“What You Should Know about Obstruction of Justice”



“We will sell no man, we will not deny to any man, either justice or right.”

– Magna Carta

Criminal law is one of the oldest of the major branches of law. It spells out rules of conduct for society to follow and provides for penalties when those rules are broken. It also protects citizens by shielding them from wrongful prosecutions and mistakes made by law enforcement officials, affording certain constitutional rights if an individual is accused of committing a crime.

What Constitutes an Offense?

In Ohio, all crimes must be defined by state statute or local ordinance. *Statutes* and *ordinances* (commonly referred to as *laws*) must also provide penalties for committing crimes. There are varying degrees of criminal offenses, ranging from jaywalking to premeditated murder.

In Ohio and most other jurisdictions, two things are required for an act or omission to qualify as a criminal offense. First, the law must prohibit the unlawful act or conduct, or there must be a failure to perform some duty required by the law. (This is called *actus reus*, or guilty act.) Second, at the time of the unlawful act, conduct, or omission, the person committing the offense must have a certain guilty state of mind, or *culpable mental state* (in Latin, *mens rea*).

Depending on the specific crime with which an offender is charged, it must be shown that he or she:

- acted in a reckless manner; or
- acted with purpose or knowledge; or
- acted with criminal negligence.

With few exceptions, for an act or omission to be considered a crime, at least one of these culpable mental states must be present.

For example, the crime of murder is defined as *purposely* causing the death of another person. Thus, causing someone’s death *accidentally* is not murder (though it may be *negligent homicide*) because the required guilty state of mind for the crime of murder is not present. Someone might actually plan to steal and therefore have a guilty mind. However, that person has not committed a crime until he or she actually takes or attempts to take something while having a guilty mind.

The exceptions to requiring a culpable mental state generally have to do with regulatory offenses dealing with public health and safety. Selling impure food, for example, is a violation of the pure food and drug laws even if the seller did not know the food was tainted. Such crimes are commonly known as *strict liability offenses*. Most traffic violations are strict liability offenses. For example, exceeding the speed limit is a crime. It does not matter whether the driver does so recklessly, negligently or with some intent or purpose.

Types of Crimes

There are two major classifications of crimes: felonies and misdemeanors. The word *felony* comes from the Latin word *felonia*, meaning treason or treachery. *Misdemeanor* combines “mis” for “wrong” or “bad,” and “demeanor” from the Middle English word “demenure,” meaning to govern oneself or behave. Both felonies and misdemeanors are further classified according to the comparative seriousness of the offense. Crimes of the *first degree* generally are the most serious. A few crimes are simply defined as felonies or misdemeanors without being classified by degree.

Felonies are the most serious crimes. In Ohio, punishment for *felons* (persons committing felonies) may include community sanctions,

various financial penalties and imprisonment. Felonies carry a potential penalty ranging from six months or more in a state prison to a penalty of death.

The most serious felony is *aggravated murder*, followed by *murder*. Both are done purposely, but aggravated murder is committed “with prior calculation and design.” Aggravated murder also can be a purposeful killing that is committed while the perpetrator is also committing a first- or second-degree felony such as kidnapping, rape or robbery. This crime is commonly referred to as “felony murder.” The murder offenses are categorized in descending level of seriousness by felonies of the first, second, third, fourth and fifth degrees.

Under certain circumstances, felony offenders can serve time in local jails or community-based correctional facilities; however, most violent or repeat offenders are housed in state prisons.

Misdemeanors are less serious than felonies. They range from speeding and littering to drunk driving and simple assault (with minimal harm). In Ohio, the penalty for a misdemeanor can range from payment of court costs to no more than six months in jail and/or a \$1,000 fine per offense. In addition, the penalty may include community control sanctions such as probation or community service. In fact, the penalty for most *misdemeanants* (persons committing misdemeanors) often involves community and financial sanctions and/or electronic monitoring rather than jail time.

Minor misdemeanors are the least serious offenses and, in Ohio, may be punished only by a fine of \$150 or less, but no jail time.

Crimes in the Ohio Criminal Code

The *Ohio Revised Code* lists all crimes that apply in Ohio. Title 29, the Ohio Criminal Code, lists most of the serious offenses according to state law.

Subjects covered include:

- homicide, assault and menacing threats;
- kidnapping, abduction, false imprisonment, extortion and coercion;
- patient abuse and neglect;

- rape and other types of sexual assault, prostitution, obscenity and disseminating matter harmful to juveniles;
- arson and other property damage offenses;
- robbery, burglary, breaking and entering, safecracking and trespassing;
- theft, bad check and credit card offenses, forgery, fraud and other theft offenses;
- gambling;
- inciting violence;
- riot, disorderly conduct and false alarms;
- certain aspects of abortion, nonsupport, endangering children and domestic violence;
- bribery, perjury, resisting arrest, harboring criminals, escape, graft, conflict of interest, dereliction of public duty and violation of civil rights;
- conspiracy, attempt and complicity;
- weapons and explosives control;
- corrupt activity (racketeering); and
- drug offenses including possession, sale, manufacture and cultivation.

Crimes Outside the Ohio Criminal Code

Besides the crimes defined in Title 29, a number of other criminal offenses are enumerated in the *Ohio Revised Code*. Some, such as traffic and liquor control offenses, are grouped in a single chapter, while others are spread throughout the Code.

Many are regulatory offenses and address matters such as motor vehicle licensing and registration, agricultural products and raw materials, weights and measures, hunting and fishing, boating, licensing of professionals, public health and elections. Many of these offenses are strict liability offenses.

Municipal ordinances, while duplicating many state misdemeanors, also cover local issues such as building repairs, property care, noisy neighbors, curfews and pets. Under the Ohio Constitution, municipalities cannot create felonies.

The *United States Code* contains federal criminal offenses, which are applicable nationwide. Federal offenses include crimes committed across state lines, on federal property or against federally insured banks. Overall, a very small percentage of criminal cases involve federal offenses. Most criminal prosecutions take place in state courts and involve violations of state statutes and local ordinances.

Penalties and Sentencing

One of the most important features of the Ohio Criminal Code is its plan for penalties and sentencing and its treatment of offenders. Penalties are listed according to the comparative seriousness of offenses. Within each degree of crime a range of penalties is provided, permitting judges to tailor penalties to individual offenders rather than basing the penalties on their offenses alone. The sentencing law provides that judges should give progressively strict penalties for certain repeat offenders, for those who use or threaten the use of violence and for those who use or carry firearms while committing a crime. (See chart on page 50 showing potential felony penalties and sentencing under Ohio law.)

Penalties

The Ohio Criminal Code was revised in July 1996. Now, in most cases, the prison sentence imposed in open court on a convicted felon is the actual time he or she will serve, minus credit for any time spent in jail while awaiting trial or sentencing.

Before the law was changed, judges would impose indeterminate sentences (*e.g.*, “5 to 25 years”). The length of time offenders actually served would be reduced for good behavior. The ultimate release date would be determined by the parole board.

Ultimate control over each offender’s actual sentence is now left to the sentencing judge. The

law prevents the parole board from releasing people from non-life sentences for acts committed after July 1996. With very narrow exceptions, only a judge can modify a sentence. The judge can do this by *judicial release* (formerly known as shock probation) for eligible offenders or by allowing the offender to be placed in a boot camp treatment or furlough program.

The length of an inmate’s sentence may be changed without direct input from a judge only if the inmate earns credit while in prison. An *earned credit* reduces a sentence by one day for each month an inmate participates in meaningful school, work, training or treatment programs.

Mandatory Terms

While judges have latitude in selecting an appropriate sentence from the range of penalties available for misdemeanors or felonies, some crimes carry mandatory jail or prison terms. In those cases, the judge must send the person to prison or jail. Sometimes, the amount of time is specified (*e.g.*, an additional three years for using a firearm during a felony). However, for most mandatory terms, the judge can exercise discretion in selecting the actual duration of the offender’s prison term.

A prison term must be imposed for offenders convicted of criminal acts in the following cases:

- aggravated murder when a death sentence is not imposed;
- murder;
- any rape and any attempted rape when the victim is younger than 13 years old;
- first- or second-degree felonies when the offender has a prior second-degree or higher felony conviction;
- first-, second-, or third-degree drug offenses when specified as mandatory by statute;
- corrupt activity (racketeering) when the most serious underlying offense is a first-degree felony;
- felony vehicular homicides and assaults, or drunk driving when specified by statute;
- having a firearm in the commission of a felony;

- gross sexual imposition or sexual battery if the offender has a prior conviction for either, or for rape, involving a victim under age 13;
- any sexual offense where the indictment states that the perpetrator is found to be a sexually violent offender;
- human trafficking involving kidnapping and certain sexual offenses;
- a felony assault against a pregnant woman, under certain circumstances;
- the wearing or carrying of body armor while committing a felony; and
- illegal conveyance, by a prison employee, of contraband items (such as narcotics, alcoholic beverages, weapons or pornography) into a prison facility.

Individuals defined as *repeat violent offenders* and *major drug offenders* face long mandatory terms and can have as many as 10 years added to their sentences. According to Ohio law, a judge must add three years to prison terms for those using, possessing or brandishing a firearm while committing a felony. If the firearm was not visible or indicated during the crime, an additional one-year term is mandated. When the firearm is an automatic or equipped with a silencer, the mandatory sentence is six years.

The offender serves a mandatory term for using a firearm before and separate from the term served for the crime the offender was convicted of committing. Firearm sentences cannot be served simultaneously (concurrently) with the original offense, and they cannot be suspended or reduced other than through credit for jail time served.

Sentencing Discretion

Although the Ohio Criminal Code gives judges sentencing discretion, the discretion is guided by some basic rules, particularly in felony cases. Generally, for first- and second-degree felonies, the law presumes a prison term is needed to punish the offender and protect the public. For fourth- and fifth-degree felonies, the law steers some offenders toward prison while steering many property and non-violent offenders toward

community control sanctions (community control sanctions are explained later in this chapter).

The most complicated provisions deal with fourth- and fifth-degree felonies. Even though felonies generally carry the possibility of a prison term, the law requires one year of community control sanctions instead of prison for those convicted of fourth- and fifth-degree felonies if:

- the most serious charge against the offender is a fourth- or fifth-degree felony;
- the crime is not an offense of violence and the offender did not cause physical harm to another person;
- the offender did not possess a firearm while committing the offense; and
- the offender did not violate any conditions of bond.

However, if the court believes that there is not an appropriate community control sanction available for the fourth- or fifth-degree felon, the judge must delay sentencing and allow the Ohio Department of Rehabilitation and Correction (DRC) to identify an appropriate non-prison sanction within 45 days. If the DRC finds such a community control sanction, the court must impose it.

If a person has committed a fourth- or fifth-degree felony, but does not meet the above criteria for a community control sanction, the judge must decide whether to sentence that person to prison. In making such a decision, the judge must first determine if the offense:

- brought physical harm to a person;
- involved an attempted or actual threat of harm with a weapon;
- involved an attempted or actual threat of harm without a weapon when the offender has a prior conviction for causing harm;
- was committed by an offender possessing a firearm;
- was related to a public office or position of trust;
- was “for hire” or was committed as part of organized crime;
- was a sex offense;

- was committed by an offender who has been to prison before; or
- was committed while the offender was under indictment or under community control for another offense.

If any one of these factors is present, the Ohio Criminal Code steers the judge toward imposing a prison sentence, provided the court finds that the offender is not a good candidate for available community sanctions. If none of these factors is present, the judge is steered toward community sanctions.

Judges can choose not to follow the Ohio Criminal Code's guidance in favor of or against a prison term when choosing a sentence. For example, a judge may order a community drug rehabilitation program rather than a prison sentence for a second-degree felon who has a history of drug dependency but no other criminal record. A judge can also sentence repeat non-violent offenders to prison if it is determined that the offender deserves to go to prison and is not amenable to community control. However, if the judge goes against the guidance, he or she must give a reason for the decision.

In every felony case, the sentence must serve to punish the offender and protect the public. Judges must look at factors indicating whether the crime was more serious or less serious and factors suggesting whether the offender is more or less likely to repeat the crime.

In sentencing for misdemeanor offenses, the judge must consider factors similar to those considered when sentencing felons, such as the risk of a repeated offense, the need to protect the public, the nature and circumstances of the offense, victim-impact statements, the history/character/condition of the offender, the offender's need for correctional or rehabilitative treatment and the offender's ability to pay a fine, if a fine is imposed. The law is less strict about judges giving reasons for sentences in misdemeanor cases, and sentence appeals are far less common.

Victims of crime, as well as the victim's family members, may provide input in the

sentencing process by way of *impact statements*. There are two kinds of victim impact statements. One is an actual statement made by the victim or the victim's family members at sentencing. It can be made orally in court or in writing. Such a statement allows the person or persons most affected by a particular crime to tell the judge how the crime has affected them. The other kind of impact statement is information a victim gives to a probation officer as part of a pre-sentence investigation. The pre-sentence investigation is ordered by the judge to gather information (such as the offender's criminal history, social history, employment record, financial situation, personal characteristics, family situation and physical and mental condition) before choosing an appropriate sentence. The probation officer gives this information, including the victim's impact statement, to the judge, and it generally remains confidential.

After reviewing the pre-sentence report, and after having heard from the victims and the defendant in open court, the judge determines the sentence to be imposed. A judge is more likely to be lenient with a first-time offender, provided leniency does not mock the seriousness of the offender's crime or the likelihood that the offender will commit future crimes. A judge is more likely to be severe when the person is a repeat or a dangerous offender.

If a felon or misdemeanor does not face mandatory prison or jail time, the judge may sentence the offender to community control sanctions or probation rather than prison or jail. Judges may place some felons on community control after they have served a certain portion of their prison terms. The time that must be served before seeking early judicial release varies depending on the length of the sentence. However, these options are not available to those sentenced to mandatory prison terms.

While mandatory sentencing reduces judges' ability to modify sentences, most crimes do not carry mandatory terms. For all of these non-mandatory offenses, judges' sentencing latitude includes:

- ordering a sentence to be served in a local jail on weekends or overnight, enabling the offender to keep a job and maintain family responsibilities (much more common for misdemeanants than for felons);
- permitting payment of a fine in installments;
- providing for commitment and treatment options for offenders determined to be mentally deficient, mentally ill or drug- or alcohol-dependent.

Felony Sentencing Table

Felony Level	Sentencing Guidance §2929.13(B)-(E)	Prison Terms §2929.14(A)	Maximum Fine ^a §2929.18(A)(2) & (3)	Repeat Violent Offender Enhancement §2929.14(B)(2)	Is Post-Release Control Required? §2967.28(B) & (C)	PRC Period §2967.28(B) & (D)(2)
F-1	Presumption for prison (also applies to “in favor” drug offenses)	3, 4, 5, 6, 7, 8, 9, 10 or 11 years	\$20,000	1, 2, 3, 4, 5, 6, 7, 8, 9 or 10 years	Yes	5 years, no reduction
F-2		2, 3, 4, 5, 6, 7 or 8 years	\$15,000			
F-3	No guidance other than purposes & principles (also applies to “Div. (C)” drug offenses)	9, 12, 18, 24, 30 or 36 months or 12, 18, 24, 30, 36, 42, 48, 54 or 60 months ^b	\$10,000	For F-2 involving attempted serious harm or for invol. manslaughter: 1, 2, 3, 4, 5, 6, 7, 8, 9 or 10 years; otherwise none	Yes if sex or violent offense; otherwise optional	If sex offense, 5 years, no reduction;
F-4	Mandatory 1 year community control for non-violent, no prior felony etc. Otherwise: If any of 9 factors & not amenable to other sanction(s), guidance for prison. If none of 9 factors, guidance against prison.	6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 or 18 months	\$5,000	None	Yes if sex offense; otherwise optional	otherwise, 3 years, reducible by Parole Board
F-5	(Also applies to “Div. (B)” drug offenses)	6, 7, 8, 9, 10, 11 or 12 months	\$2,500			

Exceptions: Indeterminate sentences for agg. murder, murder, human trafficking, and certain sex offenses & crimes with sexual motivation.

Drug Offenses—Note penalties track degree of offense, but the sentencing guidance may be different than for other offenses at that felony level.

Repeat Violent Offenders are (§2929.01(DD)): Being sentenced for: agg. murder, murder, a violent F-1 or F-2, or an F-1 or F-2 attempt of violence, with a prior conviction for one or more of the same offenses or their equivalents.

^a**Maximum Fines**—Cover conventional and day fines. There are exceptions in drug trafficking cases (§2929.18(B)(4)-(7)). And some offenses call for a superfine of up to \$1 million (§2929.32). For the fine if the offender is an organization, see §2929.31.

^b**Higher F-3s**—The longer sentence range applies to agg. vehicular homicides & assaults, sexual battery, GSI, sex with minor, & robbery or burglary with 2 or more separate agg. or non-agg. robberies or burglaries (see §2929.14(A)(3)(a)).

OHIO CRIMINAL SENTENCING COMMISSION—Sept. 30, 2011

Misdemeanor Penalty Table

Misdemeanors are punishable by a definite term in jail, a fine and/or community control sanctions. The judge may also impose a jail term, suspend it and place the offender under one or more community control sanctions. Probation supervision, community service, restitution and counseling are common sanctions imposed. Minor misdemeanors are punishable only by a fine of \$150 or less or community sanctions (no jail time can be imposed for a minor misdemeanor). The judge fixes a misdemeanor sentence from the permissible range of penalties (jail terms and fines may not exceed the maximums specified in the statute). The following table contains the basic misdemeanor jail terms and fines stated in the Ohio Criminal Code.

NOTE: This table does not specifically cover the mandatory jail or prison sentences to be imposed when an offender is convicted of operating a vehicle while under the influence of alcohol or drugs or other certain offenses. The maximum fines for OVI offenses are higher than what is reflected in the chart. As of Oct. 2011, they were \$1,075, \$1,625 and \$2,750 respectively, for a 1st, 2nd and 3rd OVI offense within six years, all of which are misdemeanor offenses.

Misdemeanor Jail Terms and Fines		
<u>Offense</u>	<u>Maximum Term</u>	<u>Maximum Fine</u>
1 st degree misdemeanor	180 days	\$1,000
2 nd degree misdemeanor	90 days	\$750
3 rd degree misdemeanor	60 days	\$500
4 th degree misdemeanor	30 days	\$250
Unclassified misdemeanor	None	\$1,000
Minor misdemeanor	None	\$150

Goals of Sentencing and Corrections

Because Ohio's felony-sentencing system is designed to punish offenders and protect the public from future crimes, courts are asked to assess and balance needs for incarceration, rehabilitation, restoring victims' losses, deterring crime and, in some cases, retribution. Somewhat less formally,

courts must make similar assessments when dealing with misdemeanor offenders.

One way to protect the public from future crime is to rehabilitate offenders. This is why the sentencing laws generally allow judges discretion in imposing sentences. However, the law recognizes that not all offenders respond the same way to efforts aimed at rehabilitation and that, sometimes, there is little chance that an offender will be rehabilitated. In cases where public safety is endangered, the law provides for the offender's long-term removal from society.

Community Control Sanctions

Since the mid 1990s, in response to crowded and expensive prisons not suited for rehabilitation, the Ohio General Assembly has formally listed a variety of alternatives to prison. These alternatives hold offenders accountable for their crimes while addressing the underlying causes.

Misdemeanants and felons not facing mandatory prison terms are eligible for the following residential and non-residential sanctions outlined in the Ohio Criminal Code:

- residential sanctions including community-based correctional facilities, jails, minimum-security jails and halfway houses;
- non-residential sanctions including house arrest and electronic monitoring, community service, drug testing, drug treatment, basic supervision, intensive supervision, monitored time, alcohol monitoring, curfew, employment, education or training, victim-offender mediation, anger management programs, license violation reports and day reporting;
- financial sanctions can include conventional fines, fines based on a standard percentage of the offender's daily income over a period of time, mandatory fines in higher level alcohol or drug cases, restitution to victims for their economic loss and reimbursement for the costs of sanctions or for the costs of jail or prison; and

- boot camps, intense regimens of work, school, training or treatment monitored by the state prison authorities.

Boot camp typically involves 90-day periods of incarceration with military-style discipline, physical training and labor, substance-abuse education, psychological treatment and social and employment skills training. Incarceration is followed by a 30- to 90-day stay in a halfway house or community-based correctional facility, followed by a period of supervision in the community.

Eligibility for the program is limited to offenders who are approved by the trial judge and the prison officials and who are generally healthy, young, nonviolent inmates who have not spent much time in prison.

Intervention in Lieu of Conviction and Diversion Programs

The Ohio General Assembly provides that certain non-violent drug users (not sellers) who are amenable to treatment can enter and complete an intervention program before being found guilty of the crime for which they are charged. If the offender is unsuccessful in the program, he or she is convicted of the offense and generally is sentenced to prison. Common pleas judges administer this program.

The Ohio General Assembly also authorizes county prosecutors to administer felony diversion programs. To be eligible for diversion, individuals must be first-time non-violent offenders who can successfully complete a diversion program with conditions that include restitution to the victim(s), if any, employment, community service and no offenses during the time in the program.

Criminal Law and Constitutional Rights

The U.S. and Ohio constitutions provide people accused of crimes with basic rights that are

designed to protect individuals from unreasonable government intrusion and to ensure fundamental fairness. These rights are so important that violating them may result in the suppression of evidence or the dismissal of criminal charges as well as charges against those responsible for violating those rights.

The following is an outline of some basic constitutional rights under the law.

Equal Protection Under the Law

The 14th Amendment to the U.S. Constitution entitles everyone to equal protection under the law. In the context of criminal law, this amendment means that the law must be the same for everyone regardless of race, creed or economic standing.

Due Process of Law

The 14th Amendment also prohibits the state or federal government from taking away a person's life, liberty or property without *due process of law*. This means that the laws must be enforced only through a rational procedure that is constructed and used to ensure fundamental fairness. Due process prevents an accused person from arbitrarily being fined, jailed or otherwise punished. Guilt or innocence must be determined fairly, impartially and in a timely manner through an appropriate procedure, such as a hearing, where the accused has the opportunity to face his or her accusers and to offer a defense.

Double Jeopardy

Both the U.S. and Ohio constitutions provide that no one can be placed in jeopardy (or tried) more than once for the same crime. Generally, this means that the state has only one chance in a criminal prosecution to prove that the accused committed the crime. If a person is found not guilty, the state cannot appeal or attempt to try that person again. The same is true if an accused is found guilty. The state cannot accuse a person of the same crime again and attempt to inflict double punishment for it.

Search and Seizure

The U.S. and Ohio constitutions prohibit unreasonable searches and seizures. Generally, law enforcement officers need a search warrant to search a person or property and only judges can issue search warrants. Furthermore, judges can do so only when there is probable cause to believe that a search will uncover particular evidence of a crime. Searches without warrants are permitted in certain situations, such as in connection with a lawful arrest, when a search is conducted with the permission of the person whose property is being searched or when the items found are in plain view of the officer.

Self-Incrimination

Individuals cannot be compelled, tortured, frightened, coerced or tricked into self-incrimination. This means a person cannot be forced to confess, make damaging statements or make any statement at all that might suggest wrongdoing. During a trial, the accused cannot be forced to testify (be a witness) against himself or herself. Likewise, if the accused decides to remain silent, the prosecution cannot suggest to the jury that the accused's silence indicates guilt.

Right to Counsel

Everyone is constitutionally entitled to the services of an attorney when accused of a crime. If a prison sentence is a possible punishment for the crime and the accused cannot afford an attorney, the state must provide one. In serious cases, legal counsel must be provided at all significant steps of the procedure, from arrest and police questioning through arraignment, trial and, if necessary, appeal.

Indictment by a Grand Jury

Both the U.S. and Ohio constitutions provide that no one can be brought to trial for a felony unless a grand jury hands down an *indictment* or the prosecutor files an *information* statement saying that there is "probable cause" to believe the accused has committed the crime. Indictment

by a grand jury helps ensure that no one is subjected to trial on false or spiteful accusations.

Notice of Charge

An accused person is entitled to fair notice of the specific charges against him or her. This notice allows the accused to prepare a defense intelligently. An accused cannot prepare a proper defense if the charge is a vague statement of some unspecified wrongdoing.

Speedy Trial

The U.S. and Ohio constitutions state that a person charged with a crime is entitled to a speedy trial so that the matter will not be hanging over the accused person's head indefinitely.

Ohio time limits are provided by statute and are extended only for good reasons. The maximum time limits for a hearing or trial after an arrest or summons service are:

- 30 days for trial in mayor's courts or minor and unclassified misdemeanors in any court;
- 45 days for misdemeanors carrying a maximum penalty of 60 days in jail;
- 90 days for more serious misdemeanors;
- 15 days for preliminary hearings in felony cases if the person is released on bail, but 10 days if the person remains jailed;
- 270 days for trials in felony cases.

Ohio law provides that when counting prison time, each day spent in jail awaiting trial is counted as three days. For example, the accused felon who cannot make bail must be brought to trial within 90 days ($270 \text{ days} \div 3 = 90$) after the arrest.

Public Trial in a Locality

Both the U.S. and Ohio constitutions give an accused the right to a public trial, thus ensuring that trials are not held in secret, but are conducted openly, fairly and properly. An accused also has the right to be tried where the alleged offense was committed so that witnesses and evidence are readily available and the state cannot transfer the

trial to a place where the atmosphere is hostile toward the accused. Accused persons who believe they cannot get a fair trial in the place where the alleged crime occurred may petition to have their trials transferred (called a *change of venue*).

Confronting Accusers and Securing Witnesses

Both constitutions also state that defendants in criminal cases are entitled to meet the accusers and the witnesses against them. The Ohio Constitution specifically requires that this confrontation occur face to face, allowing accused persons to question these witnesses and eliminating the use of anonymous witnesses. In some cases the courts have allowed a narrow exception to the face-to-face confrontation rule. For example, in some sex-offense cases involving young victims, the witness can testify by videotape. Likewise, accused persons are entitled to have their own witnesses be subpoenaed to speak on their behalf. Just as the state can force witnesses to testify, if necessary, so can the defense.

Trial by Jury

Under the U.S. Constitution, a defendant is entitled to trial by jury if it is possible for the defendant to receive a punishment of more than six months in prison. Ohio's constitution and statutes are more stringent and entitle an accused to a jury trial if the potential penalty is greater than a \$150 fine with a possible jail sentence or where jail cannot be imposed and the fine exceeds \$1,000. There are eight jurors in a misdemeanor case and 12 jurors in a felony case. All decisions, whether guilty or not guilty, must be unanimous. If the jurors cannot agree, there is a *hung jury* and the prosecution has the option to retry the accused or dismiss the charges.

Other Constitutional Rights

In addition to the rights mentioned above, other constitutional rights are important in all criminal proceedings. These include constitutional prohibitions against certain kinds of laws as well

as constitutional rights that limit criminal laws. The following paragraphs explain some of these constitutional rights.

Neither Congress nor the states can enact retroactive or *ex post facto* laws. This means a person's criminal liability must be established according to the law at the time the person committed the alleged crime. If a person's conduct was not considered a crime when it occurred, he or she cannot be subjected to liability under a subsequent or later law prohibiting the earlier conduct. Additionally, such a person cannot be subjected to a greater penalty or have a defense taken away by a subsequent law.

Both the U.S. and Ohio constitutions prohibit *cruel and unusual punishment* such as torture; death by barbaric, painful, or lingering means; and excessive punishments. (An example of an excessive punishment would be a prison term for a minor traffic offense.) Additionally, the Ohio Constitution prohibits punishments that include forcing an offender to give up personal property or family inheritance. However, if property is used in a crime (*e.g.*, an automobile used in a drug transaction), it can be forfeited as part of a civil proceeding.

Criminal laws must be specific: they must make clear what people are prohibited from doing and what they are required to do.

Informing the Accused of Rights

Accused persons cannot intelligently insist on or waive their constitutional rights if they are not fully aware of them. Accused persons must be informed of their rights if they ask or when police have them in custody and wish to interrogate them. These rights are called *Miranda warnings*. They were established as a result of a 1966 U.S. Supreme Court decision saying, essentially, that, before interrogation can begin, a suspect in custody must understand that he or she has certain constitutionally protected rights. For example, if someone is taken into custody, that person must be told of his or her right to remain silent, to have counsel and to have counsel provided at state

expense if that person cannot afford it. The accused also must be given an explanation of his or her constitutional rights when appearing before a judge and entering a plea of guilty or no contest to any charge.

Waiver of Rights

An accused individual can waive or forego a constitutional right. For example, an accused woman can confess to a crime, and waive the constitutional right that allows her to remain silent so as not to incriminate herself. However, the waiver must be voluntary and must be made with full knowledge of the rights being waived and of the consequences of waiving those rights.

Enforcement of Rights

Constitutional rights can be enforced in a variety of ways:

- Evidence obtained through an unreasonable search or an involuntary confession can be *suppressed*, or kept from being heard in court.
- A decision can be reversed and the case dismissed or remanded for a new trial if evidence is provided that shows these rights were violated and that their violation was or could have influenced the outcome of the trial. Public officials responsible for violating constitutional rights can be liable for civil damages.

Under Ohio law, certain violations of civil rights constitute crimes. For example, public servants may not knowingly deprive, or conspire or attempt to deprive, any person of a constitutional or statutory right while serving in public office. Individuals violating the law in this way are guilty of interfering with civil rights, a first-degree misdemeanor.

Review on Appeal

In Ohio, a defendant who has a trial and is found guilty of a crime has the right of *appeal*. If the defendant cannot afford it, the state must provide legal counsel and a transcript of the trial

proceedings. The appeal is limited to questions of law or issues appearing in the official court record (the trial transcript), or in papers filed in the case. If the court of appeals finds that a prejudicial error occurred (an error that might have unfairly prejudiced the jury against the defendant) and affected the outcome of the trial, it will reverse the conviction and send the case back to the trial court for retrial or other proceedings. If no prejudicial error occurred, the court of appeals will uphold the conviction.

In a capital case in which a sentence of death is imposed for an offense committed on or after Jan. 1, 1995, the judgment, or final order, may be appealed from the trial court directly to the Supreme Court of Ohio, as a matter of the defendant's statutory right. In contrast, the defendant in a non-death-penalty case will appeal to the court of appeals rather than to the Supreme Court of Ohio. If the defendant in a non-death-penalty case loses at the appeals level, he or she may *petition* (ask) the Supreme Court of Ohio to review the case. A defendant does not have an automatic right of review by the Supreme Court, except in capital cases in which a sentence of death has been imposed.

In general, the Supreme Court of Ohio does not have to accept an appeal in non-death-penalty cases, but may do so depending on the issues raised in the appeal and how the court of appeals' decision affects Ohio law. If the Supreme Court of Ohio decides not to hear the defendant's appeal or if it allows the appeal but then upholds the conviction, the defendant may petition the U.S. Supreme Court to review the case. The U.S. Supreme Court can review only issues involving rights granted or claimed under the U.S. Constitution. The high court is not required to allow an appeal, but may do so depending on the issues presented in the appeal.

Strict time limitations must be met when filing an appeal, and a document called a *notice of appeal* must be filed within the required time to secure the review of a court decision by a higher court. If an appeal is *by right* (according to statu-

tory law in death-penalty cases), counsel is always appointed to represent the defendant. If an appeal is not by statutory right (non-death-penalty cases), the accused must retain his or her own attorney or file the appeal *pro se* (on his or her own behalf).

Further, defendants generally have no right to counsel when asking the Supreme Court of Ohio or the U.S. Supreme Court to allow an appeal, although, in many cases, counsel may be appointed. The state public defender may represent a criminal defendant who has been convicted of a crime and wants to appeal to the Supreme Court of Ohio.

Review of Sentence on Appeal

When the Ohio Criminal Code was revised in July 1996 it afforded new rights to appeal certain felony sentences to the court of appeals that serves the district in which the case was heard.

The defendant may appeal to the court of appeals when:

- there was guidance against a prison sentence and the judge sentenced the offender to prison anyway; and
- the sentence is otherwise contrary to law.

The prosecution may appeal to the same court of appeals when:

- a first- or second-degree felon did not receive a prison sentence;
- the felon is granted judicial release; and
- the sentence was otherwise contrary to law.

However, these rights to appeal do not apply if the sentence was based on a plea bargain and was lawfully imposed. The defendant may appeal certain consecutive sentences, but the appellate court does not have to review these appeals and appeals addressing consecutive sentences must be consolidated with other appeals in the case.

Post-Conviction Relief

The appeal procedure outlined above, referred to as *direct appeal*, only allows for a review of issues that appear in the record. Sometimes defendants claim errors occurred that violated

their constitutional rights and contributed to their convictions, but the errors are not included in the court's record.

Because the errors claimed do not appear in the record, these cases cannot be reviewed through direct appeal; however, a defendant may file a petition for post-conviction relief in the trial court in which he or she was convicted. The defendant must include evidence that is not in the record to support his or her claims, and the petition may be denied without a hearing. Since there is no right to counsel in post-conviction proceedings, the defendant must secure counsel at his or her own expense or act as his or her own counsel (*pro se*), although the court may choose to appoint counsel in rare cases. The public defender generally will represent a defendant on post-conviction relief if the public defender believes a claim exists.

Lastly, a defendant may seek post-conviction relief if the sentencing pattern of an individual judge shows an impermissible bias based on the race, ethnicity, gender or religion of the defendant.

Non-Citizens Charged with Criminal Offenses

United States immigration laws are complex. A non-U.S. citizen (non-USC) facing a criminal matter will need both a criminal defense lawyer and an immigration lawyer. Once the criminal issue is resolved, the non-USC may have to resolve an immigration issue.

To be considered a U.S. citizen, a person must be born in the United States or have otherwise received official citizenship status—or have “derivative citizenship” based on the legal status of a parent or (possibly) a grandparent as a U.S. citizen. If none of these conditions apply, the person is considered a non-USC.

A non-USC can be arrested by local law enforcement or U.S. Customs and Border Protection (CBP). That arrest may lead to a “detainer” being placed on the non-USC by U.S. Immigration and Customs Enforcement (ICE). The detainer permits local law enforcement or

CBP to hold the non-USC until ICE arrives and takes the non-USC into custody.

For immigration purposes, the immigration court can look only at the conviction record of a non-USC. A non-USC who is convicted of a criminal offense may face deportation. To receive a “conviction,” a judge must find the non-USC guilty of the charges against him or her and order some form of punishment, penalty or restraint of freedom. Violating the terms of probation or failing to follow a court order also might lead to a conviction. A criminal offense can affect immigration status even if the non-USC was put on probation and the record was expunged.

Two main types of crime can result in deportation: aggravated felonies and crimes of moral turpitude.

The Immigration and Nationality Act’s (INA) definition of “aggravated felony” includes a number of crimes that are not commonly considered either “felonies” or “aggravated.” A criminal defense attorney working with a non-USC client must fully understand the INA definition of “aggravated felony” to provide correct advice about offenses that can result in deportation.

According to the U.S. Citizenship and Immigration Services (USCIS), a crime of moral turpitude is inherently base, vile or depraved, contrary to social standards of morality and done with a reckless, malicious or evil intent. It is a broad and subjective term that can be used for any crime that USCIS considers offensive. Conviction of crimes of moral turpitude may also disqualify someone from an employment opportunity. The precise definition of a crime that involves moral turpitude is not always clear, but the following crimes are always considered crimes of moral turpitude: murder; involuntary manslaughter; rape; statutory rape; domestic violence; prostitution; fraud and crimes where fraud is an element; all theft offenses; blackmail; malicious destruction of property; arson; alien smuggling; harboring a fugitive; bribery; and perjury.

A non-USC who has been placed in proceedings for removal from the United States may be eligible for relief from removal, even if a plea bargain is unsuccessful. Relief can include, but is not limited to, adjustment of legal status, temporary protected status or deferred action. The removal may even be cancelled. The non-USC also may be eligible for asylum or protection under the United Nations Convention Against Torture. However, depending on the crime, the non-USC may not be eligible for certain forms of relief.

Victims’ Rights

Suffering at the hands of a criminal can be traumatic for anyone, and it becomes more frustrating if it is perceived that the criminal justice system treats victims unfairly.

Punishing criminal behavior through arrest, prosecution and sentencing, and protecting the public from future crimes are the primary functions of the criminal justice system. Because we live in a free society, the system requires balance between the power of the government and individual rights.

This interest in ensuring a balance of power has driven the system to focus on protecting the rights of the accused, which, in turn, has led some to conclude that the system treats the accused better than the crime victims. Since the 1980s, this perception has given rise to a growing victims’ rights movement, and laws have been enacted at both state and federal levels to address the issue.

Congress adopted the Victims and Witness Protection Act in 1982, making it a crime to intimidate a witness or retaliate against someone who testifies or provides evidence for the prosecution. The act allows prosecutors to take steps to protect a witness or victim and to obtain a restraining order for witness protection.

At the state level, the Ohio General Assembly has adopted a series of laws over the past two decades to help crime victims. These laws were consolidated and clarified by the Ohio Criminal Sentencing Commission. Emerging from that work were Senate Bill 186, adopted in 1994, and Senate Bill 2, which applies to crimes committed after July 1996.

State law now provides that victims must be notified about each key stage in a criminal case and that they must be given the opportunity to speak to the court before key decisions are made. The law also now centralizes all legislation pertaining to crime victims in Chapter 2930 of the *Ohio Revised Code*.

Because of the 1996 adoption of *definite* sentences (replacing indeterminate sentencing ranges), victims now have greater certainty about how their attackers will be punished. Other recent changes include extending rights to more misdemeanor victims, adding a victim of crime to the parole board and creating the Office of Victims' Services at the Ohio Department of Rehabilitation and Correction.

Some of the rights and protections provided to crime victims under current Ohio law are listed below:

- Victims in any felony case, and in misdemeanor cases involving actual or threatened violence, have the right to be informed about the process and the right to be heard.
- Law enforcement officers must give victims certain information when investigating a crime, including notice of any arrest in the case.
- When practical, prosecutors must meet with victims and brief them on pre-trial matters.
- A prosecutor must provide notice of proceedings, convictions and appeals in a case if the victim asks.
- A victim has the right to be present when the defendant is present at any proceeding that is on the record.

- Courts must consider victims' objections to delays and allow them to make victim-impact statements at sentencing.
- The court must consider the impact of the crime on the victim in choosing an appropriate sentence.
- Upon request by a victim, prisons and jails must notify the victim when the victim's assailant is released.
- The court must make a reasonable effort to minimize contact between victims and defendants. When practical, separate court waiting rooms must be made available so victims do not have to be near the accused.
- Victims of sexual offenders are notified when the defendants are released from prison. All sex offenders must register with the county sheriff in the county in which they reside.
- Sexual offenders must register with the county sheriff for at least 15 years. Neighbors, schools and day care centers are then notified by the sheriff of the county in which the offenders live. In larger cities, the location of sexual offenders is on the websites of county sheriffs.
- The court may grant a motion to prevent disclosure of a victim's address, place of employment or similar information when the victim fears violence or intimidation by the defendant.
- Employers may not discipline victims for the reasonable exercise of these rights.
- In most cases, victims are entitled to the prompt return of their property.
- Prosecutors have the authority to seek compliance with the law on behalf of victims (*e.g.*, if a court clerk ignores the law's victim notice requirements, the prosecutor can petition the court to compel the clerk to follow the law).

For Journalists: Covering Criminal Trials

Coverage of criminal trials, particularly of felony trials, normally draws intense media scrutiny and interest. As with other areas of court business but especially with criminal trials, reporters are encouraged to understand, research and report on the step-by-step process of criminal adjudication so that readers/viewers can understand and appreciate the differences among criminal indictments, pre-trial hearings, cross-examination and rules on sentencing, for instance. In each criminal trial, it is the courtroom bailiff and assistants for the judges who will help to manage media presence at the trial. Reporters are advised to work closely with these individuals regarding coverage and access issues. In some cases, journalists may want to make arrangements ahead of time for seating passes, designations for cameras (if permitted), access to electronic equipment for filing and parking for vans.

In high-profile criminal cases, the judge may impose rules and restrictions on media coverage, perhaps limiting the number of media in the courtroom, for instance, or requesting greater gallery cooperation from spectators. Judges, in these instances, are required to weigh the defendant's Sixth Amendment rights to a fair and impartial jury against the media's First Amendment rights to cover the trial. The U.S. Supreme Court has ruled that the public has a First Amendment right to attend criminal court proceedings. Judges are armed with other remedies (such as ordering a change of venue or gagging trial participants) in the event that a defendant's fair trial rights may be compromised. Journalists are advised to be prepared for such limitations on coverage and should consult with their own attorneys about preparing for the possibility that a judge may limit or restrict coverage of court proceedings. In rare instances in which a judge decides to close or restrict access to court proceedings, a journalist may request a separate hearing to appeal the judge's decision. Journalists must be prepared to make such a request during the course of the proceedings.

The Associated Press recommends that journalists in these situations can raise their hand to make the following statement:

May it please the Court, I am (name) of (news organization). I respectfully request the opportunity to register on the record an objection to closing this proceeding to the public. (My organization) requests a hearing at which its counsel may present to the Court legal authority and arguments showing why any closure in this case would be improper.

The press and the public have a constitutional right to attend judicial proceedings, and may not be excluded unless the Court makes findings, on the record that: 1) closure is required to preserve a compelling constitutional interest, 2) no adequate alternatives to closure exist, and 3) the closure is narrowly tailored to protect the threatened interest effectively.

(My organization) submits that these findings cannot be made here, especially given the public interest in this proceeding. The public has a right to be informed of what transpires in this case, the positions being argued by the parties, and the factual basis for rulings made by the Court. The Court should avoid any impression that justice is being carried on in secret. (My organization) objects to any closure order and respectfully requests a hearing at which it can present full legal arguments and authority in support of this position. Thank you.

The Associated Press recommends a copy of this statement be made available in writing (handwritten is fine) to the courtroom clerk, making these same points.

Criminal trials can entail an element of theater. While it may be tempting for journalists to highlight the theatrics of lawyers or witnesses, it is more important for journalists to understand when a lawyer is using drama to make an effective legal point, and when the lawyer is simply engaging in show business that has little positive effect on the judge or jury. Gaining experience in understanding both legal procedure and the flow and theater of a courtroom proceeding can help those who cover the courts make these important distinctions for their readers and viewers. When covering a criminal trial, a reporter should not:

- come to a trial with preconceived notions or beliefs about the guilt or innocence of an accused person;
- risk missing important events by leaving the courtroom, except to file a story;
- pay too much attention to secondhand information heard outside of the courtroom;
- forget that lawyers represent their clients, and that any confidential information they may offer is likely designed to help their clients.

Chapter Summary

- In Ohio, all crimes must be written and defined by statute or ordinance.
- There are two major classifications of crimes: *felonies* and *misdemeanors*.
- Laws creating criminal offenses are found in the *Ohio Revised Code*, municipal ordinances and the *United States Code*.
- The Ohio Criminal Code outlines penalties, sentencing procedures and treatment of offenders for most criminal offenses.
- The overriding purpose of Ohio's felony-sentencing system is to punish offenders and to protect the public from future crime.
- The U.S. and Ohio constitutions provide people accused of a crime with basic rights.
- Since the 1980s, legislation has provided crime victims with certain rights.

Web Links:

From the OSBA's Law Facts pamphlet series:

www.ohioabar.org/lawfacts (search by title)

“Being a Witness”

“Your Rights if Questioned, Stopped or Arrested by the Police”

From the OSBA's “Law You Can Use” column:

www.ohioabar.org/lawyoucanuse (search by title or topic)

“Bailiffs and Court Officers: What To Do When They Tell You What To Do”

“Consensual Encounters with Law Enforcement: ‘Am I Free to Leave?’”

“Constitution Provides for Reasonable Bail in Criminal Cases”

“Criminal Defense Lawyers Help Protect Clients’ Rights”

“Criminals May Go Free When Constable Blunders”

“Guns at Home Can Make Parents Liable for Child’s Criminal Actions”

“Judges Instruct Juries in Criminal Cases”

“My Child Was Arrested: Now What?”

“Non-Citizens Charged with Criminal Offenses Face Complex Laws”

“Not Eligible for Expungement? Executive Clemency May Be Option”

“‘Not Guilty’: A Plea for Those Who Didn’t Do It ... and Those Who Did”

“Ohio’s Victim of Crime Compensation Program: Questions and Answers”

“Pleading Guilty: A Choice of Cost and Benefit”

“Police Must Give Miranda Warnings”

“Understanding How Criminal Records Are Expunged”

“Understanding the Crime of Arson”

“What You Should Know about Plea Bargains in Criminal and Traffic Cases”

“What You Should Know about Pleading ‘No Contest’”

From the Ohio Criminal Sentencing Commission:

www.supremecourt.ohio.gov/Boards/sentencing

From Cornell Law School Legal Information Institute:

www.law.cornell.edu/wex (type “criminal law” in search box)



“Each problem that I solved became a rule which served afterwards to solve other problems.”

– René Descartes

Civil (vs. Criminal) Wrongs

A *tort* is the violation of a legal responsibility when that violation directly causes injury to a person’s body, property or rights. Both the law of torts and criminal law deal with socially unacceptable conduct; however, torts and crimes are brought to court for different purposes, by different people, and they are handled by the courts using different rules. The same conduct can be both a crime and a tort, simultaneously, but each is treated independently and is analyzed and resolved by applying different rules.

Although a criminal act usually has an individual victim, the act is a crime because it is also a serious offense against a public interest: the peace and safety of the community. The alleged wrongdoer is brought to court by a prosecutor on behalf of the public, and if the defendant is found guilty, he or she is punished by the state. An individual cannot choose whether a person is prosecuted. Rather, the state decides whether a crime has been committed and whether there is enough evidence to prosecute the person alleged to have committed the crime.

On the other hand, a tort is a civil wrong that has resulted in an injury to a person. The injured person, not the state, brings the claim to court, and the defendant may be an individual, multiple individuals or even a company.

In tort cases (and other types of civil lawsuits), the person claiming to be injured and seeking compensation for alleged damages is called the *plaintiff*. The party from whom compensation is sought is called the *defendant*. If a defendant is found responsible for an injury, he or she may be ordered to pay money damages to the injured person to compensate for the injury

or wrong. In a tort case, the chief goal is not to punish the wrongdoer but to “make the plaintiff whole” to the extent that money can do so. However, sometimes a defendant will be assessed a penalty for conduct leading to injury. When it is determined that the conduct of the defendant deserves a penalty, the injured person will be awarded *punitive damages*.

What Is Negligence?

Torts may be *intentional*, such as when someone’s reputation is purposely damaged (defamed), or they may have to do with negligence. People are most likely to encounter torts involving *negligence* following a traffic accident.

Negligence is essentially the failure to use reasonable care, and may be the legal cause of damage in a tort case. Four things together determine negligence, and a tort lawsuit will succeed only if the plaintiff who brings the suit against the defendant proves all four:

- the defendant owed a duty to the plaintiff;
- the defendant violated (or breached) that duty;
- the plaintiff suffered an injury or other loss; and
- the defendant’s breach of duty directly and proximately caused the plaintiff’s loss.

However, even when a plaintiff proves these four elements, a defendant still may allege that the plaintiff “contributed to” or helped cause the injury. When this occurs, the damages assessed against a defendant may be reduced.

A Legal Duty Owed to the Plaintiff

First, there is no tort unless the defendant owed a legal duty to the plaintiff. For example, a storeowner is legally obligated to make sure that spills are cleaned up so that shoppers do not fall, but the owner of a ballpark ordinarily has no duty

to prevent a spectator from being struck by a batted ball because such a risk is inherent in the sport.

Even where there is a duty, the scope of the duty varies according to the relationship of the parties and other circumstances. For example, when broadcasting information that might damage the reputation of an ordinary citizen, a television station has a duty to use reasonable care that the information is accurate. When airing the same sort of story about a public figure such as a politician, however, the station's duty is diminished. In that situation, the public figure can recover damages for damage to reputation (or defamation of character) only if he or she can prove that the television station acted with *actual malice* (real and deliberate cruelty) in broadcasting the false, damaging information.

Sometimes the duty is created and defined by a statute or ordinance (such as the traffic laws that require drivers to stop at red lights and maintain a safe following distance, or laws that require that children must ride in child-safe seats), but many legal duties are defined by case (*common*) law. The duties recognized in case law have grown out of previous court decisions or other legal customs. Some of them have been used for decades, or even centuries.

One common law standard is the broad rule that a person must act with reasonable care for the safety of others. This does not mean that every person must ensure the safety of every other person in all circumstances. It *does* mean that, when dealing with others, an individual must act reasonably to prevent "foreseeable" injuries. This might mean telling a cable repair person that a family pet bites strangers or ensuring that everyone in a car is wearing a seat belt.

Violating the Duty

Second, there is no tort unless the defendant breached his or her legal duty. If the material facts in a case are not disputed, a judge can decide whether the defendant's actions (or failure to act) under the given circumstances violated a legal

duty. If the facts are in dispute, usually a jury decides whether a breach of duty has occurred.

Injury or Loss to the Plaintiff

Third, there is no tort unless the plaintiff suffered an injury. The injury may be physical damage to a person or property, or injury to (or loss of) a valuable right or interest. For example, if the defendant's actions caused the plaintiff to miss the opportunity to make a purchase that would have become profitable, then the defendant might be found liable for a tort. A tort injury may also be psychological, although it is often difficult to prove the extent of psychological damages.

The injury need not be great, but it cannot be insignificant. The legal rule dismissing non-significant losses is *de minimus non curat lex* (literally, "The law does not cure trifles").

Violation of the Duty is the Direct Cause of the Injury or Loss

Fourth and finally, there is no tort unless the defendant's breach of duty directly and proximately caused the plaintiff's injury. *Direct* causation is demonstrated when a defendant's action is the most obvious cause of the plaintiff's injury. For example, the defendant may have caused an injury to the plaintiff by way of a car accident.

Proximate cause is demonstrated when the action of the defendant indirectly caused the injury to the plaintiff. For example, a bartender might be found to have committed a tort by serving alcohol to a drunken patron who, while drunk, later causes an injury to the plaintiff by way of a car accident. For the bartender to be found to have committed a tort in such a situation, a court must find that the accident likely would not have occurred if the bartender had not contributed to the defendant's drunken state.

On the other hand, no tort occurs if the breach did not result in the injury, or if the same injury would have happened even without the breach. For example, if it is later discovered that the cause

of the drunken patron's car accident was actually caused by the mechanical failure of the car, the bartender may not be found to have committed a tort.

How Tort Rules Apply

The examples provided below may help to clarify how the four elements of tort apply.

Owing a Duty

Suppose a trespassing woman is injured when she sneaks into a man's yard after dark and falls into a ditch. Neighborhood children have often played on the property with the man's permission. If the property owner had been reasonably careful, he would have put a fence around the ditch to prevent accidents. Still, the man had no reason to expect the presence of a trespasser. The man has not committed a tort because a landowner ordinarily does not owe the duty of reasonable care to an *adult* trespasser. In this context, the property owner's duty is simply to not intentionally injure the trespasser. Legally, it does not matter that the landowner did not use reasonable care to keep his yard safe, or that someone was injured because of his failure to do so. When dealing with a child, however, the duty of reasonable care may be different, since children cannot be expected to exercise the judgment expected of an adult. Thus, a homeowner is expected to undertake certain measures to make sure that his backyard pool is not easily accessible to a trespassing child.

Violating the Duty

Suppose a doctor performs surgery on a heart patient and she completes the operation exactly the way a good heart surgeon is supposed to do. Nevertheless, as even the most careful surgery involves the risk of infection, this patient is infected during surgery and his heart is damaged further. Assuming she informed the patient of the risks before surgery, the doctor has not committed a tort. She had a duty to so advise the patient and

treat the patient with the degree of reasonable care used by competent heart surgeons, but because she performed the surgery according to reasonable professional standards, she did not breach or violate that duty. The patient may have been injured as a result of the surgery, but not as a result of anything the doctor did wrong.

Injury to the Plaintiff

Suppose a barber sees a spot of grease just inside his shop's front door, but turns away to answer his telephone and forgets to clean up the spot. Five minutes later, a customer walks in the door and slips on the grease. He is able to keep from falling by grabbing onto a railing, but because he is well known locally as an athlete, he is embarrassed that people have seen him lurch so clumsily. The barber has not committed a tort. Even though he owed the customer a duty of reasonable care and breached that duty by failing to take steps promptly to eliminate the danger caused by the grease, the customer was not injured. His embarrassment, without any physical harm, is not enough to count as an injury for purposes of the law.

Violation of the Duty is the Direct Cause of the Injury or Loss

Suppose a taxi driver races across town while his passenger sleeps, then slows down to the speed limit when the passenger awakens. After he has been driving with reasonable care for five minutes, a truck suddenly pulls out in front of him, and his passenger is injured in the resulting accident. The cab driver had a duty to his passenger to use reasonable care while driving and he violated that duty by speeding, and his passenger was later injured. Nevertheless, the cab driver has not committed a tort because the passenger's injury was not directly and proximately caused by his speeding. The cab driver's breach of duty was long over and done with by the time of the accident. If the passenger has a tort claim, it is against the truck driver.

Torts That Are Crimes

Sometimes an act, or the failure to act when action is legally required, is both a tort and a crime. For example, a man who shakes his girlfriend's crying baby so recklessly that the baby dies may be prosecuted for the crime of *involuntary manslaughter*. This means that he did not intend to kill the baby, but his criminal violence caused the death just the same. Because the man's gross (extreme) lack of reasonable care directly caused serious injury, he committed a tort as well as a crime. Thus, the baby's mother may sue him for the damages he caused.

In some criminal cases, the court can order the defendant to pay *restitution* (that is, to compensate the injured person for his or her loss). Usually, however, in order to recover money damages for such a tort, the injured person must sue the wrongdoer in a civil case separate from the criminal prosecution. Often, no suit is pursued because, although the injured can prove a legal right to compensation, the defendant has no money to pay the amount a court would order him or her to pay.

Once in a great while—such as in the O.J. Simpson cases—an injured or aggrieved person can recover compensation in a tort suit even though the wrongdoer was not convicted of the crime. That is possible because proof of a crime requires more convincing evidence than what is needed to prove a tort. Although the prosecutors had been unable to prove *beyond a reasonable doubt* (the criminal standard) that Simpson had committed murder, the families of the victims won a separate tort suit for financial damages against Simpson because they proved by a *preponderance*, or greater weight, of the evidence (the civil standard) that Simpson had killed their loved ones.

Tort Cases: Negligence

The elements of a tort case that have been discussed so far relate to the tort of negligence, since most tort lawsuits are based on negligence and more negligence cases arise from traffic accidents than from any other cause. As described in the last section, negligence cases involve conduct that falls short of the legal standards established to protect others from harm. Negligence is proven by showing that the defendant owed a duty to the plaintiff to exercise reasonable care and violated that duty. In many negligence cases, the standard of reasonable care is defined by common law as the sort of conduct that a “reasonably” careful person would use in the same circumstances. In some cases, however, a higher or lower standard of reasonable care is applied. For example, the professional conduct of a person with special skills, such as a doctor or a lawyer, is evaluated by comparing that person's conduct with the standards normally maintained by other such professionals in the same circumstances, unless the standards maintained by the profession are not themselves reasonable. In other words, reasonable care for a lawyer is not merely doing what any reasonably careful person would do, but doing what a person trained and skilled in the practice of law would normally do.

Similarly, the conduct of the very young must be judged according to what would be reasonable to expect of persons of similar age, intelligence, capacity and experience. The conduct of persons acting in emergencies is judged according to what would be reasonable to expect of others under similar conditions.

Proof of Negligence

In some types of cases, a plaintiff can prove that the defendant violated his or her duty simply by showing that he or she broke a law that defines specific conduct as negligent. For example, running a red light or blindly shooting a gun on a crowded playground is negligence *per se* (as such).

Where it is impossible for the plaintiff to prove that it was the defendant instead of another person who breached a duty, the law allows the plaintiff to make that proof using the rule of *res ipsa loquitur* (“The thing speaks for itself”). This rule applies only when the incident that injured the plaintiff would not happen unless someone was negligent and the cause of the injury was completely under the defendant’s control. For example, if a surgical sponge is left inside a patient after an operation, the patient does not need testimony from someone who is willing to admit he or she actually saw what happened during the surgery. It is enough to show that surgical sponges do not end up in patients unless someone violated the duty of reasonable care and that the person in charge of the surgery was the only one in a position to violate this duty.

Typical negligence cases arise out of:

- traffic accidents (which are considered in detail later in this section);
- hazards on property controlled by the defendant (such as a restaurant’s broken porch step or a dangerously placed electrical line at a construction site); and
- the failure of some person with special knowledge and skill (such as an engineer or an accountant) to do what would have been reasonable for someone knowledgeable and skilled in that sort of work.

Traffic Accidents

A person who operates or is responsible for a motor vehicle may be involved in an injury accident that results in a lawsuit. In such cases, the injured person bringing suit (the *plaintiff*)

usually claims that the injury was caused because the defendant failed to exercise reasonable care in operating a motor vehicle. Even though the person operating the vehicle may have been directly responsible for the accident, others also may be liable for the plaintiff’s injury. For example, the driver as well as the driver’s employer may be held liable if the driver was driving the vehicle in the course and scope of the employment. (*See “Responsibility for Employees and Agents” later in this chapter.*)

Because traffic accidents are the most common form of tort suit, Ohio law requires persons applying for a vehicle registration or an operator’s license to prove their ability to pay for damages caused in an accident—no matter whose conduct causes the accident. The most common way to show financial responsibility is proof of a valid insurance policy with liability coverage.

The minimum amount of coverage required by Ohio law is:

- \$12,500 for personal injury or death of one person in any one accident;
- \$25,000 for personal injury or death of two or more persons in any one accident; and
- \$7,500 for damages to another person’s property in any one accident.

Ohio law requires any person who obtains a driver’s license or registers a vehicle to sign a statement indicating that he or she will not operate any motor vehicle unless covered by an acceptable and valid insurance policy that compensates persons injured in accidents. Vehicle owners who fail to maintain appropriate financial responsibility face license suspension, the impounding of their registration papers and license plates, plus court costs and additional fees. Also, a person whose license has been suspended for any reason, or who is placed on probation for any traffic offense, must sign a proof-of-financial-responsibility statement stating that he or she can pay for the personal injuries or property damage of others caused by his or her operation of a motor vehicle.

In addition to these legal problems, the possibility of having to defend a lawsuit and pay

a large amount of money out of one's own pocket in the absence of insurance should encourage people to maintain adequate coverage. Finally, where a driver's momentary lapse of attention or judgment has caused serious injury to an innocent person, there is some moral satisfaction in being able to reimburse that person for his or her injury and loss.

Financial Responsibility Accident Report

As long as both parties are insured, neither party is required to file an accident report with the Bureau of Motor Vehicles (BMV). However, if a motorist involved in an accident has reason to believe the other party was not insured at the time of the accident, that motorist has six months to file a BMV accident report (Form 3303) and to allege that the other party was not financially responsible. After the report has been filed, the BMV contacts the other party, who must prove that he or she had insurance coverage or some other means of assuming financial responsibility. Form 3303 is available from the BMV, insurance companies and independent insurance agents, and can be downloaded from the Internet through http://bmv.ohio.gov/bmv_forms.stm (choose BMV 3303 – Crash Report).

Stopping and Exchanging Information at an Accident

Ohio law requires a driver who is involved in a motor-vehicle accident to stop the vehicle immediately and provide certain information to the owner, driver or person in charge of the other vehicle, anyone injured in the accident, or to a law-enforcement officer at the scene. That information is: the driver's name and address; the vehicle registration number; and, if the driver is not the owner of the vehicle, the name and address of the owner. Here are some other rules about traffic accidents:

- If an injured individual cannot understand or write down pertinent information, the other driver must notify the police department and wait until a police officer arrives at the scene, unless the other driver is also injured and is transported to a hospital by an ambulance or other emergency vehicle.
- If an accident occurs on private or public property other than a public road (in a shopping center parking lot, for example), all drivers involved in the accident must give the required information, on request, to any injured person and to the owner of the damaged property. Drivers must also show their operator's license upon request. If drivers do not provide the information at the time of the accident, it must be reported to the police within 24 hours of the accident.
- If an accident causes damage to land or to property attached to the land, such as a building or utility pole, the driver must stop and take reasonable steps to locate the owner of the property. If the owner cannot be located, the driver must report the accident and supply personal information to local law-enforcement authorities within 24 hours.
- If an accident damages an unattended vehicle, the driver must leave a written note (normally placed under the windshield wiper) providing personal contact information.
- Leaving the scene of an accident or failing to provide the necessary personal information is a serious offense, and people who do so are liable for a maximum fine of \$1,000 or a six-month jail term, or both. In some cases of leaving the scene of an accident, a court can impose a license suspension of at least six months and up to three years. Also, because leaving the scene may be interpreted as an admission of fault, fleeing may be used as evidence against the driver if a lawsuit is filed.

What to do at accident scenes

- Do not move the car until the police arrive unless the car is a traffic hazard.
- Cooperate with law-enforcement officers.
- Warn other drivers of any danger. It is a good idea to carry flares, reflectors, or warning lights in an emergency kit.
- Get names, addresses and license plate numbers of other drivers, their insurance carriers, passengers and witnesses. If it is not possible to get all this information, the driver should at least get license plate numbers of the other drivers involved in the accident.
- Take notes and make sketches concerning the accident and its circumstances. If a camera is available, the driver should take pictures of the scene and make notes about the location of the camera in relation to the subject of each picture.
- Attempt to make anyone who is seriously injured more comfortable until emergency medical personnel arrive. Although Ohio's Good Samaritan statute (*Ohio Revised Code*, Section 2305.23) protects those who, without willful or malicious misconduct, offer assistance to an injured person, an injured person should not be moved by anyone but medically trained personnel except in an extreme emergency.
- Report the accident to your insurance company immediately. Most insurance policies require such a report and any delay can jeopardize coverage.
- Do not make any payment in a personal-injury or property-damage accident without consulting an attorney. No settlement offer should be accepted without legal advice.

Other Tort Lawsuits

Negligence is the most common basis of liability used in tort law, but there are others types of torts. Some of these are: intentional interference with individuals or property (which encompasses

commonly known torts of assault, battery and trespass); misuse of the legal process; defamation of character; and product liability.

Intentional Interference with Property or Persons

One example of a tort involving intentional interference with property or persons is *trespass*, which is unauthorized entry onto real property, such as land or buildings. Trespass also can be an invasion of another's personal property, such as tampering with his or her car. Another tort of this type is *conversion*, the civil aspect of property theft. Conversion occurs when one person improperly assumes control of another's property for his or her own use or benefit. Stealing another person's watch and pawning it is an example of the tort of conversion.

Assault, battery, false arrest and false imprisonment are examples of torts dealing with intentional interference with a person's liberty. *Assault* is a threat of violence; it may or may not include a physical attack. Assault, even without a physical attack, may be enough to give rise to a tort action. If an individual is physically attacked, the tort becomes *battery*.

False arrest and false imprisonment are similar; both involve the unlawful detention of one person by another. For example, a police officer who arrests a person without probable cause to do so may be liable for *false arrest*. A store owner who refuses to allow a customer to leave the premises, without a valid reason to believe the customer has done something wrong, may be liable for wrongful detention.

In torts based on intentional interference with property or persons, defendants can avoid legal liability if they prove that:

- the defendant's conduct was permitted (*privileged*) in the circumstances;
- the plaintiff consented to the conduct;
- the defendant was acting in self-defense or was protecting his or her property; or
- the defendant was driven by necessity.

However, many defenses have legal limitations. For instance, although a person may “consent” to being hit by participating in a fight, the person would not be considered to have consented to being hit over the head with a baseball bat. Additionally, even though people are entitled to protect their property from trespassers, they are not entitled to purposely set up traps that might seriously injure or kill a trespasser.

Misuse of Legal Procedure

Individuals sometimes commit torts by misusing the legal system. *Abuse of process* may occur when a person who has initiated a proper legal proceeding improperly causes a warrant, summons or subpoena to be issued against another person. For example, suppose neighbor A brings about criminal or civil proceedings against neighbor B simply out of spite or hatred, without a reasonable basis to believe that B committed the wrong alleged by A. In such a case, A may be liable to B for malicious prosecution.

Even some misuses of legal process that are not torts can result in penalties. For example, a court can sanction people involved in lawsuits who will not “play by the rules” of procedure, especially when that failure harms another party, and particularly when a desire to purposely harm another party seems to have been the reason for the misconduct. Also, those who habitually file frivolous legal claims may be prohibited from filing new cases without the judge’s permission.

Defamation of Character

Defamation is a false and derogatory statement made by one person about another. Writing that defames someone is called *libel*; speaking that defames someone is called *slander*. Plaintiffs in defamation cases typically allege that the defendant wrote or said something that: 1) caused people to believe that the plaintiff is of low character and morals; 2) damaged the plaintiff’s good reputation and community standing; and 3) caused the plaintiff to lose business or sustain some other financial loss.

In defamation cases, truth is an *absolute defense*. In other words, if a newspaper accuses a businessman of accepting bribes, the businessman cannot recover for the injury done to his reputation if the evidence shows that he actually did take bribes.

As mentioned previously, there is a different standard of proof for public figures and private citizens. Public figures must prove that an individual is spreading untruthful information in order to maliciously cause an injury. Private citizens need not meet this standard. In addition, as in negligence cases, there must be some damage that relates to the alleged defamation. It is not enough that a person feels badly about what has been said or written.

Product Liability/Strict Liability

A product liability action is similar to a negligence action. In a product liability action, the plaintiff brings suit against a company, alleging that the defective nature of a product has caused an injury. A product may be defective in several ways: in its design or formulation; in its manufacture or construction; because the instructions or warnings as to its use were inadequate; or because it did not work as advertised or intended.

A product liability case differs from a negligence action in that the plaintiff need not prove all of the elements of negligence. Some of the elements are assumed (such as the duty to produce a product that is safe for consumers). If, therefore, the plaintiff is able to prove that the product caused the injury, the defendant is said to be “strictly liable” for the injury.

A well-publicized example of strict liability in a product liability case is the class-action lawsuit filed against Firestone in the late 1990s. In that case, the plaintiffs claimed that many people had been killed or seriously injured when the company’s tires blew out, and that the blow-outs were a result of a defective tire design.

Strict liability is not only applicable in a product liability action. Strict liability also may apply where the plaintiff’s injury was caused by

a dangerous substance (such as explosives, poison or radioactive materials) that was under the defendant's control. Sometimes the dangerous substance is in "control" of a company, such as where a company sells a chemical that explodes if handled improperly by a consumer. However, sometimes a private citizen may "control" a dangerous substance, such as when setting off fireworks for a Fourth of July celebration.

Liability for the Acts of Others

Under certain circumstances, individuals, employers and parents may be responsible for the acts or omissions of others.

Responsibility for Employees and Agents

An employer is responsible for employees or agents when they are actually working for the employer. The law uses the phrase, "acting in the course and scope of employment," to describe this relationship. For example, a construction company may be held liable for damages if an employee negligently allows debris to fall from a jobsite and injure a pedestrian. Liability in these cases is based on the ancient common-law rule of *respondeat superior*, or, "The master must answer."

However, an employer is not responsible for the wrongful conduct of an employee or agent acting outside the scope of his or her employment. For example, an employer generally is not liable for damages caused by the negligent driving of an employee traveling between home and the workplace. Again, a shoe salesman who punches an irritating customer is probably outside the scope of his employment at the time; he is not doing his job carelessly, but is, instead, doing something that is not his job. Usually, the employer won't be responsible for the salesman's violent acts unless he or she had reason to know that the employee was inclined to act that way.

An employer is usually not responsible for the actions of an independent contractor. An independent contractor is an individual who may do work at times for an employer, but is not necessarily consistently employed with an employer from day to day. An independent contractor might, for example, be a painter who is hired by a construction company to finish some painting work on a job or employees of a yard service who are hired by a corporation to do landscaping work.

Because an employer is usually not liable for the acts of independent contractors, it is necessary in some cases to determine how much control the employer had over the independent contractor. If it is determined that the employer had a high degree of control over the independent contractor, then the employer may become liable for the independent contractor's actions. If the worker has agreed to accomplish a particular task, but is free to decide how and when to do the work, the worker probably will be considered an independent contractor and the employer would not be liable for any acts committed by the independent contractor.

Negligence of Children, and Parental Responsibility for Children and Minors

The law in Ohio is that children under the age of seven are incapable of negligence. The law also "presumes" that children aged 7 to 14 are likely incapable of negligence, but negligence can be demonstrated if the child is shown to be mature enough to make intelligent decisions about the activity in which that child is engaged. For example, a 12-year-old child with babysitting experience who allows a toddler to bathe without supervision might be found negligent if the toddler drowns. Children over 14 years of age may be held liable in the same way that an adult may be held liable, but a jury in such a case would determine whether negligence has occurred. Parents or guardians may be responsible for the acts of a minor child if they knew the child would commit an injurious act (or was very likely to commit the

act), but failed to take reasonable steps to prevent the act.

Additionally, according to Ohio law, parents are strictly liable for up to \$10,000 for damages caused by a child under age 18 who willfully and maliciously injures another person. Likewise, parents are held liable for as much as \$10,000 for injury or loss to a person and property as the result of their child's criminal acts.

Similarly, when a minor applies for a driver's license, his or her parent or guardian, or another adult willing to assume responsibility, also must sign the application. By signing, the parent or guardian agrees to be liable for damages resulting from the minor's negligence, recklessness or willful misconduct while driving.

Defenses in Tort Actions

Comparative Negligence and Assumption of Risk

When a suit is filed in which the plaintiff claims injury as a result of the defendant's negligence, it is not unusual for the defendant to claim that the negligence of the plaintiff caused, or helped to cause, the loss. For example, where the plaintiff might say that the defendant's negligent speeding caused a traffic accident, the defendant might claim that the plaintiff caused the accident or increased the force of impact and the severity of the resulting injuries by suddenly and negligently changing lanes in front of him or her.

Ohio uses the rule of *comparative negligence* when determining the degree to which a party is responsible for an accident. Applying the comparative negligence rule, the negligence of the plaintiff is compared to the negligence of the defendant (or defendants). The plaintiff is not barred from recovering damages even if he or she was negligent, so long as that negligence was no more than the combined negligence of all the other parties involved. However, the

compensation due a negligent plaintiff will be reduced in proportion to his or her negligence.

For example, suppose a three-car accident results in the injury of driver X, and the combined negligence of drivers X, Y and Z caused the accident. If X's negligence was 10 percent of the total negligence, and Y's and Z's combined negligence was 90 percent of the total negligence, X will be able to recover damages totaling 90 percent of the proven loss. Driver X will have to pay for that 10 percent of the loss that he or she fairly can be said to have caused. However, if X's share of the total negligence was more than 50 percent, he or she will not be able to recover at all; if the accident was 51 percent the fault of X and 49 percent the fault of Y and Z combined, X will go away empty-handed.

Assumption of risk is another defense to negligence claims. In the broadest terms, this rule of law provides that an adult who knows that he or she is voluntarily taking a specific and high risk by engaging in particular conduct (say, playing Russian Roulette with a loaded pistol), will not be allowed to recover compensation for his or her injuries from someone whose negligence helped to create the dangerous situation (perhaps, the gun's owner, who negligently failed to lock it away). Evidence of assumption of risk is considered by the judge or jury as part of its comparative negligence analysis. That is, the conduct of the injured person in voluntarily taking a high risk is compared to whatever the defendant did that helped bring about the injury.

In two types of cases, assumption of risk can still be a complete bar to recovery. First, where one party has expressly agreed to assume the risk of injuries arising from certain conduct (by signing a waiver of liability, for example), the agreement may be enforced by the court if the parties had equal bargaining power and the waiver does not violate some other law or public policy. Second, a recreation provider ordinarily owes no duty to protect a participant or spectator against risks so inherent in the activity that they cannot be eliminated. This rule of primary assumption of

risk therefore bars recovery where a baseball player or fan is injured by a batted ball, for example.

Statutes of Limitations

A person who has been injured by the tortious conduct of another cannot wait forever to make a claim for compensation. As with nearly every other sort of legal proceeding, suits on tort claims are subject to *statutes of limitations*. For example, negligence claims for personal injury usually must be brought within two years after the defendant's negligent conduct first caused injury to the plaintiff. Malpractice claims against professionals such as medical doctors or attorneys are usually covered by a one-year limitation, as are cases against those accused of assault offenses.

Determining the proper statute of limitations is, however, sometimes very complicated. Depending on the type of the claim, the limit may be calculated from the date of the injury or the date the plaintiff discovered the injury. For instance, if a patient is unaware that a surgical instrument has been left in his or her body, the statute of limitations will not begin until the person discovers that this mistake has occurred. Other dates that might determine when the statute of limitations begins may include the date the plaintiff identified the defendant's conduct as a possible cause of the injury or the last day of the professional relationship between the plaintiff and the defendant.

Further, in some cases the operation of the statute of limitations is postponed or its "running" is interrupted. For example, if a girl is injured on her 17th birthday by a careless driver, she will have three years to bring suit against the driver because the two-year limitation won't begin to run until she turns 18.

Because so many variables affect the time allotted to bring a legal action, it is important to consult with an attorney promptly if you believe that you might have a tort claim against someone. The attorney can determine how the relevant statute of limitations applies in your particular case.

Remedies for Tort

Compensatory Damages

The basic remedy used by courts in successful tort cases is an order requiring the defendant to pay a certain amount of money to the plaintiff. The money is intended to compensate the plaintiff for losses or injuries suffered. *Compensatory damages* may include reimbursement for actual expenses, such as medical bills, repair bills or lost wages, as well as compensation for intangibles, such as pain, suffering and mental anguish. If an injury is permanent, the jury may include damages for disability and loss of future earning power.

Punitive Damages

As previously mentioned, a court can order a party to pay *punitive damages*, also called *exemplary damages*, in the case of certain intentional torts such as assault or defamation, and in negligence cases where the party's acts or omissions are especially outrageous. Punitive damages are used both to punish such conduct and to warn other members of the community not to follow that example. They can be likened to a fine in a criminal case, except that the plaintiff collects the money instead of the state. When punitive damages are assessed, the court also may order the wrongdoer to pay the attorney fees and other expenses incurred by the innocent party.

Workplace Torts

Some types of tort cases arise as a result of legally wrongful conduct in the workplace. For example, claims based on sexual harassment or discrimination are sometimes called *workplace torts*. Additionally, certain cases of workplace injury—those arising out of certain dangerous conditions known to the employer—may form the basis of a tort claim even though injury lawsuits against employers are generally prohibited by the law that provides workers' compensation to

injured employees. (For more information on workplace torts, see Part XI, "Workplace Law.")

Resolving Disputes Without a Trial

A trial determines whether a defendant is liable (responsible) for the plaintiff's damages and, if the plaintiff is liable, the amount of money required to compensate the plaintiff. Getting a case to trial (litigation) is often a long, stressful and expensive process. Lawyers, courts and other professionals use other ways to resolve civil disputes that do not require a trial.

These *dispute resolution* processes include the following: negotiation, mediation, arbitration, mini-trial, summary-jury trial, and trial to a private judge. The method used depends on the nature of the dispute, the people involved, the amount of money at risk and many other factors. In many cases, dispute resolution helps the parties reach an agreement that is satisfactory to all and helps the parties save time and money. It can also be more creative and less stressful than litigation. Although some disputes are not good candidates for dispute resolution, many will benefit from the process even if the parties do not reach a complete agreement. (*Dispute resolution is also discussed in Part III at "Stage 5: Pre-trial conferences."*)

There are two types of dispute resolution processes: binding and non-binding. If parties use a process like arbitration or a private judge, they may agree to have the decision be binding (final). Negotiation and mediation are both non-binding, meaning that any party who is not satisfied with the result may leave the process and continue to litigate.

Arbitration

In *arbitration*, the parties present facts and legal arguments to an arbitrator or panel of arbitrators. The arbitrator is impartial and makes a decision. A contract may require arbitration, or a court may order arbitration. Parties also may

agree to arbitration. They may agree that the arbitrator will decide all of the issues or only selected issues in their dispute. The arbitrator will strive to reach a fair and reasonable solution. For example, a major league baseball player who cannot reach a salary agreement with the owner of his team may choose to submit the dispute to an arbitrator, who will consider the matter using rules that the owners and players adopted years ago. At the end of that process, the arbitrator decides what the player will be paid.

Mini-Trials/Summary-Jury Trials

Disputes may also be resolved without trial through mini-trials or summary-jury trials. Although usually more complicated than arbitration, mini-trials and summary-jury trials are also ways of resolving disputes without the investment in time and expense of a full trial.

In a *mini-trial*, attorneys for the parties present a shortened version of their cases to a panel of people they have jointly selected. Panel members usually represent the parties and/or the insurance companies for the parties. After the presentations, a neutral third party helps the parties, representatives and attorneys discuss the issues of the case. Because they have gained a clearer understanding of both sides of the case during this process, the parties often are able to evaluate their positions more realistically and can agree to a settlement.

In a *summary-jury trial*, lawyers present shortened versions of their cases to a panel of jurors. The jurors do not have a stake in the outcome of the dispute. After the presentations, the jurors discuss the issues and reach an advisory verdict. They then discuss the reasons for the verdict with the parties and attorneys. This information can help parties reach settlement because it helps them see their cases the way an unbiased group of ordinary people would see them.

Private Judging

Sometimes the parties choose to use a private method to resolve their dispute. Ohio law allows parties to engage a retired judge to hear a case.

Such a “private” judge can hear a case and provide a binding decision that parties may or may not appeal. A trial to a private judge may help resolve a case more quickly and help to ease the overloaded dockets of many Ohio courts, especially in complex and expensive cases, such as malpractice cases.

Negotiation

Nearly all attempts to resolve (or settle) claims without a trial involve *negotiation*. Before the negotiation, the attorney and client talk about what the client wants or needs in order to resolve the case. Also, based on his or her knowledge and experience, the lawyer discusses with the client the advantages and disadvantages of settlement and what the terms of a reasonable settlement might be. The lawyer then discusses the possible settlement of the case with the lawyer for the opposing party. Offers and counteroffers are usually part of these discussions. Even if a client is not present during these discussions, the lawyer must use negotiation sessions to advance the client’s interest. An attorney may agree to a final settlement only with the client’s permission.

Mediation

Mediation helps people reach an agreement (settlement) about some or all of the issues in

a dispute. Mediation is private; the mediator is impartial. This means that the mediator has nothing to gain or lose from the outcome of the dispute. The mediator is not a judge and will not decide the case. In mediation, the parties make their own decisions. During mediation, the mediator leads the parties and/or their lawyers through a discussion of all aspects of the dispute and helps them learn about the other side’s issues and interests. The mediator helps the parties assess the advantages and disadvantages of settlement and can also help look at different options for settlement.

For Journalists: Covering Torts

Just as when covering criminal trials, journalists covering tort cases are advised to spend time understanding the law and the process of tort law. Since journalists are usually assigned to cover criminal cases, more study and research may be required for the journalist when covering a tort case. Much of the same advice about covering criminal trials can apply here (*see “For Journalists: Covering Criminal Trials” in Part IV, “Criminal Law”*).

Chapter Summary

- A *tort* is a violation of a legal responsibility when that violation directly causes injury or loss to a person's body, property or rights.
- *Negligence* is the most common basis of liability used in tort law, but there are others. Some of these are: intentional interference with individuals or property; misuse of the legal process; defamation of character; and strict liability. Four things together determine negligence, and a tort lawsuit will succeed only if the plaintiff proves all four: the defendant owed a legal duty to the plaintiff; the defendant violated (or breached) that duty; the plaintiff suffered an injury or other loss; and the defendant's breach of duty *directly and proximately* caused the plaintiff's loss.
- Under certain circumstances, individuals, employers and parents may be responsible for the acts or omissions of others.
- Where a person's own negligence caused, or combined with the negligence of other(s) to cause, his or her own injury, the amount of money the person can recover as compensation may be diminished or, in certain cases, recovery may be completely denied.
- The basic remedy used by courts in successful tort cases is an order requiring the defendant to pay a certain amount of money to the plaintiff.
- *Dispute resolution* is a phrase used to describe the development and use of various methods or techniques to settle tort claims and other conflicts.

Web Links:

From the OSBA's "Law You Can Use" column:

www.ohiobar.org/lawyoucanuse (search by title or topic)

- "Are Schools Legally Responsible for Your Child's Sports Injuries?"
- "Auto Accidents: Do You Know Your Legal Responsibilities?"
- "Business Owners Shoulder Responsibility for Employed Drivers"
- "Consumers Use Arbitration to Settle Lemon Law Disputes"
- "Harm Caused by Defective Products Can Lead to Liability Claims"
- "Know about Varieties of Ohio Automobile Insurance Coverage"
- "Landowner or Tenant Could Be Responsible for Harm to Trespassing Children"
- "Law Allows Citizens to Help Heart Attack Victims"
- "Mediation Can Resolve Disputes"
- "Ohio Law Protects Property Owners from 'Recreational User' Liability"
- "Ohio's 'Good Samaritan' Law Protects Volunteers"
- "Ohio's Lemon Law Protects Consumers"
- "Ohio's Social Host Law: Parents Serving Teens"
- "Parents May Be Liable for Child's Actions"
- "Uninsured Motorist Coverage Protects Drivers from Lawbreakers"
- "Underinsured Motorist Coverage: When Auto Liability Coverage Is Not Enough"
- "What Is a Wrongful Death Claim?"
- "What You Should Know about Auto Insurance Law"
- "What You Should Know about Loaning Your Car to Others"

From the OSBA's Law Facts pamphlet series:

www.ohiobar.org/lawfacts (search by title)

- "Court Mediation"
- "Traffic Accidents"

From Cornell Law School Legal Information Institute

www.law.cornell.edu/wex (search by keyword: "tort")

Hieros Gamos's general torts page:

www.hg.org/torts.html



“The business of the law is to make sense of the confusion of what we call human life—to reduce it to order but at the same time to give it possibility, scope, even dignity.”

– Archibald MacLeish

Contracts permeate our lives. If we rent an apartment or agree to buy a home, we enter into a contract. When we have electricity, gas and water furnished to that apartment or home, we have a contractual relationship with each utility provider for the service. When writing a check, we are under a contractual obligation with our bank to honor the check. We even enter into a contract when we marry.

Generally, common law, which was developed by our courts (and England’s) over the last several hundred years, governs contract law. However, some significant contracts, particularly those dealing with the sale of goods and business transactions, are governed by statute. (See *Part VII, “Business Transactions and Organizations.”*) It is important to understand the details and obligations of various types of contracts because they affect so many areas of our lives.

What Is a Contract?

Common law defines a contract as “a promise the law will enforce.” However, this simple definition is deceptive because the law of contracts imposes numerous limitations on the types of promises that *can* be enforced and under which circumstances they *will* be enforced.

Basic Requirements for a Contract

The basic requirements for a contract are *mutual agreement*, usually made through a process of *offer* and *acceptance*, and *consideration*, or one of its substitutes. (*Consideration* is generally defined as the reason or compelling influence

that causes a party to enter a contract.) In addition, the parties must be 18 years of age and mentally competent, the terms of the agreement must be defined in enough detail that a court (and the parties) can determine their obligations and the subject matter of the agreement must not be illegal.

To illustrate how a contract is formed, imagine that your neighbor, Ms. Lodge, approaches you about raking the leaves around her house. You discuss the project, and Ms. Lodge agrees to pay you \$50 to rake and bag the leaves. This meets the *mutual agreement* requirement for a valid contract: your neighbor offered to pay you \$50 to rake and bag her leaves and you accepted the terms of her proposal. Consideration is present because you promised to rake her leaves in exchange for her promise to pay you \$50. You will receive a \$50 benefit as a result of the deal and your neighbor will receive the benefit of a raked yard. Assuming you are both adults and not suffering from any mental incapacity, a valid contract exists because the terms are definite enough that it will be easy to determine if each of you performed your respective promises and there is nothing illegal about an agreement to pay a neighbor to rake your leaves. This is a promise the law would enforce; however, if your neighbor failed to pay you for your work, it likely would not be worth bringing a lawsuit against your neighbor to collect the \$50.

The Offer

An offer is the outward expression of a willingness to enter into an agreement. The agreement between you and your neighbor arises from an oral offer. Offers also can be written or even implied from conduct. Let us say you go to the doctor to be treated for the flu. The fact that you sought treatment from the doctor implies that you offered to pay the doctor for his or her medical services and that he or she agreed to treat you in

exchange for your implied promise to pay. In rare cases, an advertisement also can be an offer, although the usual advertisement is nothing more than an invitation to patronize the advertiser's business.

An offer might impose time limits on the acceptance. If so, the offer expires if it is not accepted within that time period. If there is no specific time limit, the offer must be accepted within a "reasonable" period of time. If you are the one making the offer, usually you may revoke or withdraw the offer before it is accepted, even if you have promised to keep it open for a specific amount of time. If the contract involves a sale of goods, however, and you promise to leave the offer open for some period of time (not to exceed three months), the offer cannot be withdrawn within that period.

Also, if the other person has paid you to keep the offer open, thereby creating an *option contract*, then you do not have the right to revoke or withdraw the offer before it is accepted. For example, a company may find a parcel of land that looks promising for a new factory, but needs six months to decide whether it is feasible to build there. That company would then pay the property owner a sum of money to keep the property off the market for a six-month period. The option agreement typically would provide that, at any time within the six months, the company could exercise its option and buy the land for a specified price and on terms set forth in the option agreement.

The Acceptance

Like an offer, an acceptance consists of some outward expression of agreement. The acceptance can be express or implied, written or oral. It might consist of a signature on a written offer, a simple "okay" or even a nod of the head. If you call a repairperson, Mr. Simmons, to fix your washing machine and he responds, your call is an implied offer to pay for the repair services. By coming to your house, Mr. Simmons has implied his acceptance of your offer to pay a reasonable price for the repairs.

When an offer specifies terms of a particular method of acceptance, it may not be satisfactory to accept it any other way. For example, if an offer by Joe to sell a car to Hilda stipulates that it can only be accepted by a \$250 deposit on the purchase price, an acceptance by Hilda without the deposit will not be effective.

Generally, accepting an offer requires an affirmative act by an individual. Silence does not usually imply acceptance. Let us say a telemarketer calls during dinner and offers to sell you steak knives. You let the caller make his pitch, but then hang up without responding. Six weeks later, a set of steak knives arrives in the mail along with a bill. Must you pay the bill? No, because you have not entered into a contract to buy the knives by your silence. You can keep the knives without paying. Both Ohio and federal law clearly state there is no obligation to pay for unsolicited merchandise.

An individual does not have to accept an offer as proposed. The individual can reject it outright or make a counteroffer, which may include its own terms and conditions. If a counteroffer is made, all previous offers are void. If an offer is "accepted" with conditions, it is not actually an acceptance at all, but, rather, a counteroffer. The process of purchasing a house, for example, usually involves an initial offer and several counteroffers until the parties agree on the terms of the sale and create a written contract. Contracts to purchase a home must be in writing.

Consideration and Reliance

For a contract to be valid, *each* party must make a promise or give or receive some benefit in return for the promise. A contract's consideration may be either an act or a promise. Without this element of exchange, a promise lacks consideration and usually cannot be enforced as a contract. As a result, a promise to make a gift to someone generally is not regarded as a contract, because usually only one party benefits and the necessary element of consideration is lacking.

Consideration can take many forms. It might be money, property, rights, services, a promise to do something in return, or even a promise not to do something that you would otherwise have the right to do. Consideration can be present even though no money changes hands. Consideration exists when parties have done nothing more than exchange promises with one another. If, for example, you promise to sell your car to someone for \$2,500 next Saturday and the other person promises to pay that amount for your car at the same time, consideration exists even though neither of you has yet performed the contract, and no down-payment was made.

Even when there has been nothing given in exchange for a promise, the promise still might be enforceable if someone relied on the promise in some tangible way. Thus, even though a promise to make a gift is not usually enforceable, if the beneficiary of the gift takes some concrete action in reliance on the promise, the promise may be enforced. This is called *promissory estoppel*, because the person who made the promise is “stopped” from claiming that there was no consideration for the promise. A good example of this is when a person promises to make a charitable donation and the charity takes some action in anticipation of receiving the promised gift. Thus, if a person promises to make a donation to a college and the college, relying on the promised donation, constructs a building, the promise likely will be enforceable even though the college gave nothing in exchange for the pledge.

A promise to make a gift to a family member also might be enforceable if the family member takes some definite action in reliance on the promise. For example, if a rich uncle promises to give his niece \$5,000 so she can take a trip to Europe and the niece relies on the promise of the gift and actually goes on the trip, the niece will probably be able to enforce the contract and collect the \$5,000.

In reality, charities and family members usually are reluctant to sue people who have made such promises. They hope that the promised gift

will eventually be made and that the donor will make even larger gifts in the future.

Additional Requirements: Certainty, Legality and Competence of the Parties

A contract cannot be enforced if its terms are so vague that no one can determine what to enforce. For example, you tell a friend you will do something for him in the future and he agrees. Because there is no certainty about what to do, when to do it or the consideration for doing it, the contract (if there is one) would be unenforceable based on any one of these uncertainties.

In addition, the agreement must be for something on which it is legal for the parties to agree. An agreement to do something illegal is not a contract.

Also, the parties to a contract must be competent to enter into it. In most cases, children under 18 years of age are not considered legally competent to enter into legally binding agreements. Furthermore, a person suffering from a mental disease or disability may be found by a judge to be incompetent to enter into a legally binding agreement. However, a minor or incompetent person who receives something necessary for life, such as food, shelter, clothing or medical care, may be responsible to pay for the reasonable value of whatever was provided.

While a minor or a person suffering from legal disability cannot be bound to a contract, if such a person performs his or her part of an agreement, the other party will be bound by the contract.

Express and Implied Contracts

The terms “express contract” and “implied contract” refer to nothing more than the formality or informality of the method used to create the contract. Many express contracts are created by signing a detailed written agreement, containing all or most of the terms the parties have agreed on, such as a contract for the purchase of a home

or a new car. “Implied contracts” are created with little or no formality, such as the implied contract that is made when someone asks a mechanic to perform a necessary car repair. By asking the mechanic to do the work, the car owner implies that he or she agrees to pay the mechanic’s usual hourly service fee together with the cost of any parts necessary to complete the repairs. By taking the car, the mechanic agrees to perform the work within a reasonable time and to do so in a professional manner for the usual hourly fee. If the charge is too high or the work takes too long, a court might have to determine the precise meaning of these agreed terms. However, there would be little doubt that the parties entered into some type of agreement for the repair of the car even if they signed nothing and even if neither of them made a legal “offer” or “acceptance.”

Written and Oral Contracts

With some exceptions, an oral contract is as valid as a written contract, as long as the basic elements of a contract exist. However, in a dispute, the terms of an oral contract may be more difficult to prove than the terms of a written contract.

Some types of contracts must be in writing and will not be enforced unless the essential terms of the agreement are contained in a signed, written document. Contracts that must be written are:

- contracts for the sale of land or any interest in real property, including a home;
- contracts in which one person promises to pay another’s debt (for example, when a parent guarantees a child’s debt);
- prenuptial agreements or contracts between couples settling various questions of property and other rights in consideration of marriage;
- contracts that cannot be fully performed within a year of the time the contract is made, such as a contract to work for someone for 18 months;
- contracts for the sale of goods for a price of \$500 or more.

Written contracts do not have to be formal. They may be printed or typewritten and the language can be plain or very complicated. The writing may be nothing more than a sales slip, which is no more than a memorandum of the contract of sale, or it might be a handwritten note on a stray scrap piece of paper.

Of course, it is almost always better to write out the terms of a contract, even when there is no legal requirement for the contract to be written. The more that is available in writing to all the parties to a contract, the less likelihood there is that there will be a misunderstanding between the parties about their obligations. However, if parties go to the trouble of writing out the terms of their agreement, they should make sure to include all of the agreed-upon terms. Otherwise, they may not be able to prove that a particular part of their agreement was ever made, and oftentimes parties agree that the written contract surpasses any and all previous oral contracts.

Performance of Contracts and the Consequences of Breach

Generally, parties to a contract must do everything required by their agreement. Differences of opinion and legal action may arise when one party to a contract either fails to perform completely or chooses not to complete his or her end of the bargain.

A person who substantially performs his or her side of a bargain can enforce the contract against the other person if the other person fails to perform.

The situation becomes more complicated when a person “partially performs” a promise, but does not “substantially perform.” A person

who only partially performs a contract may not be able to get paid for the value of that partial performance, and likely will be responsible for any harm caused to the other party. Let us say, for example, that a bricklayer only performs 20 percent of the patio he promised to install. If the homeowner must pay another bricklayer a higher price to get the job finished, then the cost of paying the new bricklayer might be higher than the value of the work done by the original bricklayer who started the job. In such a case, there may be a “cause of action” for the homeowner to collect from the first bricklayer for the additional expense, but if, for example, the original contract did not establish a timeframe for completion of the work, the homeowner may not prevail in such a legal action.

Generally, a party to a contract must fulfill the promises made as part of the contract. If one party does not perform, the other party usually is entitled to recover money damages for the losses suffered as a result of the breach. In addition, depending on the extent of the breach, the injured party may be justified in delaying or terminating performance of his or her own obligations under the contract.

Substantial Performance and Material Breach

At one time, the law required strict compliance with the terms of a contract. Even a minor deviation from the terms of one person’s promise would excuse the other person from performing his own duties. Today, if one party has broken a promise in some minor way, but has still *substantially performed* the promise, then the other party still must perform his or her own part of the deal. The second party is excused from performing his or her own part of the deal *only* if the first party’s failure to perform is serious enough to be a *material breach*.

An example will illustrate how this works. Mr. Smith has several dead trees on his property and enters into a contract with ABC Tree Company (ABC) to cut down and remove the trees for a price of \$700. ABC cuts the trees

down, but leaves them lying on the lawn without removing them as promised. This is not only a breach; it is probably a material breach because it does not fulfill the essential purpose of the contract, which was to get rid of the trees. If, as a result of ABC’s breach, Mr. Smith has to hire another company, which charges him \$800 to cut up the trees and haul them off, Smith will not have to pay ABC anything. In fact, ABC would owe Mr. Smith the \$100 difference between the \$700 it agreed to charge for the job and the \$800 Smith ended up having to pay to have the job finished.

On the other hand, if ABC cut down the trees, cut them up and hauled off everything except for two small pieces that had fallen into some bushes, ABC will have substantially performed its contract with Mr. Smith. Although ABC did not do absolutely everything it contracted to do, it substantially performed the contract, and would be entitled to full payment, minus only whatever small expense Mr. Smith may incur to remove the two pieces that ABC failed to remove.

The result would be the same in a contract for the sale of goods. If, after a car is delivered, the buyer discovers that the brakes don’t work, the buyer is justified in returning the car and refusing to pay for it. Before returning the car without paying the agreed-upon price, however, the buyer may be required to give the seller a chance to “cure” the breach by repairing the defective brakes. (Likewise, in the agreement between ABC and Mr. Smith, Mr. Smith likely will be required to give ABC an opportunity to finish the job before refusing to pay ABC and hiring someone else.) If the only problem the car buyer discovers is that the spare tire needs to be replaced, the buyer still must pay the price of the car, with a modest reduction based on the cost of a new spare tire.

Offer to Perform as a Precondition to the Right to Sue

As previously explained, Ohio law does not require one party to honor an agreement if the other party fails to perform his or her end of the

contract. But, to enforce a contract, a party may be required to demonstrate that he or she is still “ready, willing and able” to fulfill his or her part of the agreed exchange. For example, unless the buyer can demonstrate he or she can pay the agreed price for the promised product, the buyer will not be able to sue the seller if the seller refuses to deliver the goods to the buyer. Likewise, unless a seller can show he or she was ready, willing and able to deliver the product that was to have been sold, the seller will not be able to recover damages from the buyer. It works the same way with services that are to be performed.

In the case of ABC Tree Company, if ABC failed to cut up and remove the trees because Mr. Smith said he wouldn’t pay for the work under any circumstances, then Mr. Smith has breached the requirement of good-faith tender of performance and would not be able to sue ABC for failing to finish the work.

Excuses for Nonperformance or Breach of Contract

Sometimes, a party to a contract may be excused from performing his or her part of an agreement. As explained, a person is excused from performing due to the other party’s failure to substantially perform his or her own obligations. Similarly, a party may be excused if it is clear that the other party is unlikely to perform, even if the other party has not yet breached the contract.

Consider, for example, a contract between a shopkeeper and one of the shop’s suppliers for merchandise to be delivered immediately, but paid for some time later, such as at the end of the month. If the shopkeeper goes out of business, the supplier is likely to be excused from delivering the merchandise as promised, even though payment is not due until a month after the goods will be delivered. The likelihood that the shop-

keeper will be unable to pay will justify the supplier in making a written demand for adequate assurances of performance and in refusing to deliver the goods until the shopkeeper provides adequate assurance that the goods will be paid for if they are delivered.

When the contract specifies that its duties or obligations absolutely must be performed by a specific time (when “time is of the essence”), a delay by one party can excuse performance by the other and provide the other party with grounds for legal action. For example, contracts for constructing large buildings often require precise scheduling, and the general contractor or project manager will specify that various subcontracts must be completed by certain dates. Delay in performing a subcontract may justify the prime contractor in refusing to continue with the contract, and give the prime contractor the right to recover any losses caused by the delay.

A party to a contract also may voluntarily give up some rights through a voluntary “waiver.” A waiver can be an excuse for nonperformance by the other party. For example, let us assume that you order a new car in “Treasure Island Green.” Two weeks later, the dealer calls to tell you that the factory no longer makes that color. If you agree to allow the dealer to substitute “Sky Blue,” you have waived the “color” portion of the original contract. Waivers are contract amendments and may be formal or informal, in writing or implied through the action or inaction of a party. If an original contract must be in writing, amendments must be written as well. Generally, a written amendment is the safest and most effective way to change a contract.

Prevention of Performance

Nonperformance of a contract is excused if one party prevents the other from complying with the contract. For example, the owner of a building cannot contract to have the building renovated, and then deny the renovator access to the building to perform the work.

Impossibility of Performance

Impossibility of performance of a contract also might excuse nonperformance. Let's assume that a carpenter, Ms. Harris, contracts with an owner to renovate the owner's building, but before the carpenter can start to work, a tornado destroys the building. Under these circumstances, it is impossible for Ms. Harris to perform the contract, and she is excused. If the owner has paid Ms. Harris a down payment, the owner probably will be able to recover the down payment. Otherwise, Ms. Harris would be unjustly enriched as a result of the tornado.

On the other hand, if the carpenter agrees to restore the building and then sells all of her tools and fires all of her workers before beginning work, she has only herself to blame. The fact that it is now impossible for her to complete the promised renovations is not an excuse and she will be liable to the owner for all the damages that the owner suffers as a result.

Remedies for Breach of Contract

The usual remedy for breach of contract is legal action to recover enough money to pay for the harm caused by the breach. In some cases, the injured party can force the breaching party to perform the contract, under threat of imprisonment for contempt of court, or have the contract modified or cancelled, or obtain some other type of court order to prevent further loss.

The injured party should notify the other party right away if there is a defect in the other party's performance. In some situations, the injured party who fails to provide prompt notice will be prevented from obtaining any remedy. This is particularly true in contracts for the sale of goods. If the goods are defective, the buyer must advise the seller as soon as possible. If the goods are so defective that the buyer wants to "rescind" the contract and get his or her money back, the buyer must advise the seller promptly. Waiting, even

for a little while, might prevent the buyer from getting the solution he or she wants or from obtaining any remedy.

Money Damages for Breach of Contract

The usual remedy for losses caused by a breach of contract is *monetary damages* (money paid to make up for the loss). The person who breached a contract is not necessarily liable for the entire contract price, but rather for the value of the actual loss suffered by the injured party. For example, if a buyer breaches a promise to buy a house for \$100,000, and the seller is able to resell the property to someone else for only \$90,000, the first buyer will be responsible for the \$10,000 difference. The seller also may recover additional damages, such as insurance and maintenance expenses incurred while finding another buyer, and any other losses resulting from the delay or inconvenience.

Specific Performance

If the object of a contract cannot be obtained by any other means, or if the subject matter of the contract is unique, a court may force a party to comply with the contract rather than pay damages. For example, land is considered unique, and a rare museum piece or antique may be unique. A court may require the person who contracted to sell the land, museum piece or antique to transfer the land or item to the buyer as promised. Note that there is nothing unique about the money the seller would receive as the purchase price, so that if the buyer defaults, the seller's only remedy is monetary damages. Even if the subject of the contract is not unique, the court may award specific performance damages if obtaining a substitute will be difficult.

Cancellation

The technical term for cancellation of a contract is *rescission*. In the earlier example involving the insolvent storeowner, the supplier probably would call the storeowner to say the contract is

cancelled, and probably should formalize and record the cancellation of delivery by writing a letter to the storeowner. In some cases, however, a party might remain bound to a contract despite a breach by the other party. In such instances, the first party may have to go to court to have the contract rescinded.

For example, suppose that a husband and wife contract to purchase a house subject to their ability to secure a loan, but the husband passes away before the sale is completed. If the wife is unable to secure financing alone, the contract may be cancelled or rescinded.

Injunction

Injunctions are court orders that require people to act (or not to act) in certain ways. An injunction may order a party not to violate a contract when there is a real threat that a breach of contract will continue. In these situations, monetary damages are inadequate remedies because the injured party would have to go to court repeatedly. If the injured party succeeds in getting an injunction against the other party, the other party risks being found in contempt of court for breaching the contract.

Let us say Mr. Smith contracts to sell a unique, antique dresser to Mr. Jones for \$5,000, to be delivered six months in the future, but then threatens to sell it to someone else in the meantime. To prevent Mr. Smith from carrying out this threat, Mr. Jones might get an injunction, in which the court orders Mr. Smith not to sell the dresser to someone else. If Mr. Smith violates the injunction, he might not only be liable to Mr. Jones for the damages arising out of his breach of contract, but he also might be punished by the court for contempt—that is, for willingly violating the specific terms of the court's order.

Quasi-Contract

Sometimes the law infers a contract-like relationship among parties to prevent someone from benefiting unjustly (legally called an *unjust enrichment*). Such a quasi-contract is used to protect one party from taking advantage of

another, especially when the event in question arose innocently or accidentally.

The following scenario illustrates the concept of quasi-contract. Sue asked Fred to paint her house. She wanted it to be finished before her husband returned from a business trip. Fred gave Sue an oral quote that she accepted. When the work was completed, Fred gave Sue an invoice for his work, which she said would be paid when her husband returned. When Sue's husband came home, he refused to pay because he alone owned the house and had not contracted for the work. While Sue did not have the authority to enter into a binding contract with Fred to paint her husband's house, Fred may be able to recover payment for his work. Under the concept of quasi-contract, the law will not let Sue and her husband benefit from the misunderstanding. Sue's husband would have to pay the reasonable value of the work to prevent an unjust enrichment.

For Journalists: Covering Contract Cases

Because so much of contract law is linked to actual written agreements, journalists covering contract cases are advised to obtain the original contract documents. But the documents alone will not be enough to gain understanding about the nature of a contract dispute. Case briefs can often provide more detail about the nature of the contract dispute as can interviews with those parties affected by the contract in dispute. These can be obtained from the court as well as from the parties in a lawsuit. Increasingly, such briefs are posted by opposing sides online.

In covering contract cases, the devil is in the details. Journalists are advised to spend time understanding the specifics of contract law and the nature of the dispute. Much of contract law requires a thorough understanding not only of contract law but also of the field or industry that is part of the contract dispute. Thus, a real estate contract case will require the journalist to understand the nature of real estate law as much as the nature of contracts. A dispute about an Internet user agreement or terms of service statement

will require the writer to understand how agreements are negotiated and enforced in an online environment. (For more information on the Internet and the law, see Chapter 13).

Covering contract cases often requires advance homework and hours of reading court documents to ascertain the exact nature of the the court's decision. There may be dozens of

questions within the contract for the court to consider. Journalists covering such cases are often called on to make judgments about the most important claims to highlight and explain to readers and viewers. Those judgments are critical and can be assisted by the attorneys involved in the case, with the understanding that attorneys represent a particular viewpoint.

Chapter Summary

- A *contract* is a legally binding agreement between or among two or more parties to perform the duties stated in the agreement.
- Contract law is largely governed by common law with some significant areas, such as contracts for the sale of goods, governed by statute.
- The basic elements of a contract are an offer, an acceptance of the offer, and either consideration or (sometimes) reliance on the promise.
- The terms of a contract must be sufficiently clear that the court can determine what the parties promised to do, the parties must be legally competent to enter into the agreement, and the subject matter of the agreement must be legal.
- If the basic elements of a contract exist, an oral contract is as valid and enforceable as a written contract, with certain exceptions.
- If a party performs the contract “substantially,” or in large part, the other party cannot refuse to complete his or her part of the agreement. A *material breach* may justify the other party in refusing to perform his or her own promises.
- There are a number of situations in which a party to a contract is excused from performing his or her part of an agreement.
- The usual remedy for breach of contract is an action for damages.
- *Specific performance, injunction, unjust enrichment* and *rescission* are extraordinary remedies for breach of contract.

Web Links:

From the OSBA's "Law You Can Use" column:

www.ohiobar.org/lawyoucanuse (search by title or topic)

"Ask Questions When Pre-Paying for Funerals"

"Bad Faith Claims Address Insurer Violations"

"Consumers Should Know Rights When Buying Used Cars"

"Consumers Should Watch Out for Predatory Contractors"

"Electronic Signatures: Can Your Computer Sign a Contract without Your Knowledge?"

"How Can a Franchise Owner Get Out of an Agreement?"

"Know Your Repossession Rights"

"Some Contracts Can Be Cancelled within Three-Day Period"

"Understand Recording Company Contracts before You Sign"

"Vacation Timeshares: Paradise or Problem?"

"What You Should Know When Choosing a Continuing Care Retirement Community"

From FindLaw's website:

<http://library.findlaw.com> (choose "Commercial Law and Contracts")

From Cornell Law School Legal Information Institute:

www.law.cornell.edu/wex (search by key word: contract)



Part VII

business transactions and organizations

“A man with a new idea is a crank, until the idea succeeds.”

– Mark Twain

Children learn about business transactions when they set up their first lemonade stands or do chores for an allowance, but they likely will not appreciate the pervasiveness of business transactions until they grow up and begin to manage their own lives. At this point, it becomes important for them to have a basic understanding of business law.

Special sets of rules govern many daily business transactions. For example, sales, credit and banking are largely regulated by special statutory rules. In Ohio, these rules are compiled in the *Uniform Commercial Code* (UCC), and give predictability to our business lives.

Business transactions may involve several major fields of the law, particularly the law of contracts and the law of property. (For discussions of these areas, see Part VI, “Contracts,” and Part VIII, “Property Law.”)

Business Transactions in General

Most states, including Ohio, have adopted the UCC to govern a wide range of commercial practices, including:

- sales of goods and merchandise and other consumer transactions;
- commercial paper, such as checks and promissory notes; and
- secured transactions—sales of goods on credit, or loans secured by a security agreement roughly similar to a mortgage (except that it applies to personal property rather than real estate).

Many commercial transactions, and, in particular, most consumer transactions, are not covered by the UCC, but by separate laws. Some of these retail transactions include retail installment sales, charge accounts, home solicitation sales and small loans.

Commercial Paper

What is *commercial paper*? Commercial paper is a written document evidencing an obligation of one party to pay another. Checks and promissory notes are the most common forms of commercial paper. Drafts, bills of exchange and certificates of deposit are also common forms of commercial paper. Think of a regular check when the term commercial paper is used. Similarly, think of depositing a check, paying a bill by check, or cashing a check when the terms *negotiation*, *negotiable* and *negotiability* are used.

When a check is negotiated, the cash represented by the check is transferred from one party to another. For example, when an individual writes a check to pay an electric bill, the value of the cash represented by the check is taken from that individual’s checking account and transferred to the electric company’s account.

When commercial paper meets certain requirements, it is *negotiable* and moves freely in commerce. Negotiable commercial paper is a substitute for cash and is used in commerce because it can be more convenient and more secure than cash.

Negotiability

Commercial paper is considered a negotiable instrument if it:

- is in writing;
- is signed by the person making it (the *maker*) or by the person on whose account it is drawn (the *drawer*);
- contains an unconditional promise or order to pay a fixed amount of money;
- is payable either on demand, or at a definite time; and
- is payable either to the order of a certain individual, or to the *bearer* (the bearer is the individual possessing the commercial paper, even though that individual's identity may not be known when the commercial paper is first issued).

How Commercial Paper Is Negotiated

Commercial paper is transferred or negotiated by *endorsement* (the act of approving a transaction with a signature). There are two broad categories of endorsements: *blank* and *special*.

A *blank endorsement* occurs when the person filling out the check (called the *drawer*) simply leaves the “Pay to the Order of” line of the check blank and authorizes the check with his or her signature. This blank endorsement becomes a *bearer instrument*. Someone who holds a bearer instrument, such as a blank check, can negotiate it by simply giving the check to another party. The other party then may deposit or transfer the blank check as he or she wishes.

Special endorsement occurs when, for example, an individual writes a check to a business entity such as the electric company. The bank endorses the check with a stamp indicating, “For deposit to the account of _____ Electric Company.” Depositing the check in the named account is the only method of negotiation. Also, if a check is endorsed, “Pay to the order of John Doe,” then only payee John Doe is permitted to endorse the check.

Holder in Due Course

The *holder in due course* doctrine is a mechanism used to give some assurance to parties not

involved in an original transaction that the commercial paper (or negotiable instrument) is valid. It ensures that commercial paper moves freely and is honored (paid) by the business and banking worlds.

To become a holder in due course, a person to whom commercial paper is transferred must:

- give something of value in return for having the instrument transferred;
- complete the transaction in good faith; and
- complete the transaction without notice of any problems with the instrument.

If these conditions are present, then a party acquiring a negotiable instrument is said to be a *holder in due course*. This means that, when the instrument is finally presented for payment, the maker of the note cannot challenge the holders' rights to receive payment.

The following example explains the rights and obligations of parties and holders in these types of transactions. Mary owns a floral shop and needs a supply of vases for flower arrangements. She locates Bob, a supplier, and buys a year's supply of vases on credit, giving Bob a promissory note that obligates her to pay him within six months. Bob takes the promissory note to the bank to have it discounted. That is, he sells the note to the bank for something less than its face value to get cash, rather than to wait six months for Mary to pay him. Bob may be willing to take less from the bank than what Mary owes him because he knows he can offset this loss by getting the money earlier and investing it.

The bank then takes the promissory note to another financial institution and has it discounted again to increase the bank's supply of money or credit. In each case, the note is transferred by endorsement. Mary, as the maker of the note and the buyer of the vases for her floral shop, is primarily liable to repay the note. However, the holder in due course, that is, the “holder” of the note, does not have to look to the maker (Mary) alone—or even at all—for payment. Mary, as well as the vase supplier who had the note dis-

counted, and the bank, which also had the note discounted, are all liable to the holder in due course for the note.

Mary agrees to pay the note when it is due. If Mary dishonors (does not pay) the note, both the supplier and the bank will be liable for paying the holder, since each, by endorsement, has agreed to make payment. The endorsement by the supplier and the endorsement by the bank are individual agreements by which each has committed to be liable for payment if Mary does not pay the note.

Let's add a twist to this scenario. If the supplier furnished substandard or defective vases, Mary has a valid excuse for not paying, but only against the supplier, since she cannot raise this defense against a holder in due course. The above rule has been modified for most consumer credit transactions. (See "*Consumer Transactions In General*" at the right.)

Cognovit Notes

A *cognovit note* is a note in which the maker acknowledges the debt with the understanding that, if the debt is not repaid, a court may order a judgment against the maker without the usual notice or hearing.

Many states prohibit any use of cognovit notes. In Ohio, these types of notes are prohibited in consumer transactions. Since Jan. 1, 1974, any note given in a consumer loan or transaction and executed has been enforceable only through a regular lawsuit. That is, the cognovit provision of a consumer note (the waiver of notice and the right to trial) is invalid. If the remainder of the note is valid, however, it may be enforced after notice and trial.

In Ohio, cognovit provisions are valid in commercial transactions, but the note must contain a conspicuous warning that the maker is forfeiting the right to notice and trial. (There is specific language that must be stated in the note and may not be altered.) Further, the actual confession of judgment can only be filed in courts whose territory includes the maker's residence or the location where the note was executed.

Consumer Transactions in General

Consumer transactions are common and often depend on the use of credit. In fact, credit is used so often that paying cash for large consumer transactions (buying a car, for example) has become rare. Consumer credit transactions can be confusing and expensive and are governed by various state and federal laws.

Interest rates charged on borrowed money must fall within certain limits. For most consumer loans, including retail installment sales and revolving charge accounts (credit cards), Ohio law allows an interest rate up to an annual percentage rate of 25 percent. However, the law also allows for some methods of computing the annual percentage rate that may result in rates of more than 25 percent, which can be enforced under the law. (See "*Small Loans*" later in this chapter.) The law does not *require* a 25 percent annual percentage rate (or any other interest rate). Rather, interest rates are subject to market pressure negotiation, and each consumer's credit rating.

Individuals should shop for low interest rates and low finance charges in the same way they shop for low prices on products and merchandise. One of the basic goals of the federal Truth in Lending Act is to give consumers enough information so that they can shop for credit (that is, know and compare the cost of credit).

Individuals have the right to read all parts of applications, contracts and disclosure statements. In fact, Ohio case law states that, generally, a person must honor the terms contained in the document he or she signs, unless the person was kept from reading it. Before signing anything, an individual should ask questions about any aspects of the documents that are not absolutely clear and get satisfactory answers to all questions. Someone who signs a document is bound to its terms, even

if he or she has not read it. An individual who does not understand a document should ask for the opportunity to study the document or to have an attorney review it. Moreover, if an individual has trouble getting information, it should be taken as a sign of potential problems with the transaction.

Both state and federal laws deal with cancelling (*rescinding*) many kinds of consumer transactions within a short period after the goods or services are received. Consumers usually have only a very short time to exercise their *right of rescission* (cancel their orders). For example, a consumer who has been solicited at home to buy merchandise or services on credit has three days to change his or her mind. If the consumer wishes to cancel an order, it is good practice to do so in writing.

Similarly, in most consumer transactions, the traditional concept of holder in due course has been modified. Under the consumer laws, a buyer can take all appropriate legal actions against any person or entity to which the seller has transferred the buyer's contract or note.

For example, if someone takes out a loan to buy a car, chances are the auto dealer will sell its interest in the note the buyer signed to a bank or financing company. Under the Federal Trade Commission's holder-in-due-course rule, any rights an individual might have against the dealer will also apply to the bank that bought the note. The bank cannot use the holder-in-due-course rule to escape all responsibility for the individual's car purchase because Ohio law may consider the lender (bank) to be an integral part of the sales process. For example, if a used car you bought from a dealership falls apart as soon as you leave the showroom, the bank that financed your loan through the dealership cannot expect you to make good on a \$3,000 loan if the car is discovered to be worth only \$500. The bank must take some responsibility and it may have to approach the dealership to recover its loss.

Disclosure to the Buyer

Most consumer transactions are one of two types: an "open-end" credit transaction or a

"closed-end" transaction. In an open-end transaction, the lender or creditor expects repeated subsequent transactions, as when a consumer uses a credit card. Closed-end credit usually involves only one transaction, such as when a consumer gets a home loan or a car loan. In both types of credit transactions, the buyer receives paperwork that includes cost of credit disclosure forms required by the federal Truth in Lending Act and certain state laws. Disclosure forms vary. Sellers and lenders may, with certain limitations, modify the disclosure forms, and the forms may or may not be separate from the contract. Even where disclosure forms are part of a contract, the information shown in the form also must clearly appear in the contract itself.

For example, if Mary decides to open a credit card account to purchase the furniture for her home, then, before opening the account, the bank providing the credit card must fully explain her rights and responsibilities as a cardholder. The bank also must provide certain additional disclosures in writing with every periodic statement or bill issued upon the account. Buyers who use credit cards should read and understand this information.

Some credit card companies are proactive in making sure their clients understand the terms and conditions associated with using their cards. Certain companies, for example, have credit education programs for college students to communicate the conditions and responsibilities that come with credit card use. More information about credit cards is provided later in this chapter.

In the example provided on page 91 regarding Mary's purchase of vases for her business, Mary gave Bob a promissory note to finish paying for the vases within six months. To purchase furniture for her home, however, Mary will use her new credit card. The disclosure form that was given to her when she opened the bank credit card account shows, among other things, the Annual Percentage Rate (APR) being charged for purchases and other types of charges that can be made on the account, along with the due date and any penalty being charged if payments are not made on time, plus

any minimum interest charge and other fees that may be incurred. With each monthly billing statement, Mary will also receive notice of the APR payments she has made, the balance on her account, and other information, including her right to dispute any inaccuracy.

Now let us examine the concept of cost of credit disclosure for something other than credit cards. After having bought the vases, Mary decides to buy a used car for her family's use. She will not pay any money down and does not have a trade-in, and she wants to obtain financing for 24 months. A cost of credit disclosure statement for the purchase of the car would include certain key disclosures, such as:

- the APR;
- the total amount of finance charges;
- the amount being financed;
- the total amount of the purchase, including any down payment or trade-in allowance;
- the number of payments, the amount of each and the due date for each payment;
- any possible late charges;
- any possible prepayment penalty;
- notice of a security interest, if any, on the vehicle Mary is buying;
- any fees or other charges included in the transaction.

The price of Mary's used car in our example is \$5,000, and the interest rate is 12 percent APR. If there are no other charges or fees in the transaction, then the resulting finance charge would be \$675.31, and her first payment would be \$262.03, followed by 23 payments of \$235.36 each. As a buyer, Mary should make sure she receives the disclosure form. She should then study the form and the contract before making a final commitment to Big Wheel Auto, the seller.

The disclosure form may be a separate form or part of the contract. If the disclosure form is *not* part of the contract, it will not include the description of the vehicle (make, model, color and serial number) that is included in the contract. Many cost-of-credit disclosures itemize the amount

financed, showing the consumer how the amount being financed will be distributed.

Amount Financed Itemization

The best way to explain the itemization of a financed amount is by example. If Mary indicates on the disclosure form that she wants an itemization, she would receive a written statement similar to the following:

Itemization of the Amount Financed of \$5,145.50		
\$ -0-	Any "cash back" amount the dealer pays you directly	
\$ 5000.00	Amount paid to your account or paid directly to Big Wheel Auto	
Amount Paid on Your Behalf		
\$ 25.50	to Bureau of Motor Vehicles	
<u>\$ 120.00</u>	to Credit Life Insurance Co.	
\$5,145.50	Total	

Such information is helpful because it shows the distribution of the amount financed. If part of the amount financed included, as it does in many motor vehicle transactions, a fee being paid to the motor vehicle bureau or for credit life insurance or a prepaid finance charge, then that is entered, along with any types of insurance, such as credit life insurance in the above example. Car dealers routinely include the customer's initial state title, registration and tag fees with the sale costs. If the consumer wants to also purchase credit life or credit disability insurance in the transaction, that cost is routinely included in the amount being financed. Generally, credit life insurance pays off the balance of the loan if the buyer dies before the loan is paid off, and credit disability insurance pays the monthly payments if the buyer becomes unable to work. Both types of insurance have routine restrictions and terms that should be carefully reviewed when making a purchase.

Credit Cards

Credit cards are perhaps the most widespread method of extending consumer credit. Some people use credit cards instead of cash or checks. Historically, credit card (revolving charge) accounts have been among the most expensive forms of consumer credit because many people do not reduce the principal balances on those cards each month. Instead, they pay just the minimum payment while the principal continues to accrue at a high interest rate.

Revolving Charge Accounts

A credit card is evidence that the credit card holder has a contract with the card issuer to maintain a revolving charge account in the cardholder's name. This permits the cardholder to purchase goods and services at any time on presentation of the card where it is accepted.

The first and most obvious advantage of using a credit card is that it allows the user to buy goods and services without having to pay for them immediately. Most credit cards allow a grace period within which a consumer may pay for goods and services purchased on a card without paying any interest charges. This feature allows a consumer to defer payment for purchases, keeping funds in savings accounts until the payment is due, and thereby earning interest on the savings. Or, a consumer who doesn't have funds available for the purchase can use a credit card to finance the purchase over a long period of time. A credit card also may be used as a line of credit to increase flexibility in an individual's budget for large and unexpected expenses.

The primary disadvantage of using a credit card is the cost of interest. Users who do not pay off their credit card balance promptly at the end of the monthly billing cycle are charged interest from the date of the purchase until they pay off the balance owed. Additionally, because the interest rate on credit cards is generally greater than the market rate for most other loans, those who make the minimum payment on outstanding

balances pay the maximum in interest, but do not greatly reduce the principal amount of the debt they owe.

When purchases are made on a credit card, the card issuer must send the cardholder a monthly statement (a bill). Under many plans, the cardholder may pay the total monthly balance without charge (just as if the cardholder had an open account with the issuer).

In all cases, the cardholder may make a minimum payment and carry the balance into the following month(s) by paying a monthly finance charge. The minimum monthly payment may vary depending on the size of the balance, and it is not necessarily uniform among issuers.

A late payment fee is charged when a payment is received after the due date. In general, the card issuer has no security interest in the goods sold (that is, it is unsecured credit).

Some credit card accounts are not revolving charge accounts but, rather, open accounts where the cardholder promises to pay the entire balance within a certain time period. In such cases, a balance is not forwarded to the next billing period. The issuer can cancel the credit card immediately and refuse to accept further charges if the bill is not paid on time. These credit cards are usually "travel and entertainment" cards. For example, some credit card companies offer their cards to small business owners. The card gives business owners access to cash for various purposes under the promise that outstanding balances will be paid off monthly.

Credit Card Law (In General)

Credit card companies are willing to extend credit to consumers because it is profitable. Credit card issuers earn interest on consumers' payments when consumers do not pay off the entire balance of their credit cards on a monthly basis. Because of the popularity of credit cards in our society, it is important to understand some general rules about credit card law:

- Credit cards cannot be issued indiscriminately. They can be issued only in response to a written or oral request, or as a renewal or replace-

- ment of an existing card. While companies sometimes issue unsolicited credit card offers that may include actual credit cards, no card can be activated for use without the written or oral agreement of the person to whom the card was issued.
- If a credit card is stolen or lost, the cardholder is liable for paying no more than \$50 in any unauthorized charges, and maybe nothing at all, depending on the credit card issuer. (The maximum liability can be reduced by contract or through negotiation. Further, the cardholder can reduce the maximum liability by reporting the loss as soon as possible after the loss is discovered.)
 - A cardholder may, with limitations, withhold payments when a dispute arises over a particular purchase. For the cardholder to exercise this right, however, the initial transaction must have 1) exceeded \$50 and 2) taken place within the same state as the cardholder's mailing address or within 100 miles from that address. If these requirements are met and the cardholder has made a good faith attempt to resolve the disagreement with the merchant, then the card issuer may not attempt to collect the amount in dispute or issue adverse credit reports against the cardholder until the dispute is settled.

Disclosure to Buyer (Cardholder)

Generally, a financial institution must notify a consumer in writing at least 21 days before making changes to the terms or conditions of a particular account, if those changes would mean the consumer would pay more, or have increased liability or decreased access to the account.

As noted earlier, there are special disclosure requirements for credit card accounts. Before a credit card account is used, the card issuer must provide the cardholder with a written initial disclosure, stating, among other things:

- the periodic (monthly) rate used to determine finance charges and the annual percentage rate of the finance charges;
 - when finance charges begin accruing and any grace period (a period where no interest or finance charges are made);
 - the method used to determine the balance upon which the finance charge is computed;
 - any fees or cash advances, late payments, exceeding the credit limit, transferring balance, and for a returned payment;
 - a description of the property or item purchased by the cardholder, if the lender keeps a security interest; and
 - a reference to a website established by the Federal Reserve at which consumers can obtain information about shopping for and using credit cards.
- Finally, the initial disclosure must contain a statement of the cardholder's billing rights under the federal Fair Credit Billing Act.
- The cardholder also must receive *periodic statements* (bills) when there is an outstanding balance on the account. The terms used in the periodic statements must be the same as those in the initial disclosure and must show:
- the previous balance of the account;
 - the transactions within the billing period;
 - credits to the account;
 - periodic rates;
 - the balance on which the finance charge is being computed;
 - the finance charge;
 - the grace period during which the balance must be paid to avoid additional finance charges;
 - the annual percentage rate and any other charges;
 - the closing date of the billing cycle; and
 - the address for notices of billing errors.
- In addition to the initial disclosure and periodic statements, the card issuer must provide the following:
- an annual statement of billing rights, if billing rights are not stated on each periodic statement (bill);

- a written notice of any changes in terms of the contract on the account (such notices must be made at least 45 days before the effective date of the change); and
- the existence and amount of any surcharge.

As noted above, the card issuer must tell cardholders that they have the right to challenge billing errors. (For example, you purchase lunch for \$10, but later look at your bill and discover that you were charged \$100.) In summary, the procedure for challenging billing errors is as follows:

- The cardholder must give the card issuer written notice (a billing error notice) of any billing error within 60 days after receiving the first statement (bill) containing the error.
- The card issuer must resolve the dispute within 90 days of receipt of the billing error notice. If the dispute is not immediately resolved, the card issuer must acknowledge receipt of the cardholder's billing error notice within 30 days of receiving it.
- The cardholder need not make payments on the amount in dispute and the card issuer may not charge interest on, or attempt to collect, the amount in dispute. Further, the card issuer may not issue any credit reports that would adversely affect the cardholder's credit rating until the dispute is settled. In fact, it is a violation of federal law for the card issuer or its agents to threaten to make an adverse credit report on account of the consumer's failure to pay the disputed amount.
- Upon identifying the billing error, the card issuer must correct the error and send a written notice of correction to the cardholder.
- If a billing error did not occur, the card issuer must send the cardholder a written explanation and may then bill the cardholder for the amount due, including finance charges on the disputed amount.

Retail Installment Sales

An individual who finances a new car likely will be participating in a retail installment sales transaction. A *retail installment sale* is any transaction where the purchase price is paid over time in periodic payments. In this type of sale, the buyer always gives the seller an installment note and a security interest or *lien* (like a mortgage) on the items purchased, which permits the seller to repossess the items if the debt is not paid. Sometimes the contract, security agreement and note are all included in one form. (The previous section discussing disclosure for credit cards is an example of the required kind of disclosure.)

Balloon Notes

A buyer signs a *balloon note* when promising to pay a series of small installments and a final large installment (or balloon payment) for the remaining balance. Balloon notes are permitted in consumer transactions only if the note specifically allows the buyer to refinance the balance due on the final installment at the same, or better, terms as the small installments.

For example, Joe buys a used car for \$1,000. He makes a down payment of \$100 and finances the balance of the loan for two years at an interest rate of X percent. With the finance charges added to the unpaid balance, Joe normally would pay monthly installments of more than \$50. To reduce these payments, Joe could secure a balloon note requiring 23 installments of \$35 each and a final installment of \$397. According to Ohio law, Joe must be allowed to refinance the final installment amount at the same interest rate of X percent, or less.

Acceleration of Payments

If the buyer is more than 30 days late on a payment in a consumer transaction, the seller may demand that the payments be paid more quickly, or *accelerated*. Stated differently, the seller can demand that the entire remaining balance be made immediately since, by delaying payment, the buyer has defaulted on the loan.

Interest Refund

A buyer who pays off the balance of a loan before the final payment is due is entitled to a proportionate refund on any interest or finance charge that was included in the original loan amount.

Home Solicitation Sales

Paramount's 1987 film, *Tin Men*, parodied the door-to-door aluminum siding sales industry of the early 1960s. The film shed light on abuses that had become common in sales made at consumers' homes. Such abuses led Ohio and other states to pass laws controlling home solicitation sales.

Common abuses included:

- deception and high-pressure salesmanship;
- the sale of goods and services the consumer did not want or need; and
- the sale of inferior goods and services at grossly inflated prices.

Another common abuse involved the business practices of transient salespersons. Door-to-door salespeople would sell the consumers' promissory notes—their written promise to pay—to finance companies or banks for less than the face amount of the note before leaving the area. In effect, they left the consumer owing a finance company or bank, but did not provide the name of a person or company to contact about any problems with the sale or with the goods and services. Note, however, that the good-faith sale of promissory notes

at a discount by sellers of goods and services is a common and legitimate business practice.

Basic Requirements for a Home Solicitation Sale

In a *home solicitation* sale, the seller closes the transaction at the buyer's home following a personal solicitation. An example would be the purchase of a vacuum cleaner from a door-to-door salesperson. Home solicitation sales do *not* include:

- sales under \$25;
- sales of real estate, insurance, stocks, bonds, or cars or automotive services (when licensed brokers or dealers in such items are making the sales); or
- sales at auctions.

To be valid, a contract for a home solicitation sale must be in writing and must contain substantially the same language used in the sales pitch. That is, the salesperson cannot say one thing and write something else into the contract.

If the sale is made on an installment plan, the laws on retail installment sales apply to such transactions and must be followed. The contract must contain a *cancellation notice* (a clear description of the buyer's right to cancel) and clear instructions on how the buyer can cancel the contract.

Right of Cancellation

A buyer in a home solicitation sale may cancel the contract at any time within three days (the grace period) after it is signed by providing a written notice of the cancellation to the seller. If the sale is cancelled, the seller must return any money paid, plus any trade-in or deposit. Also, the seller cannot discount the note until five days after the sale, nor can the seller *negotiate* (transfer) the note after the sale has been cancelled. In such cases, the note must be returned to the buyer. If the note is negotiated, the laws on retail installment sales apply and

the *transferee* (the person or entity who received the note from the seller) must notify the buyer of the transfer and give the buyer 15 days to say why the note is not valid. For example, the buyer may state that the note is not valid because he or she had cancelled the transaction within three days. A buyer who cancels a home solicitation sale must return any goods in substantially as good a condition as when the buyer received them.

When an individual buys something for \$25 or more from a home sales representative, he or she has until midnight of the third business day to legally cancel the transaction. In return, the company must give the buyer a notice of cancellation form along with a copy of the signed contract, and must provide a valid address to which the cancellation notice is to be sent.

Purchase of New Motor Vehicles (Ohio's Lemon Law)

Ohio's "lemon law," enacted in November 1987, protects consumers against manufacturers' defects that substantially impair the use, value or safety of a new motor vehicle, either purchased or leased. These defects must be reported in the first year or within 18,000 miles, whichever comes first. The law protects passenger cars, light trucks (no more than one ton capacity and not used for business), motor homes (vehicle portion only) and motorcycles. If the manufacturer is unable to repair the defect after a reasonable number of repair attempts, the consumer may be eligible for a refund or replacement. The manufacturer is presumed to have made a reasonable number of repair attempts if any of the following have taken place within the first year or 18,000 miles, whichever occurs first:

- There have been three or more attempts to repair one problem and the problem either continues to exist or reoccurs.
- The vehicle has been out of service for repair for 30 days or more.
- There have been eight or more attempts to repair different defects that substantially impair the use, value or safety of the vehicle.

- There has been one attempt to repair a manufacturer's defect that could result in serious injury or death and the problem continues to exist or reoccurs.

(For more information about Ohio's lemon law, see www.ohioabar.org/lawyocanuse. Type the word "lemon" in the search box.)

Other Consumer Credit Transactions

Other means of extending consumer credit are through electronic fund transfers, small loans and payday lenders.

Electronic Fund Transfers

The Electronic Fund Transfer Act establishes the basic rights, liabilities and responsibilities of individuals who receive electronic transfers to their accounts and make debit card transactions using electronic fund transfer machines, more commonly known as *automatic teller machines* (ATMs) and point-of-sale terminals. The terms and conditions involving an individual's account must be disclosed in understandable language when such transactions occur.

In addition to certain other specific requirements, the disclosure must include:

- the consumer's liability for unauthorized transfers;
- the person or office to contact with questions;
- a statement of any charges assessed for the service;
- the circumstances under which the financial institution will, in the ordinary course of business, disclose information about the customer's account to third persons;
- the consumer's right to stop payment of a pre-authorized electronic fund transfer and how to initiate a stop payment order; and
- a statement of the consumer's right to receive documentation of electronic fund transfers.

Gramm-Leach-Bliley Act

Signed into law in 1999, the Gramm-Leach-Bliley Act requires financial institutions to give customers notice about its privacy policies and practices when initiating the customer relationship, and annually once a customer relationship is established.

Banks, credit card issuers and all other types of businesses that offer financial products and services to consumers are required to protect the privacy of non-public, personal information about customers. Such institutions may not disclose non-public personal information to non-affiliated third parties, unless the financial institution meets various disclosure and opt-out requirements, and the customer has not chosen to opt out of the disclosure. This means financial institutions must send out initial and annual notices of their privacy policies to customers, notifying them of their right to maintain the confidentiality of personal or private (protected) information with non-affiliated entities, except in limited cases.

Small Loans

All loan companies must be licensed by the state of Ohio. According to state law, loan companies are allowed to make small loans—up to \$5,000—at special interest rates. They may charge up to 28 percent per year on the first \$1,000 and 22 percent on loans of more than \$1,000. Interest rates are negotiable, meaning buyers can shop for the best interest rate and terms. Sellers of money as well as sellers of merchandise can change the terms of their documents, and interest rates on this type of transaction might fluctuate.

Payday Lenders

Payday lenders make small, short-term, high-rate loans, called payday loans, cash advance loans, check advance loans, post-dated check loans or deferred deposit check loans. Typically, an individual writes a personal check payable to the lender for an amount, plus a fee. The lender gives the individual the amount of the check, minus the fee. An individual who extends the

loan for payment at a later time pays a fee for each extension.

The federal Truth in Lending Act requires payday lenders to disclose the cost of payday loans. Individuals must receive, in writing, the dollar amount of the finance charge and the annual percentage rate.

Payday or cash advance loans secured by a personal check are very expensive credit. Throughout the 1990s, state public interest research groups and the Consumer Federation of America studied payday lenders and found they were making short-term consumer loans of \$100 to \$400 at legal interest rates from 390 percent to 871 percent in states where payday lending was allowed.

Under Ohio law, check-cashing businesses can make loans provided that each loan meets all of the following conditions:

- the total amount of the loan is not more than \$500;
- the length of the loan is not less than 31 days;
- the length of the loan is not more than six months;
- the interest on the loan is not more than five percent per month, and no unpaid interest can be deducted from the loan proceeds or paid in advance;
- the loan is under a written contract;
- the contract states the terms and conditions of the loan;
- the contract discloses the total amount of the fees, charges and the rate of interest, calculated both as an annual percentage rate based on the loan principal and as an annual percentage rate based on the sum of the loan principal plus any loan origination fee, check collection charge or other fee under the loan contract;
- any loan origination fee is not more than \$5 per \$50 of the loan amount;
- the contract states the total amount of each payment, when each payment is due, and the total number of payments that will be made under the loan contract;

- the contract contains a highly visible statement, warning that the rate of interest charged on the loan is higher than the average rate of interest charged by financial institutions on substantially similar loans; and
- the loan is not made for the purpose of paying off an existing payday loan.

Additionally, Ohio law limits payday loans to a single borrower to four per year and payday lenders may not make more than two loans to one borrower within a 90-day period.

Bankruptcy

No discussion of business law would be complete without an examination of bankruptcy. The U.S. Bankruptcy Court is part of the federal court system. (*See Part II, "The Courts."*) Individuals and businesses use bankruptcy as a way to obtain relief from debts owed to creditors. Title 11 of the *United States Code* governs bankruptcy. The *U.S. Bankruptcy Code* has been amended several times since it was enacted in 1978, most recently with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. As federal law, it supersedes any conflicting state law, and with the exception of certain exemptions, it is fairly uniform from state to state.

Types of Bankruptcy

There are four kinds of bankruptcy proceedings, named for the chapters of the Bankruptcy Code that describe them. The chapter best suited for a business or individual depends on the nature of the debts and the nature and value of assets.

Chapter 7

Chapter 7 bankruptcy, known as a *straight liquidation*, is available to qualified individuals, married couples, corporations and business partnerships. A Chapter 7 trustee, assigned by the U.S. Trustee's Office or chosen by the creditors, *liquidates* (sells) any assets that are not protected

by the court (*non-exempt assets*) to pay all or a portion of the debts owed to creditors. Depending on where the individual debtor lived before filing bankruptcy, he or she may be entitled to keep (or *exempt*) some or all of the equity in certain kinds of property (such as a house, car, boat or household item).

Unless the money raised from the sale of the property is expected to be greater than these exemptions and any liens or mortgages, the trustee may decide to abandon the item of property, meaning that the debtor gets to keep it. Through this liquidation process, any debts not paid by the trustee, with certain exceptions, will be *discharged* (eliminated), and creditors cannot force the debtor to pay any remaining amount owed.

Chapter 13

Chapter 13 of the Bankruptcy Code provides for an *individual reorganization*, an alternative to Chapter 7 that generally allows a debtor to keep personal property. A Chapter 13 debtor must have regular income and meet certain debt and asset limits. Effective Oct. 17, 2005 under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, individuals who earn more than the median income in the state where they lived before filing bankruptcy, and who can repay at least \$6,000 of their debt over five years, are no longer eligible to have all their debts eliminated.

Instead, these individuals must repay their creditors over time and enroll in a financial counseling program. Under Chapter 13, an individual debtor submits a plan detailing how all of his or her debts will be paid from disposable monthly income (income after providing for ordinary living expenses) over a period of time of up to five years. A plan or reorganization is monitored by a Chapter 13 trustee and supervised by the bankruptcy court. A Chapter 13 debtor must pay creditors at least as much as they would be paid if the debtor's assets had been liquidated in a Chapter 7 case.

Chapter 11

Corporations or other businesses typically use Chapter 11 reorganization as an alternative to Chapter 7 liquidation. It also may be available for individuals who do not qualify for the Chapter 13 individual reorganization because they cannot meet the debt and asset limits, or for those who do not wish to reorganize under Chapter 13.

In a Chapter 11 reorganization, as in a Chapter 13 reorganization, the business debtor may keep certain property and be required to pay creditors with future earnings according to a reorganization plan.

Chapter 12

Chapter 12 is a special reorganization for family farmers. To qualify, a family farmer must earn most of his or her income from family farming operations.

Process of Filing for Bankruptcy

To file for bankruptcy, the debtor files a petition with the appropriate bankruptcy court and pays a filing fee, unless that requirement is waived by the bankruptcy court. In addition to filing a petition, the debtor must provide the court with detailed information about assets and liabilities on documents called *schedules*. These documents must include an accurate list of everything owned and everything owed to creditors, as well as personal information concerning employment and transfers of money or other property the debtor may have made before filing for bankruptcy.

After these documents are filed, the debtor meets with a trustee. The debtor's creditors are invited to this meeting. The trustee checks the petition and schedules for accuracy. Also, the trustee and creditors may ask questions about the debtor's financial situation.

In a Chapter 7 case, the debtor must provide the trustee with any non-exempt property or its value in cash. If no creditor objects, claiming that a particular debt is not dischargeable (for example, because it was incurred by fraud), the

court will issue a discharge of all qualifying debts in about three to six months after the original bankruptcy filing. At that point, the case is complete.

In a Chapter 13 proceeding, the debtor files the same forms and a proposed repayment plan. The plan describes how the debtor intends to repay the debts over the next three to five years. Again, the debtor and trustee hold a meeting with the creditors to give them a chance to review and question the schedules. After the meeting, the debtor attends a hearing before a bankruptcy judge who either "confirms" or "denies" the plan. If the plan is confirmed and all the payments under the plan are made, the debtor often receives a discharge of any remaining balance owed.

Exemptions

The *U.S. Bankruptcy Code* and *Ohio Revised Code* include a list of items bankruptcy filers are permitted to keep from creditors during the bankruptcy proceedings. These items are called *exemptions*. Again, depending on where the individual debtor lived before filing bankruptcy, he or she maybe entitled to keep (or *exempt*) some or all of the equity in certain kinds of property. In general, the exemptions available to debtors are as follows:

- **Equity in the home:** The homestead exemption may allow debtors to protect all or some of the equity in their homes.
- **Insurance:** Debtors may be permitted to keep the cash value of their life insurance policies.
- **Retirement plans:** Pensions that qualify under the Employee Retirement Income Security Act (ERISA) are fully protected from bankruptcy proceedings. In addition, many other retirement benefits are protected; however, IRAs and Keoghs are not.
- **Personal property:** Most household goods, furniture, furnishings, clothing (other than furs), appliances, books and musical instruments are exempt up to a certain amount. Debtors may be limited in how much jewelry they can keep. Most states allow a debtor to keep a vehicle if the debtor has paid off more

than \$2,400 of the vehicle debt; many states give debtors a prescribed (or “wild card”) amount of money that they can apply toward any property. Ohio permits \$1,175 of wild card money.

- **Public benefits:** All public benefits, such as welfare, Social Security and unemployment insurance, are fully protected.
- **Tools used on the job:** Debtors may be able to keep a few thousand dollars worth of tools used in their trade or profession.
- **Wages:** In most states, including Ohio, the debtor can protect at least 75 percent of wages that have been earned but not yet paid.

Discharge of Debts

Individuals frequently opt for a Chapter 7 bankruptcy because the debtor receives a discharge of most unsecured debts within several months of filing the case. If the debtor’s income appears high enough to permit some repayment of debt, the trustee or the court may move to dismiss the case for substantial abuse. The theory is that allowing someone with the ability to repay to file Chapter 7 and avoid repayment abuses the bankruptcy system. This is why Chapter 13 is often a better choice for debtors if they:

- have debts that cannot be discharged in Chapter 7;
- default on mortgages or car payments;
- own more property than can be exempted from creditors in Chapter 7;
- owe taxes or other debts that are not discharged under Chapter 7.

Chapter 11 bankruptcy is a form of reorganization available to individuals, corporations and partnerships. It is the typical choice for large businesses seeking to restructure their debt. The debtor entity usually remains in possession of its assets and operates the business under the supervision of the court and for the benefit of creditors. A Chapter 11 plan is allowed only with a vote of

approval by creditors, who are divided into classes based on the characteristics of their claims, and whose votes are allocated based on the amount of their claims against the debtor.

The filing of a bankruptcy petition does not guarantee the discharge of debts. The bankruptcy court may deny a general discharge of debts if the debtor commits certain acts of misconduct before or after filing the bankruptcy petition, such as destroying, concealing or removing assets that might otherwise be used to pay creditors. Also, a discharge of debts may be denied if the debtor has destroyed or concealed records that show what assets are available to pay creditors. Finally, the bankruptcy court may deny a general discharge if the debtor has lied under oath during the bankruptcy case, or has refused to answer questions without a good reason. In addition to acts of misconduct, a debtor will not be granted a general discharge if he or she has obtained a discharge in a Chapter 7 case within six years of the date that a second bankruptcy is filed.

Even if a general discharge is granted, some debts are not discharged in bankruptcy. Also, the type of bankruptcy affects which debts may be discharged. Generally, more debts are discharged in Chapter 13 than in Chapter 7. Congress provided for greater relief under Chapter 13 as an incentive to encourage debtors to repay their debts through a reorganization plan.

Debts that are generally not discharged in bankruptcy include taxes assessed within 240 days of the bankruptcy filing, certain student loan debts, some child or spousal support debts arising from a divorce, criminal fines and debts arising from operating a vehicle while impaired (OVI), and any debt incurred because the debtor has committed fraud, breached a fiduciary duty as a trustee, or committed a “willful” act causing injury to a creditor. The bankruptcy court ultimately decides whether these types of debts will be discharged based on a particular debtor’s circumstances.

Common Sense in Business Transactions

Individuals and businesses often find themselves in difficult situations because they do not wisely manage their business affairs. This is particularly true when it comes to consumer credit transactions. Most troubles of this kind can be avoided by following five simple rules:

- use credit sparingly;
- stay within a written budget;
- understand the terms of business transactions before entering into them;
- meet personal or business obligations, but if trouble arises in meeting those obligations, let the other party know immediately; and
- keep accurate records.

Use Credit Sparingly

Consumer credit can be expensive and should be used carefully. In the long run, it may be better to pay cash and use the money saved on interest to buy more goods and services. Often individuals buy things because they believe they have an immediate need. Usually, however, it is smarter to save and pay cash later rather than to buy now on credit and pay more in interest. Further, regular savings through a bank, credit union, or investment can make an individual's savings grow.

Stay Within a Written Budget

Individuals should not commit to payments they may have trouble meeting. It is wise to pay the essentials first, such as housing, health care, transportation, food and clothing, saving a little extra for emergencies and leisure. Many individuals have discovered that adhering to a written budget is extremely valuable to their financial planning and helps limit the number of impulse purchases.

Further, do not calculate overtime pay when determining long-term payments. The fact that

an individual is currently getting substantial overtime pay is no guarantee that the overtime will continue.

Understand the Terms

Entering into a business transaction without fully understanding the particulars is like hiking an unfamiliar mountain trail in the dark. It is unwise and you may get hurt.

You should understand your rights and obligations. Read and understand all paperwork, and do not sign anything with blank spaces on it; everything should be filled in, or crossed out if it does not apply. Do not rely on sales talk. Rely only on what is written in the contract, note, security agreement, mortgage or other papers that formalize the agreement. Consult a lawyer if you cannot understand the terms of a contract or agreement. A lawyer can greatly assist in providing guidance before you close a particular deal.

Meet Personal or Business Obligations/Pay on Time

Keep your promises once you make them. A good credit rating is invaluable. A bad credit rating can restrict you financially and may prevent you from obtaining credit in the future, or make future credit more expensive. In fact, a bankruptcy filing likely will remain on your credit report for seven years leaving you with limited credit options during that period.

If you have trouble making payments on time, contact your creditors to discuss the situation. Creditors are often willing to adjust or temporarily delay payments.

People in the business of extending consumer credit know that if they pressure a debtor in financial trouble too much or too quickly, they may destroy the debtor's ability to eventually make complete payment. A debtor who does not contact creditors when in financial difficulty may give the creditors the impression that the debtor has no intention of paying.

Keep Accurate Records

It is important to keep:

- copies of all signed papers;
- copies of all correspondence concerning purchases and payments;
- records of all tax payments in case a dispute, error or question arises; and
- mortgage and home-equity loan records as proof of the interest paid on these loans, which may be deductible for federal income tax purposes.

Business Organizations

The law of business organizations concerns the various forms of businesses, such as corporations, limited-liability companies and partnerships, and the legal consequences that arise from each form of business.

Business Formation in General

There are several legal forms that a for-profit business can take. Each form requires complicated legal and taxation decisions that can affect the business entity and its owners far into the future. New businesses must consider the following issues:

- start-up expenses;
- the management structure desired;
- personal liability issues;
- tax consequences; and
- the continuing legal requirements imposed on the business form by statutes and regulations.

Most businesses choose from among the following forms: sole proprietorship; partnership; limited liability company; or corporation.

Sole Proprietorship

Sole proprietorship offers the simplest form of organization, combining ownership and management in one person. The business has no

separate existence. The owner is directly affected by business profits as well as losses. Income is taxed on the owner's personal return and not at the business level (business activity is shown on a separate schedule). Sole proprietorships are popular, but a disadvantage is that sole proprietors are completely and personally liable for business obligations. This means that their personal assets, such as homes and automobiles, are not protected from debt obligations. A sole proprietor can start a business at any time, but must obtain any needed licenses and obey employment laws.

Partnership

There are various kinds of partnerships: general partnerships, limited partnerships and limited liability partnerships. A *partnership* is similar to a sole proprietorship; however, it involves two or more owners operating a business for profit. As in a sole proprietorship, the partners pay the partnership taxes themselves (the partnership must file a tax return to show its taxable income and allocate it among the partners according to their interests). Also, in a general partnership, all the partners are personally liable for business obligations.

Ohio recognizes three partnership forms:

- The *general partnership* involves two or more owners conducting a business for profit. General partners share equally in the right and responsibility to manage the business, and any individual partner can bind the entire group to a legal obligation. Each individual partner assumes full responsibility for all of the business's debts and obligations. The tax advantage of a general partnership is that profits or losses are not taxed to the business, but pass through to the partners, who include the gains on their individual tax returns at a lower rate or use the losses to offset other ordinary income. No formal filing is required to create a general partnership, though if it is operating under a name other than that of its partners, it may need to file a certificate with the county recorder's office.

- The *limited partnership* can be formed only by filing a certificate of limited partnership with the secretary of state. Once formed, a limited partnership offers personal liability protection for some of its participants. The “limited partners” have no voice in managing the business and are not liable for its debts. However, as in a general partnership, limited partners are liable for the tax on their shares of the partnership income. Every limited partnership must have at least one general partner who manages the partnership and is liable for its debts.

Ohio does not require a written partnership agreement. In the absence of an agreement, the rights and obligations of the partners in a general partnership are determined by Ohio’s version of the Uniform Partnership Act. Ohio’s Revised Uniform Limited Partnership Act governs the rights and responsibilities of limited partnerships. However, it is wise for partners to define these matters for themselves through a written partnership agreement. Such efforts may help settle disputes if they arise.

- The *limited liability partnership* is similar to the general partnership, except that a partner in an LLP is not personally liable for the negligence or wrongful acts of other partners or of employees who have not been directly supervised by a partner. The partner is still personally liable for contracts entered into by anyone on behalf of the partnership. To create a limited liability partnership, a registration application must be filed with the secretary of state, and a report must be filed with the secretary of state every two years.

Incorporation

The *corporation* is a separate legal entity that is liable for its own taxes and obligations. This form insulates the owners, directors and officers of the business from personal responsibility for taxes and debts. A corporation can sell

ownership interests, or shares, in the company to raise capital. Two different kinds of tax treatment are available for corporations, depending on whether the corporation qualifies for, and elects to be taxed under, Subchapter S of the *Internal Revenue Code*.

A corporation is formed by filing articles of incorporation with the secretary of state. Various other formalities, such as electing directors, adopting regulations and accepting subscriptions for shares, need to be carried out before the corporation begins to operate.

C-Corporations

A *C-corporation* is a corporation that has not elected special tax treatment under the *Internal Revenue Code*. It is subject to corporate income tax on its profits and its shareholders are generally taxed on any dividends at a maximum rate of 15 percent. The application of these two layers of tax is sometimes referred to as *double (or dual) taxation*.

One advantage of establishing a C-corporation is that income tax brackets are lower than individual rates for the first \$75,000 of income. Due to double taxation, however, the shareholders benefit most if earnings are retained and reinvested rather than paid out to shareholders as dividends. A C-corporation has the flexibility to create different classes of stock containing varied distribution and voting rights.

One of the disadvantages of C-corporation status is double taxation (described above), and another is the trapping of losses in the corporation. This means that losses are suspended and carried forward until they can offset corporate income. Shareholders of a C-corporation cannot use losses to offset their individual income as owners in a sole proprietorship or partnership can do. Finally, in Ohio and many other states, the C-corporation is subject to a separate state franchise tax, which does not apply to S-corporations or limited liability companies (LLCs).

S-Corporations

An *S-corporation* is a corporation that has elected to have its income and losses taxed like a partnership. The chief advantage of an S-corporation is the ability to obtain limited liability while eliminating the second layer of taxation. Also, shareholders can use corporate losses to offset their income from other sources.

One disadvantage of an S-corporation is its rigid structure (only one class of stock is permissible). Also, the number of shareholders is limited to 75, and there are restrictions on who can be a shareholder. Only individuals, estates and certain trusts and tax-exempt entities can be S-corporation shareholders. Corporations and other entities generally cannot own S-corporation stock.

Limited Liability Companies

The *limited liability company* is Ohio's newest form of business entity. Its owners are identified as members. To form an LLC, articles of organization must be filed with the secretary of state. Fewer formalities are required in the ongoing operation of an LLC than are required for a corporation. Members of an LLC are not liable out of their personal assets for debts or obligations of the business, unless they have specifically agreed to personally guarantee the debt. Members are liable only for the amounts they have agreed to invest in the business.

An LLC may elect to be taxed under the same rules that apply to partnerships. This means that the business itself only files an information return with the IRS, and the income and losses of the limited liability company are taxed to the members on their personal income tax returns. The LLC, unlike the S-corporation, can create different classes of membership interests having different preferences in earnings and different distribution rights upon liquidation.

An LLC may be managed by all its members, just as a general partnership is managed by all its partners. Alternatively, the members can be creative in developing a management structure. The LLC can be managed by a manager, by a board,

or by a combination of members and managers. As a result, the LLC structure, as described in its operating agreement, can resemble that of a corporation, a partnership or something in between.

One of the disadvantages of the LLC is that employment taxes apply to all LLC distributive shares of member-employees. Also, because LLCs are a relatively new type of entity, there may be issues regarding LLCs upon which the courts have not yet ruled. In the area of taxation, however, members can turn to the body of partnership law for answers if the LLC has not opted out of pass-through taxation.

Most owners desire the protection of limited liability. Both corporations and LLCs afford their owner-employees limited liability from obligations and liabilities of the company. In choosing among the various business entities, the facts and circumstances of each business must be considered. For many businesses that wish to avoid the double taxation of a C-corporation, but want flexibility in management and distributions, the LLC is an increasingly popular choice.

Nonprofit and Tax-Exempt Organizations

A *nonprofit corporation* is a corporation that is not formed for its members' financial gain or profit. The net earnings of a nonprofit corporation are not distributed to its members, directors, officers or other private persons. A nonprofit corporation must follow the specific guidelines set forth in Section 501(c) of the *Internal Revenue Code* of 1986 if it wishes to obtain an exemption from federal and state taxes that might otherwise be imposed upon the income it receives. Nonprofit corporations that qualify as charitable, religious, scientific, literary or educational organizations under Section 501(c)(3) also may receive contributions that are tax-deductible to their donors. The government has granted special tax treatment

to nonprofit organizations because of the benefits the public derives from them. Many states also regulate nonprofit corporations that engage in certain charitable activities.

Structuring an organization as a nonprofit corporation protects its directors, officers and members from personal liability for the corporation's debts and liabilities. Of course, its directors and officers remain personally liable for their own negligence in carrying out their duties to the nonprofit organization.

For Journalists: Covering Business Transactions and Organizations

Covering the law of business transactions and organizations mostly involves following and researching the detailed paper trail of business establishments, much like covering contract law (Section VI). Journalists covering credit card, loan or bankruptcy stories are advised to spend time reading about the law, comparing that law to the notices issued by businesses regarding these issues, talking to attorneys involved in disputes and talking to business spokespersons about the disputes. As when covering other areas of the law, journalists need to understand the subtle differences in business and consumer options. For example, in

stories about bankruptcy, readers and viewers are likely to understand more about bankruptcy when they understand the choices consumers and businesses can make when filing for bankruptcy (for example, the differences between Chapter 7 and Chapter 13 bankruptcies.) More recently, the federal government's bailout of whole industries, such as the auto and banking industries, has required local reporters to understand the impact of federal policy on local business developments. Bankruptcies and foreclosures are popular media topics that are increasingly affected by continuous changes in federal policy, which in turn have had an impact on Ohio law.

Often, the job of the reporter in covering this area of the law is simply to educate. Unlike the criminal trial, in which the reporter's goal may be to tell the public about how its government is trying to ensure safety and punish criminals, the reporter covering a credit card story or a bankruptcy filing plays a critical role in educating the public about consumer and business protection issues. In many cases, the media may be the first and only contact the consumer or business has about this aspect of the law.

Because such laws and regulations are often intricate, experienced legal reporters often try to represent such laws in graphic form. Writers are encouraged to employ the help of graphic artists and web designers who can often communicate such important intricacies in the form of charts, visual graphic devices and online links for more information.

Chapter Summary

- Special sets of rules govern many daily business transactions.
- Business transactions may involve several major fields of the law, particularly the law of contracts and the law of property.
- Ohio and other states have adopted the *Uniform Commercial Code* (UCC) to govern a wide range of commercial transactions that may cross state lines.
- Checks and promissory notes are the most common forms of commercial paper. Drafts, bills of exchange and certificates of deposit also are common forms.
- Commercial paper is transferred or negotiated by *endorsement*.
- *Holder in due course* is a doctrine giving some assurance to individuals (or entities) who were not parties to an original transaction that the commercial paper (or “negotiable instrument”) is valid.
- The maker of a *cognovit* note acknowledges the debt and authorizes the creditor to enter a judgment against him or her without notice or a hearing in case of default. In Ohio, *cognovit* notes cannot be used in consumer transactions.
- Consumer transactions often depend on the use of credit.
- State and federal laws cover most consumer transactions, including those involving credit.
- The credit card is perhaps the most widespread method of extending consumer credit.
- A credit card represents the credit card holder’s contract with the card issuer to maintain a revolving charge account in the cardholder’s name. This allows the cardholder to use the card to buy goods and services.
- A *retail installment sale* is any transaction where the purchase price is paid over time by making periodic payments.
- In a retail installment sale, the buyer always gives the seller an installment note and often a security interest or lien (similar to a mortgage) in the items purchased, permitting the seller to repossess the items if the debt is not paid.
- In a home solicitation sale, the seller (commonly known as a door-to-door salesperson) comes to the buyer’s home to solicit and close the sale.
- “Lemon laws” protect consumers who buy or lease vehicles by requiring manufacturers, under certain circumstances, to replace or buy back defective vehicles that cannot be or have not been properly repaired in a timely manner.
- Consumers also may get credit through electronic fund transfers, small loans and payday lenders.
- *Bankruptcy* is a process designed to help consumers and businesses eliminate their debts or repay debts under the protection of the bankruptcy court.
- The law of business organizations concerns the various forms of businesses, such as corporations, limited liability companies and partnerships, and the legal consequences that arise from each form of business.
- A *nonprofit corporation* is a corporation not formed for financial gain or profit, and none of its net earnings may be distributed to its members, directors, officers or other private persons.

Web Links:

From the OSBA's Law Facts pamphlet series:

www.ohioabar.org/lawfacts (search by title)

“What you should know about ... Bankruptcy”

From the OSBA's “Law You Can Use” column:

www.ohioabar.org/lawyoucanuse (search by title or topic)

“Bankruptcy Law Limits Filing Choices”

“Consumer Sales Practices Act Addresses Predatory Lending Issues”

“Consumer Sales Practices Act Affects Mortgage Brokers, Appraisers and Lenders”

“Consumers Should Exercise Care When Purchasing Health Products Online”

“Consumers Use Arbitration to Settle Lemon Law Disputes”

“Credit Repair: You Can Do It Yourself”

“Federal Law Restricts Activities of Debt Collectors”

“Franchise Laws Protect Investors”

“Guard Against Identity Theft”

“Holiday Spending with Credit Cards: How Much Do You Know About It?”

“How Do Consumer Class Action Lawsuits Work?”

“Member-Owned Credit Unions Offer Banking Alternatives”

“Ohio's Lemon Law Protects Consumers”

“Some Contracts Can Be Cancelled within Three-Day Period”

“Stores Must Honor Shelf Prices”

“To Lease or Buy: Know the Differences before You Decide”

“Use Caution When Considering Foreclosure and Debt Mitigation”

“What Consumers Should Know before Selecting a Credit Counseling Agency”

“What You Should Know about Being a Smart Bank Customer”

“What You Should Know about Online Shopping”

From Nolo.com:

www.nolo.com

Links to resources and information of interest to small businesses

Search by topic: under bankruptcy, personal finance and retirement

Continued on page 108

Web Links *continued*

From the Ohio Attorney General's website:
www.ohioattorneygeneral.gov/consumers

From the federal government:
www.donotcall.gov
www.usa.gov (type "consumer" in search box)

From the Consumer Federation of America:
www.consumerfed.org

From Findlaw:
www.findlaw.com
Legal topics: bankruptcy and debt; consumer protection

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Berkeley, CA: Nolo.com, 2010.

The American Bar Association Legal Guide for Small Business. Second Edition.
New York: Random House, 2010.



Part VIII

property law

“To those who are engaged in commercial dealings, justice is indispensable for the conduct of business.”

– Cicero

Buying property is considered a vital part of living the “American Dream.” While most people buy property for personal enjoyment, some individuals make a business of buying, selling, leasing, or renting real property. So, whether someone is a homeowner, business owner, real estate magnate, or merely interested in purchasing land as an investment, it is important to understand the large and complex world of property law and, in particular, real property law.

Kinds of Property

The word “property” has many meanings. In a strict legal sense, it signifies ownership. As a practical matter, it refers to objects that can be owned. The two main classifications of property are *real property* and *personal property*. Real property law deals with land, fixtures on land, and rights and other intangible interests relating to land that are capable of ownership. Real property may include land, a single-family house, a condominium or a vacation home. Personal property is anything that is not related or attached to real estate; it may be tangible or intangible. Personal property might include cars, clothes, furniture, refrigerators, tools and cash as well as various rights or interests such as stocks or bonds.

(Different aspects of personal property law are also addressed in Part VI, “Contracts,” and Part VII, “Business Transactions and Organizations.”)

Real Property

The terms *real property*, *real estate* and *realty* refer to land, buildings and other fixtures on land. They also refer to different kinds of interests in

land and to various rights that go along with land or some interest in it.

The term *land* includes the actual surface area and everything under and above a parcel of ground. In the past, ownership of a parcel of land began at the center of the earth and extended through the boundaries of the parcel out into space. Today, the airspace above the parcel is not exclusive; it is considered to be part of the public domain and subject to rights of navigation, which means that members of the general public can travel through or use that airspace.

Generally, a *fixture* is something not naturally a part of the land, but affixed to the land in such a way that it cannot readily be removed without causing damage. Because buildings are usually affixed to land, they are thought of as real property. A furnace is personal property until it is installed, when it becomes a fixture. If something on the land is portable, such as a mobile home, it may or may not be considered part of the land, depending on how it is installed. For example, crops and trees are part of the land while growing, but become personal property when they are harvested. The same is true of minerals, which are part of the land in their natural state, but become personal property when mined, quarried, pumped or otherwise removed. Fixtures such as crops and minerals are sometimes referred to as mixed property, because they have some characteristics of both real and personal property.

There are many degrees of land ownership, ranging from full ownership—that is, including all rights relating to it, such as the right to sell it or give it away—to rental (permission from the owner to use a portion of the land for specific purposes). (Of course, all interests in property are subject to the rights of the community. Thus, even the full owner of real estate must comply with zoning and building codes, for example.)

Someone who has less than full ownership of land is said to have a *partial interest* in the land. Certain types of ownership carry particular rights, such as the right of a landowner to receive any rent the land might yield.

Personal Property

Personal property is anything that is not real estate or affixed to real estate. Personal property can be tangible or intangible.

Tangible personal property can be transported, seen and touched. Examples of tangible personal property include cars, clothes, furniture, refrigerators, tools and cash.

Intangible personal property includes various rights or interests that cannot be seen or touched. Examples include ownership of stocks and bonds, ownership of a debt and the right to bring a legal action. Stocks and bonds merely represent the value of the underlying interest; it is not the underlying interest. For example, a stock certificate represents an amount and kind of ownership interest in a particular corporation.

Personal property includes money in a bank account, interest in a joint bank account, or a payable-on-death account. A joint-and-survivorship bank account is an account in the names of two or more individuals who have an equal right to the assets in the account with ownership passing to the survivor(s) on the death of one of them. The *payable-on-death account* (POD) is an account owned by one person during his or her lifetime, which passes, on the owner's death, to one or more named persons.

Personal property is subject to a set of rules that is different from those governing real property. Because there is such a wide variation in types of personal property, a variety of rules govern its ownership and use.

Types of Real Property Ownership

When an individual is said to own real estate, it usually means that he or she is the full owner of a particular piece of property. Full ownership is only one of the ways to own real property. Or, someone with a lesser degree of ownership might have an interest in a property for a lifetime (called a *life estate*) or for a period of years, months or even weeks. Ownership also may be shared in various ways.

Property may act as security for debt, and the *security interest* is a kind of shared ownership. An individual may own an interest in real property merely by having the owner's permission to use it in a certain way, such as where the owner of a large yard allows the neighborhood children to play ball there. Many different kinds of interests can be separated from the full ownership and can be owned or disposed of separately. For example, the mineral rights of a piece of property can be sold while the property owner continues to own the land and live on it.

Fee Simple

Full ownership of real property is called *fee simple ownership*, *fee simple title* or, sometimes, *ownership in fee*. The distinguishing characteristic of a fee simple title from lesser degrees of ownership is the right to pass full ownership to someone else, whether during the original owner's lifetime or upon his or her death.

Fee simple ownership

also gives the right to...

- use the real property as the owner sees fit;
- allow others to use the property;
- limit the use of the property by other people;
- sell, rent or lease the property;
- collect rents or profits the property yields; and
- mortgage the property.

Fee simple ownership of real property is sometimes described as *absolute ownership*. This description is misleading because there are substantial limits on how a fee simple owner may use the real property. For example, the fee simple owner must pay taxes on the real property, abide by zoning and other restrictions on the use of the land, and honor the rights of others who own an interest in the land (tenants, lessees, mortgagees, holders of easements, etc.). Further, the fee simple owner's use of the land must not interfere with the rights of other landowners or the public.

Life Estate and Remainder Interest

A fee simple property owner can grant ownership of the property to another person for the duration of the other person's life. This type of ownership is called a *life estate*. The person who holds the life estate is called a *life tenant*. (The term *tenant* may be confusing. In this context, *tenant* does not refer to a participant in a rental arrangement, but to a kind of ownership in real property.) With certain important exceptions, a life tenant can treat the property in much the same way that a fee simple owner can treat the property.

For example, a life tenant has access to the property and is entitled to use the property, to lease it, and to retain any rents or profits the property may yield. However, by definition, the life tenant's interest in the property ends at his or her death. The life tenant cannot sell a fee simple

interest in the property. Further, the life tenant cannot destroy or waste the property because such action affects the rights of those who will own the property after the life tenant dies.

When a life estate is created, a *remainder interest* is also created. The person who holds the remainder interest (called the *remainderman*) automatically acquires the fee simple title to the property when the life tenant dies. The terms of the original grant determine whether the fee simple title stays with the remainderman. If no remainderman is named, fee simple ownership reverts to the original owner or to the owner's heirs upon the death of the life tenant.

Types of Joint or Common Ownership

In Ohio, there are currently two different forms of ownership of real property where two or more individuals own the property: *tenancy in common* and *survivorship tenancy*.

In a tenancy in common, each owner has an undivided, fractional share of the property. Depending on how the tenancy in common is created and the transactions that subsequently take place, the shares may be equal or unequal. Regardless of the size of an individual's share, each tenant in common enjoys full ownership of his or her share, and can sell, mortgage, use or dispose of it as a full owner. On his or her death, the tenancy passes to heirs or to those named in the will of the tenant in common.

For example, if one tenant wishes to take control of his or her rights in the property, or to obtain the monetary value for that part, the tenant may file a lawsuit to divide or partition the property. If partition is ordered, the property may be physically divided and a fee simple portion given to each tenant in common, or the property may be sold as a unit and the proceeds divided among the tenants in proportion to their respective shares.

In Ohio, a *survivorship tenancy* is a form of joint ownership created by statute. A survivorship tenancy is similar to tenancy in common, except that tenants have a right of survivorship. That is,

when one tenant dies still owning his or her share, the share passes automatically to the surviving tenant(s). Thus, a survivorship tenancy interest cannot be transferred by will, as the nature of this form of ownership is that it automatically passes to the survivor(s).

The right of survivorship may be ended where, for example, all tenants transfer or convey their interest to a third person.

In most states, the right of survivorship is automatically created when a joint tenancy (common ownership by two or more persons) is created. In Ohio, however, the right of survivorship must be specifically described in the document that creates it. The statute allowing joint tenancy with right of survivorship states that this law should be liberally interpreted to comply with the intent of the owners. However, the legal document that creates the joint tenancy must use clear survivorship language. If the document does not have such a provision, the result will probably be tenancy in common.

It should be noted that joint and survivor ownership is commonly used for both real property and personal property. A bank account with more than one name on it, for example, normally is joint and survivor property, because the signature card that opens the account usually contains survivorship language.

Tenancy by the entirety is essentially a survivorship tenancy created by a husband and wife. Ohio law allowed tenancy by the entirety from 1972 to 1984. Under that statute, each spouse owned the entire property and the entire ownership automatically transferred to the surviving spouse. Tenancy by the entirety can no longer be created in Ohio, although those interests that were created while the statute was in effect are still valid.

Condominium ownership created by statute is a hybrid of individual and group ownership. An individual condominium owner normally owns a portion of the property (such as one apartment) outright and a portion (the common areas) as a tenant in common. For example, each resident might be a fee simple owner of the unit and be a

tenant in common with other apartment owners as to halls, stairways, recreational facilities, walkways and other common areas, including the ground on which the building stands. Of course, because each owner has an interest in these common areas, he or she also must contribute toward their maintenance and repair.

Leasehold Estate

A property owner may give temporary possession and use of a particular property to another individual in return for the payment of rent or something else of value. If the owner does this by means of a written agreement called a *lease*, the party taking possession of the property acquires a *leasehold interest* or *leasehold estate*. In such a case, the landowner is called the *lessor* or landlord and the person to whom the property is rented is called the *lessee* or tenant. The term of the lease may be weeks, months, or years. Many residential property leases are for one year, whereas business property leases are often for five, 10, or 20 years or longer. A lease may provide one or more renewal options. An example of a renewal option is a provision that states the tenant may extend the lease for another year at a rate that will be adjusted by a certain formula. This provision gives the tenant the security of knowing that the lessor will not lease the property to someone else at the end of the term without first giving the tenant the right to stay.

Commonly, leases state that a tenant or lessee cannot sell a leasehold interest (that is, sublet the property or assign the lease to someone else, without the lessor's [owner's] permission).

If the lessor sells fee simple title to the property during the term of a lease, the new owner must honor the lease.

Sometimes a lease provides for automatic renewal: that is, if the lessee does not tell the owner he or she is going to leave the property at the end of the term, the lease is automatically renewed. Sometimes the lease will specify that a tenant's *holdover* (failure to leave the property) is not an automatic renewal of the lease term,

but converts the tenancy to one running from month-to-month, week-to-week, or at will.

Obviously, it is very important to read and fully understand the specific terms of a particular lease or rental agreement, as the terms can vary widely.

Tenancy from Month-to-Month, Week-to-Week, or at Will

Rental arrangements not bound by a lease may be either by the month or at the pleasure of the parties. (*See the “Landlord and Tenant” section later in this chapter for more information.*) Usually, when residential property is rented without a lease, it is on a month-to-month basis. The tenant is entitled to possession for one month at a time, and if he or she stays on the premises for even one day into the following month, occupancy is renewed for that entire month. One month’s notice by either the landlord or tenant generally is necessary to terminate a month-to-month rental agreement, and one week’s notice is necessary to terminate a week-to-week agreement.

Transient accommodations, such as furnished rooms, are often rented by the day, and rental arrangements of this sort can usually be terminated by either party without advance notice, that is, terminated *at will*.

Liens and Mortgages

A *lien* is a claim against property to secure the payment of a debt or the performance of some act. The most common form of lien is created when an individual mortgages his or her real property to another person to ensure repayment of a loan.

That is really what a mortgage is about: a bank loans a large amount of money to a real estate buyer, but nobody is likely to loan a buyer \$100,000 without some protection. That protection is the signed mortgage that gives the bank a special kind of lien on the property. Most mortgages provide that the real estate owner cannot *convey* (sell) a fee simple interest in the property to someone else without first paying off the bank loan. And if the real estate owner fails to pay this

loan, the bank can foreclose its mortgage lien, sell the property, and pay off the loan from the proceeds of the sale.

There are many other types of liens:

- A *tax lien* attaches to real property at the beginning of each tax year, even though the actual amount of the property taxes has not been determined and the taxes are not yet due. A tax lien is just like a mortgage lien, but it exists automatically, because all property owners have a duty to pay real estate taxes to the community. To ensure that those taxes are paid, the community automatically has the protection of this lien on the property. If taxes are not paid for a long enough period, the community—that is, county authorities—can have the property sold in order to pay off the tax debt.
- A *judgment lien* may be used when someone has won a money judgment in a lawsuit and wants to make sure to collect the money that is owed. Let us say Mr. Smith was awarded \$25,000 from a lawsuit against Mr. Jones over injuries sustained in a traffic accident. If the \$25,000 is not paid, Mr. Smith can file a judgment lien on Mr. Jones’s property, and ultimately can ask the court to have Mr. Jones’s property sold to generate cash to pay off the \$25,000 judgment.
- One way of making sure an arrested person will appear for a criminal trial is for the state to place a lien on the defendant’s property by the terms of the *bail bond* he signs.
- A *mechanic’s lien* protects those people who build or repair homes or other buildings. If the owner does not pay the bill within a certain period of time, the party supplying labor or materials can file documents to secure a lien against that property. Again, as a practical matter, the property cannot be sold to a third person without paying the amount owed, and the lienholder (for example, the contractor) ultimately can ask the court to have the property sold and the proceeds of the sale applied to pay the outstanding bills.

Property is frequently subject to many liens. In such cases, it is desirable to avoid a series of foreclosures and forced sales. Accordingly, when one lienholder sues to foreclose, all lienholders are notified and their claims dealt within the same suit. This process is called *marshaling of liens*.

When there are many liens, the property may not be worth enough to cover all liens, so it is necessary to determine the priority of liens. The general rule is that the first lien in time is the *first lien in priority* (“first come, first served”). Thus, when the property is sold, the first lienholder will be paid. If enough money is left, the second lienholder will be paid, and so on in order of priority. The priority of some liens is outlined by statute. Thus, for example, tax liens almost always take priority over other kinds of liens.

Easements and Licenses

Sometimes a landowner will give someone permission to use part of his or her property for a specific purpose. Such permission may be either an *easement* or a *license*.

An *easement* is formal permission, granted in writing by deed or similar document, to use another’s property. An easement can run with the land, meaning it remains valid even though the property involved is rented, mortgaged, sold or transferred through a succession of owners. Normally, an easement is automatically cancelled when the easement holder abandons the specific purpose for which it was granted. Easements are commonly granted to utility companies to install and maintain water, sewer, gas, electric, and telephone and cable lines across private property. Sometimes an owner whose property has no entryway (*ingress*) or exit (*egress*) will acquire an access easement across adjoining property.

A *license* is informal permission to use another’s property and is most often *personal* in nature (that is, the rights may be exercised only by the specific person to whom the permission is given). It may be in writing, but is more often oral and may be implied from the conduct of the parties. Licenses do not run with the land, so that the holder of a license cannot

sell or otherwise transfer it to someone else. Also, the property owner can terminate a license at any time. A typical example of a license would be oral permission for a person to hunt on another individual’s property.

Because an easement is a genuine interest in property while a license is not, a dispute may arise about what kind of permission was given. If the court decides that an easement was granted, the permission is an enforceable property right, whereas if the court decides that only a license was granted, then no property right is involved.

Mineral Rights and Similar Interests

Rights to search for and develop minerals and harvest timber are among important real property interests that may be owned separately. Typically, these activities require a lot of money, so landowners often lease mineral or lumber rights to professionals. For example, a landowner might lease the mineral rights to his or her property to an oil-exploration company in return for a flat payment when the lease is signed, plus a royalty of, say, one-eighth of the value of any oil or natural gas brought to the surface. Leases to mine coal, quarry stone, sand, or gravel usually involve fixed rent rather than royalties. Timber leases often are granted for a single, flat payment, but sometimes also include payment based on the amount of timber cut.

Sometimes, ownership of the property itself, and of the mineral rights, is transferred separately. There are many areas in Ohio, for example, where mineral rights were transferred more than 50 years ago; the land is now owned by grandchildren of the original landowner, and the original oil company long ago sold out to a major producer—but the land is still being farmed, the wells are still producing oil and royalties are still being paid. Under certain circumstances, mineral interests not exercised for at least 20 years can be considered abandoned and the interest in the mineral rights returned to the landowner. This termination of mineral interest can be very important to clear title to property.

How Real Property Ownership Is Transferred

Property is a commodity, meaning it often changes hands from one individual to another. An individual can acquire an interest in real property through:

- a written document, such as a deed, lease, mortgage or other conveyance;
- inheritance;
- the operation of law (such as a property transfer following abandonment by the owner or a transfer ordered by a court following a lawsuit); or
- adverse possession or prescription, that is, through “squatter’s rights.”

Deeds, Leases, Mortgages and other Conveyances

Fee simple interest in land is generally granted through a deed. A leasehold interest is granted by means of a lease. A mortgage is an interest in land where the land is pledged to secure or guarantee payment; it is created by a document called a *mortgage deed*, or, more simply, a mortgage. A *conveyance* is any transfer of an interest in real property, whether done by deed, lease, or mortgage. Deeds, leases and mortgages are not only conveyances (transfers) of real property interest, but they also may be contracts or contained in contracts, meaning that other rights and obligations may be spelled out that the parties must honor.

The higher degrees of ownership in land are almost always granted by means of a deed or similar document that:

- names the person making the grant (the *grantor*) and the person to whom the grant is being made (the *grantee*);
- describes the property or interest being granted in formal, technical terms;

- is signed by the grantor; and
- is acknowledged (notarized) by the grantor.

If the grantor is an individual, a deed should state whether the grantor is married so that a spouse’s interest in the property (called a *dower interest*) can be determined and released. In a *general warranty deed*, the grantor guarantees that he or she has legal authority to transfer the property and will defend the title to the property against all claims of other people. If the grantee’s title is successfully challenged at a later date, the grantee has a claim against the grantor based on the grantor’s warranty. A *limited warranty deed* (referred to in some states as a “special warranty deed”) guarantees title only as to acts of the grantor and matters arising during the grantor’s ownership. Warranty deeds are used to convey fee simple title. A *quitclaim deed* is similar to a warranty deed, except that it does not guarantee the grantor’s title to the property. The effect of a quitclaim deed is to convey the grantor’s interest in the property (if he or she has any), without guaranteeing that he or she has any interest to convey and without guaranteeing that the property is free from liens or other claims. Quitclaim deeds are often used to adjust boundaries, correct errors in previous deeds and to obtain releases in land disputes.

A lease is used to bind a property rental agreement and is both a contract and a transfer of an interest in the property. A lease names the property owner (the landlord or lessor) and the renter (the tenant or lessee) and describes the premises involved. It states the period of the lease and the amount and method of payment of the rent. The lessor usually promises to protect the lessee’s possession and “quiet enjoyment” of the property. The lessee promises to pay the rent as agreed, use the premises for proper purposes, protect the property from undue harm and return it in good condition when the lease expires. The terms of a lease frequently cover a variety of other matters, such as renewal and assignment.

A mortgage is similar to a deed, except that the mortgage lender's ownership of the property is in the nature of a lien, enforceable against the property upon default. A mortgage states the promissory note amount and terms for the repayment of the debt, as well as the language usually found in a deed. The borrower (called the *mortgagor*) may have to take steps to protect the lender's security, such as paying the taxes when due and keeping various insurance policies up to date.

Further, a mortgage states that if the borrower or mortgagor pays the debt in full as agreed, the mortgage will become null and void and the lien will be released; but if the debt is not paid according to the terms of the promissory note, the lender can ask a court to foreclose the mortgage and cause its sale to satisfy the amount due to the lender.

Transfer by Inheritance

When someone dies owning or holding some interest in real property, the deceased owner's interest must be transferred to another person or entity. That other individual may be a beneficiary named by the deceased owner's will or the person entitled by law to the property when there is no will. This other individual also may acquire the property of the deceased because he or she owns the remainder interest after a life estate, or because of a right of survivorship. Ohio also recognizes *transfer-on-death* (TOD) affidavits (and, under prior law, transfer-on-death deeds). Such affidavits or deeds transfer ownership to an individual named in the affidavit or deed upon the death of the property owner. Transfer-on-death affidavits or deeds differ from right of survivorship deeds in that survivorship property is owned jointly by the individuals during the life of both of them, whereas ownership of TOD property goes to the second individual named in the affidavit or deed only upon the death of the title owner.

A feature that distinguishes real property from personal property is that real property automatically belongs to the successor on the death of the lifetime owner. When an individual has a right of

inheritance or survivorship in real property, that interest passes when the property owner dies. Title to personal property, on the other hand, is not automatically assigned to heirs. Although the title to real property passes immediately upon death, real property and interests in real property may have to go through an estate administration process to ensure that the deceased's debts and taxes are paid and that the transfer of title to the property is properly recorded in public records. (See Part IX, "Probate Law," for a more complete discussion of inheritance and estates.)

Transfer by Operation of Law

Ownership in real property may be transferred without a formal conveyance procedure. Such a transfer may occur as the result of a judgment in a lawsuit. For example, a divorce decree, or the court order in dissolution of marriage that approves a separation agreement, may award the family home to the wife (or husband), and the decree, or order, may have an effect similar to a deed. An abandoned mineral interest is another example.

Transfer By Adverse Possession or Prescription

Sometimes the title to real property or an interest in real property is transferred because the original owner neglects his or her rights. For example, an individual may acquire title to another person's real property by *adverse possession* (which, in lay terms, is something like "squatter's rights"). Adverse possession is using real property without permission continuously for 21 years, provided that the use is obvious and exclusive against others and that the original landowner does nothing significant to assert his or her rights as owner. Sometimes entire tracts of land are acquired by adverse possession, although the usual case involves a small portion of someone's property that an adjoining owner uses for 21 years. For example, one individual may build a fence three feet into his neighbor's side of the property line, without

realizing it is the neighbor's property. If the neighbor does not consent and fails to dispute the fence's location and this situation continues for 21 years, the individual who built the fence will own the property by operation of this legal principle.

Similarly, an *easement* (the rights to use real property) may be acquired by *prescription*, which is based on actual use (without permission) coupled with the landowner's failure to prevent the use. An example of a prescriptive right is a right-of-way acquired over another's property by using the property for driveway purposes for a substantial period of time without complaint by the owner; the non-owning person acquires an easement by prescription.

Encouraging Unrestricted Transfer

Feudal land laws in medieval times allowed the concentration and retention of land (and thus wealth and power) in the hands of a few families, thus stifling economic growth. In response, society developed a policy that land should be freely transferable. The law gradually developed legal rules implementing this policy. The proper development, use and transfer of land are essential to the health of our national economy.

The law generally does not permit grantors (those who transfer their property) to impose restrictions that would unreasonably keep future owners from selling, leasing, mortgaging, or otherwise disposing of the property as the future owners see fit.

The *rule against perpetuities* is another rule that encourages free transfer of property by limiting the period of time a property owner can delay a change of ownership. This rule states that any grant of interest in real property that is to occur in the future must take effect, if at all, within the period of the life or lives of beneficiaries living at the time of the grant, plus 21 years. (*The rule against perpetuities is discussed in Part IX, "Probate Law," at "Limitations On Wills; Special Provisions."*)

Land Records

Ownership of real property is recorded in a government office for the owner's protection. Under the law, if an individual's ownership interest is not made a matter of public record, he or she may not be able to assert title—especially against those who innocently purchased the property from a former owner. Every state maintains public records of land and transactions and events affecting land ownership. In Ohio, the county recorder of each of the state's 88 counties maintains ownership records for the land within its geographical borders. A careful search of these records will reveal the status of the record title or ownership of any given parcel of land.

Necessity for Land Records

Just because someone lives in a house on a certain property does not mean that person is the property owner. The actual owner may or may not live on the land. Further, the actual owner of the land may be an international corporation with headquarters outside of the country. Consequently, some system of land records is necessary to keep track of land titles and interests. The primary value of land records is to give notice to anyone examining these records of the existence and nature of interests in, and claims on, real property.

An individual with an interest in real property is responsible for filing documents to prove he or she has a right to that property (this filing is often called *recording*). Failure to record does not, in itself, destroy the individual's interest in the property, but it may prevent the individual from taking action against anyone who might subsequently challenge that interest.

For example, if a buyer has not recorded a deed establishing the property transfer, he or she may not be able to make a valid claim against a third person who subsequently "acquired" the property without knowing about the holder's prior

claim. The reasoning behind this is clear. Since the holder's claim, while valid, was not recorded in public records, others who might have a later potential interest in the property cannot be expected to know about the existing claim. In fact, the third person may acquire the real property innocently, relying on public records.

Or, let's suppose a landowner mortgages the property as security for a loan, but the lender neglects to file the mortgage deed in the county records. Later, the owner sells the property to a third person who does not know about the unrecorded mortgage. The mortgagee (lender) is now powerless to foreclose its mortgage on the real estate, because its claimed lien on the property was not made a matter of public record. The property that secured the mortgage has been transferred to a third party who had no knowledge of the mortgage. If the mortgage had been filed, it could have been foreclosed. In that case, the buyer legally would have been presumed to know about the filed mortgage, even if the buyer neglected to examine the public record.

Types of Land Records

In Ohio, the county recorder's office has records of mechanic's liens, property bonds posted for bail, deeds, mortgages and indexes for these records. The most numerous are the records of deeds and mortgages. Mortgages and deeds to be filed with the recorder's office are copied in detail and bound. This information is also maintained on computer databases. When a deed or mortgage is recorded and placed in its proper book, the volume and page where it appears is noted in a general index. The simplest form of index is arranged alphabetically according to *grantors* (sellers), with a reverse index of *grantees* (buyers). In many counties, indexes and copies of records are in electronic files or on microfilm, and books are no longer used for new filings.

A land registry is another important set of land records kept in some counties, and is part of an entirely different and separate system of

recording. Land registration requires a court proceeding (a *land registration suit*) to establish the status of the title. Once the status of the title is determined, a certificate of registration is filed and all mortgages, liens, subsequent transactions and other claims are noted on the certificate. The system is called the "Torrens" system, and registered land is often described as "Torrenized" land. Such certificates are used in only a few Ohio counties today. Although the original goal of land registration was to compile all records relating to a parcel on a single certificate, and thus to simplify recordkeeping, in actual practice it has turned out to be more complex. Therefore, registration has become unpopular.

The county recorder's office is the repository for plats and surveys. A *plat* is a map of subdivided land, showing the various lots, the portions of the land dedicated for roads or other public uses, and the easements for utilities and other features. *Surveys* are exact descriptions of land parcels using "compass calls" and precise measurements that come from actual observation and measurement by means of instruments such as a compass, transit, theodolite or surveyor's chain.

Other county officials also keep important land records. For example, the county auditor and county treasurer are responsible for keeping track of property taxes. (Taxes are mentioned here because they are liens, or charges, on real property.) The auditor's tax maps can be used to identify property and are often the starting point for a title search. Also, records kept by the clerk of common pleas courts must be searched because lawsuits and judgments can affect the title to property. Similarly, probate court records are extremely important in determining the status of property ownership. The county sheriff also keeps a record of "foreign" judgments filed in the county (a foreign judgment being one rendered in a court in another county). Thus, if a judgment is issued in a lawsuit in Montana against someone who owns property in Ohio, the foreign judgment can be recorded in Ohio and thereby becomes a lien on the Ohio property.

Descriptions of Property

There are several ways to describe a parcel of real property, but the most common method includes some sort of map reference to locate the parcel in the county, plus a series of bearings and distances called *metes and bounds*, describing the exact boundaries of the parcel. If property is subdivided and platted, a parcel can be accurately described by giving the subdivision name, lot number and location of the recorded plat.

Title Examination; Marketable Title

Searching land records and determining the status of land titles is a job for professionals because of the many different kinds of interests in real property, and the complexity of land records. Any person interested in finding the title to a particular piece of property should contact an attorney or a title agent.

A typical title examination is a backward search of the records, beginning with the present owner and tracing back through each preceding owner. The object of this examination is to establish the *chain of title*. The present owner's claim is good if his or her title proves to be part of an unbroken chain of ownership.

In a complete title examination, the chain of title is taken back to the original source, which, in Ohio, will vary depending on the location of the property. The original sources of Ohio property usually date back to land grants from Congress or from various state legislatures (especially those of Virginia and Connecticut, both of which granted land in the "Ohio Country" to Revolutionary War veterans after the war as payment for their services).

A complete title examination is tedious and can be difficult or impossible to obtain. Many early records have been destroyed, since nearly every courthouse in Ohio has been damaged or destroyed by fire at least once. Further, older records are not reliable because the men who created them generally used crude instruments. Harsh environmental conditions did not help matters. Old land descriptions can be vague. They can read, for example:

"Beginning at a clump of black locust located at the northeast corner of the Peter Schweitzer farm, then north-easterly 250 rods, more or less, to a large flat rock on the southerly bank of Moccasin Creek."

There are numerous potential difficulties with this description. For example, the surveyor's compass was inaccurate; the locust trees died of natural causes or were cut for fence posts; the record of Peter Schweitzer's farm was possibly destroyed in the courthouse fire of 1831; and the large flat rock could have been washed away in the 1913 flood when Moccasin Creek cut a new bed, etc. Luckily, today we have legal descriptions based on data from more accurate surveying instruments.

In Ohio, complete title examinations are usually unnecessary. Statutory or written laws set the rules about what constitutes a *marketable title* (one that can be relied on when buying and selling property). Standards for searching titles have been established by the courts, title insurance companies, lenders and the Ohio State Bar Association. Under Ohio law, if a title search shows that there is an unbroken chain of recorded title that goes back to a deed or other conveyance document of record for at least 40 years, it is considered proof of fee title. Further, it can be assumed that the current owner has *fee title*, that is, the right to pass title. This right to pass title is established by the title document recorded at least 40 years before the search, called the *root of title*.

It must be noted that a title search often must go beyond the marketable root of title. For example, a 99-year lease, or easement, which was effective in 1950 would be beyond 40 years of a search conducted in 2010, but still could affect the title to the property if it falls within certain exceptions under the marketable title law. In such a situation, fee title could be passed, because the chain of title is verified, but the title might be subject to the lease or easement made in 1950. Many title examiners follow a 65-year standard to gain a more complete record.

Purchase and Sale of Real Estate

The most common real estate transaction is the purchase or sale of a home. This section outlines some of the matters to be considered in purchasing or selling a home, including a contract of sale, financing, title examination and closing.

Contract of Sale

Real estate brokers use one of several standard form contracts for the purchase and sale of residential property. The contract contains an offer by the prospective buyer, with a space for acceptance by the seller. Frequently, offers are limited in time: that is, the offer is automatically withdrawn if it is not accepted by a specified time.

The boxed text on the next page explains what the offer does. *Premises* refers to land plus any buildings upon the land. It can also refer to a particular part of a building in the case of a condominium.

Both parties are bound by the contract when the seller accepts it. If the buyer defaults, the seller may hold the buyer liable for the difference between the contract price and the price at which the seller is eventually able to sell the property (assuming it is lower than the original contract price). If the seller defaults, the buyer may compel the seller to specifically perform the contract, or may sue for damages. In either case, liability can have serious consequences. A buyer should not sign an offer until he or she has read all of it and understands all of the terms. Similarly, a seller should not accept a contract (the offer to purchase) until he or she has read all of it and understands all of the terms. If either party has any questions, an attorney should be consulted before any paperwork is signed.

What the offer does...

- identifies the premises, usually by street address;
- states the proposed terms of the purchase, such as amount of down payment, type of financing and maximum interest rate;
- specifies the type of evidence or proof of title (certificate of title, abstract of title or title insurance) to be furnished by the seller;
- provides for payment of unpaid taxes and assessments (usually these will be prorated between buyer and seller, based on the amount of taxes accrued but not yet payable when the sale is completed);
- lists the various kinds of personal property to be included in the transaction, such as rugs, drapes, dishwasher and other items; and
- states other terms and conditions.

In Ohio, certain transferors of real estate, including homesellers, must provide a disclosure form around the time the contract is signed. On this form, sellers must summarize what they know about any problems with the water supply, the sewage system, the walls and the foundation, the presence of hazardous substances, such as lead-based paint, asbestos, and radon gas and any other material defects. In certain situations, when undisclosed defects are discovered before the closing, the buyer may rescind the contract without any liability.

This law does not apply to a number of common transfers or sales. For example, it does not apply to sales of new homes that have never been inhabited, sales to persons who have already inhabited the property for one year or more, or in general, to transfers made as part of a court order. Federal law also requires sellers to advise buyers if a home was built before 1978, and to allow the buyers to inspect the home for lead-based paints.

Finally, buyers should understand their relationship with a real estate agent, whether the agent is hired by the buyer or the seller. An agent may work for the seller or the buyer, and, in some cases, may represent both the buyer and seller. This representation of both the buyer and seller is referred to as *dual agency*. The agent must give the client(s) (the buyer or seller or both) a Consumer Guide to Agency Relationships, which explains the various relationships between brokers and their clients. The agent also must provide an Agency Disclosure Statement, which describes the particular relationship between the agent and the client(s).

Financing the Purchase

Most people borrow money to buy a house. The usual ways for financing are a conventional mortgage, an FHA or VA mortgage, a mortgage assumption or a land contract.

All buyers should ask themselves, “Can I afford to buy this house?” No matter how carefully a family may budget its income and expenditures, there are limits on how much housing debt a family can afford. Other expenses, such as food, medical and automobile insurance, etc., also must be paid. One rule of thumb (though not the only one) is to limit monthly housing expense to one week’s take-home pay. “Housing expense” includes the mortgage payments (principal and interest), plus fire or homeowner’s insurance premiums and property taxes and assessments.

For example, suppose the monthly payment on a proposed mortgage is \$600, the homeowner’s insurance costs are \$192 per year or \$16 per month, and the property taxes are \$720 per year or \$60 per month. Adding these costs together, the total monthly housing expense would be \$676 (\$600+\$16+\$60). To handle this expense comfortably, the buyer should earn at least \$676 per week.

Money may be borrowed from various types of financial institutions, including savings and loan companies, banks, mortgage bankers and mortgage brokers.

The federal government insures some kinds of mortgages through agencies such as the Federal Housing Administration (FHA) or the U.S. Department of Veterans Affairs (VA).

Mortgages by banks and other lending companies are called *conventional mortgages*. Usually, a purchase on an FHA or VA mortgage will require a smaller down payment than purchase on a conventional mortgage, although the total costs in an FHA or VA transaction may be higher because of the increased risk involved in a *high-ratio loan* (a loan where the amount of the loan is high in relation to the value of the property).

Sometimes, when mortgage money is especially hard to find or interest rates are very high, a seller may sell a home on the condition that the buyer assumes and agrees to pay the seller’s existing mortgage. This arrangement is called a *mortgage assumption*. The buyer who assumes a mortgage takes over the seller’s mortgage and the interest rate of that mortgage. If the mortgage’s interest rate is lower than the current market rate, it would be an advantage to the buyer, although the mortgage assumption may require a higher down payment than a conventional loan.

For a mortgage assumption to be legal, the seller’s mortgage must *allow* assumption. Many mortgages do not allow assumption. Also, the seller generally remains liable on an assumed mortgage, so the seller must choose a buyer who can and will keep the payments current. A seller also can accept a mortgage from the buyer. This means that the seller, rather than a bank or other financial institution, becomes the lender, and the title is conveyed to the buyer subject to the mortgage lien. This usually occurs only where the buyer cannot qualify for a loan from a bank or other commercial lender. However, it is more common for a seller to sell the property on an installment land contract rather than accept a mortgage, because, under a land installment contract, the seller does not have to give the buyer title to the property until the full purchase price is paid.

Title Examination and Evidence of Title

If a home purchase is to be financed through a bank or other financial institution, the lender will require a title examination. If the lender does not require it, or if there is no institutional lender, the buyer should contact an attorney or a title agent to have the title examined. The seller's promise to furnish a good title is not a guarantee that the seller actually can, or will, furnish such a title.

In some parts of the state, the buyer is responsible for protecting himself or herself by securing the title examination. In other areas of Ohio, purchase contracts require that evidence of title be furnished by the seller in one of three ways. One way is to have an attorney give a certificate stating the title is good. The certificate often may list a series of exceptions—issues or areas the lawyer has not researched or cannot research. Another way is to obtain an abstract of title, which is a chronological summary of all transactions concerning the property found in the public records.

The third and most common method is to purchase *title insurance*. Title insurance provides protection against claims arising from title problems that may not be uncovered by a title search. If the buyer pays for a title insurance policy only on the loan, then the title company would only pay the mortgagee (lender) if the title to the property is successfully challenged in court. By paying an additional premium, the buyer can get an owner's title insurance policy that will pay the buyer if there is a title defect that the title insurance company did not discover.

Environmental Concerns

Identifying certain potential environmental risks or concerns before purchasing property can alleviate future stress and expense. Homebuyers may be concerned about lead-based paints, asbestos, radon gas and gases emanating from fuel storage tanks, or the home's water supply and septic system, for example. A property inspection by a certified home inspector

can reveal environmental concerns. Some of these matters may be regulated by either the federal Environmental Protection Agency (EPA) or the Ohio Environmental Protection Agency (OEPA) or both.

The EPA is the federal agency charged with implementing the environmental laws passed by Congress. The OEPA was created in 1972 to implement Ohio laws and regulations regarding air and water quality standards; solid, hazardous and infectious waste disposal standards; water quality planning, supervision of sewage treatment and public drinking water supplies; and cleanup of unregulated hazardous waste sites.

Closing

A contract of sale is closed when:

- a title has been examined and all necessary documents are signed;
- closing costs and the purchase price are paid (either entirely by the buyer, or partially via the mortgage lender);
- the property is transferred to the buyer by the seller's delivery of the deed; and
- the seller's mortgage and any other liens are paid from the purchase price, to clear the buyer's title.

This process is called a *closing*. There are two kinds of closings: *round table* and *escrow*. A round table closing is an actual meeting where the buyer, seller, lender and their representatives meet, make payments and adjustments and actually sign and exchange the various documents. The deed is recorded shortly after a round table closing. An escrow closing is not an actual meeting. All the necessary documents, payments and adjustments are delivered to a neutral third party (called the *escrow agent*), and on the scheduled day, the escrow agent records the deed and delivers money, with neither buyer nor seller present. The purpose of both types of closings is similar, although which one is used depends on local custom and the needs of the individual transaction.

During a closing, the balance of the purchase price is paid and the deed signed and given to the buyer for recording. Various deductions and adjustments are made in the amount paid to the seller. The buyer and seller each receive a closing statement, which is prepared before closing so that the transaction can be completed. The statement lists the purchase price of the property and all adjustments to that price.

The statement includes specific entries for the:

- buyer's down payment (or "earnest money" deposits);
- amount of cash, if any, that is to be paid to the seller;
- pay-off price of the seller's existing mortgage;
- transfer tax the seller is required to pay to the county;
- cost of the title examination and the cost of the title insurance policy;
- proration of real estate taxes between the buyer and seller;
- cost of document preparation and recording (the seller is usually required to pay for the release of the existing mortgage and for the preparation and recording of the documents necessary to cure defects in title);
- cost of the insurance and tax escrows that lender may require of the buyer; and
- real estate commission.

The allocation of the fees and costs between the buyer and seller is determined by contract or area custom. As stated above, the buyer also *executes* (signs) the promissory note and mortgage to the lender. The buyer should make certain that all of the contract's terms are completed before signing the mortgage. The contract of sale becomes merged in the deed when the deed is accepted and the parties may lose the right to enforce any unperformed contract obligations. Also, the buyer is theoretically entitled to possession of the property immediately upon closing, but it is not uncommon for the contract to provide for delayed possession (from one to five days after closing), which is usually one of the contract provisions.

Landlord and Tenant

The first time many people encounter aspects of real property law is when they rent their first apartment or house. Laws addressing real property transactions as well as certain aspects of the rights, obligations and remedies of residential landlords and tenants can be found in Chapter 5321 of the *Ohio Revised Code*, the Ohio Landlord-Tenant Act.

What is a Rental Agreement?

A *rental agreement* or *lease* is a written or oral contract between a *lessee* (tenant) and *lessor* (landlord). A properly written agreement will eliminate most of the misunderstandings and problems that commonly arise between a landlord and a tenant.

A rental agreement benefits and protects both parties and is an efficient way of handling a business transaction. A written agreement may create a tenancy for a fixed period of time or from week to week, month to month or year to year. To protect the landlord and the tenant, it is wise to specify the exact manner in which the rental agreement may be terminated. If there is no written lease or rental agreement, the landlord or the tenant may end a week-to-week tenancy by giving the other party at least seven days' notice prior to termination. Either party may end a month-to-month oral tenancy by giving the other party at least 30 days' notice before the end of the current monthly term.

A landlord may not use a contract clause to limit or escape certain types of responsibility, including repair and maintenance, which are mandated by law. If such a clause is included in a signed rental agreement, it cannot legally be used against the tenant.

Ordinarily, the landlord prepares a rental agreement. For this reason, any doubtful or ambiguous terms are decided against the landlord and in favor of the tenant if a dispute arises and ends up in court.

Under Ohio law, both tenants and landlords may recover damages and reasonable attorneys' fees, in some situations, for certain unlawful acts of the other party.

Obligations of the Landlord

A landlord must keep the rented or leased property (premises) decently habitable and may not unreasonably interfere with the tenant's privacy.

The landlord must ensure that common areas (parking lots, stairs, halls, sidewalks, etc.) are clean and safe, and that the structure complies with building and housing codes. Specifically, electrical, plumbing, heating and ventilating equipment must be maintained. The landlord also must provide water and heat, unless these utilities are under the tenant's control. If the building contains four or more dwelling units, the landlord must provide trash containers and trash removal. The landlord cannot insist on having unreasonable access to the rental premises and must give reasonable advance notice (presumed to be 24 hours) of the intention to enter the tenant's suite, apartment or area. Finally, the landlord may not attempt to evict a tenant by changing the lock, terminating utility service or removing the tenant's belongings without a court order.

Obligations of the Tenant

Tenants have a variety of obligations beyond paying rent or lease payments on time. Specifically, a tenant must:

- keep the premises clean and safe;
- properly dispose of trash;
- keep plumbing fixtures as clean as their condition permits;
- properly use electrical and plumbing equipment;
- maintain appliances furnished as part of the lease;
- cause no disturbance and forbid family, friends and guests to disturb other tenants;
- see that controlled substances (such as certain drugs) are not illegally used on the property;

- comply with housing, health and safety codes; and
- allow the landlord reasonable access to the premises to inspect, make repairs, deliver large parcels or show the property to prospective buyers or tenants.

The tenant cannot change any of these legal duties. However, the landlord may agree to assume responsibility for fulfilling any of these tenant duties as part of the lease agreement.

Security Deposits

A landlord often will require a new tenant to post a *security deposit* (commonly equal to one month's rent). The purpose of the deposit is to cover any damage to the rental property caused by the tenant, and, in some instances, unpaid rent. If the deposit is more than \$50 or one month's rent (whichever is greater), and the tenant is in possession of the property for six months or more, the landlord must credit the deposit with five percent interest. Within 30 days after a tenancy ends, the landlord must itemize every deduction from the security deposit and give the tenant a copy. If the tenant has furnished the landlord with a forwarding address, the landlord must refund the deposit plus interest and minus any valid deductions. If the landlord fails to provide a refund and/or explanation of any deductions, it could cost the landlord double the amount due, plus reasonable attorney fees should the tenant pursue legal action.

Rent Withholding

A tenant living in a building with four or more dwelling units may place the rent in escrow, if the tenant reasonably believes the landlord has failed to live up to his or her obligations, or if the landlord is found to be in violation of any law or regulation affecting health or safety. However, if the tenant does not do this properly, the tenant may face eviction for non-payment. To withhold rent properly, the tenant must be current in rent payments and give the landlord 30 days' notice of

the health or safety problem. The 30-day period gives the landlord an opportunity to remedy the problem. If the problem is not fixed, the tenant may deposit the rent payment by the due date with the clerk of the local municipal or county court instead of paying it to the landlord. At the direction of the court, the withheld rent may be applied to correct the problem, or the court may order the monthly rent reduced until the problem is remedied.

Retaliatory Conduct

A landlord cannot raise the rent, withhold services or attempt to evict a tenant when a tenant exercises his or her lawful rights, including rightfully withholding rent or properly complaining about living conditions. Acts of the landlord are not considered retaliatory if:

- the tenant created the problem that is the basis for withholding rent payments;
- the tenant owes back rent;
- the tenant has failed to leave at the end of the rental term;
- correction of the problem would require demolition or remodeling of such major proportions that the tenant would lose the use of the premises; or
- the rent increase is to cover improvements or increased costs.

If a landlord takes retaliatory action, the tenant can recover possession of the premises (if evicted), terminate the rental agreement or use the retaliatory action as a legal defense when protesting an eviction. The tenant also may recover damages and reasonable attorney fees.

Eviction

The technical name for an eviction action in Ohio is *forcible entry and detainer*. Eviction actions allow landlords to recover rented or leased premises, provided their tenants' rights are not violated.

Before bringing an eviction action, the landlord must give the tenant at least three days' written notice to leave. The notice must include

specific language, including a recommendation that the tenant seek legal advice.

After the eviction suit is filed, the summons issued by the court to the tenant must state that the tenant:

- cannot be evicted unless the tenant's right to possession has terminated (a tenant's right to remain on the premises is terminated when, for example, the tenant has breached the agreement or the lease term has ended);
- cannot be evicted in retaliation for an assertion of rights covered by the law;
- should continue depositing rent with the court if already doing so;
- has a right to jury trial in the eviction action; and
- has a right to legal assistance.

In an eviction case, the court determines who has the right to possession of the rented or leased property. It may also determine all rights and liabilities of the landlord and the tenant. For example, the court may order an appropriate governmental agency to inspect the property and report if any condition of the property violates the law. If such a condition exists and was caused or was allowed to occur by the tenant, the court may order the tenant to pay the landlord the reasonable cost of repairing the condition. Where the tenant did not cause such a condition and the court decides the tenant should have possession, the court may order the landlord to correct the condition. If the tenant did not cause such a condition and the court decides that the tenant should not have possession, the court may forbid the landlord from renting the property until the condition is corrected.

Other Real Property Issues

Zoning

Zoning is the process by which political subdivisions (cities, villages, townships and counties)

regulate land use. These political subdivisions are further divided into districts or zones. Subdivision officials enact regulations to control the types of buildings and uses within each of these districts. The primary purpose for zoning is to facilitate planning and land development on a community-wide basis. Zoning legislation may regulate uses of land. It also may regulate such things as the size of lots and buildings; minimum front, back and side yard requirements; or the minimum number of parking spaces required for certain types of buildings, depending on the use.

Planning commissions, appointed by the local legislatures of political subdivisions, review land use within the community and propose a comprehensive *land use plan*. This plan serves as a guide for dividing the political subdivision into districts or zones. The most common types of districts are residential, commercial and industrial. These districts may be further divided. For example, a residential district may be restricted for only single-family homes, or an area may allow multi-family buildings.

A comprehensive plan may be adopted only if the proposed zoning regulations are reasonable. The local legislature, whether a city or village council, board of township trustees or board of county commissioners, is responsible for enacting the plan and the zoning regulations that define each zone. Because comprehensive plans and zoning regulations provide a blueprint for future growth and development, they should be periodically updated to reflect changes in the community.

Violation of a zoning regulation (for example, establishing a commercial business in an area zoned for residential use only) is a civil rather than a criminal matter. Zoning inspectors may issue orders to stop a violation. That might be followed by a court action resulting in a penalty, which might continue as long as the violation remains uncorrected.

Because properties have different sizes, shapes and topographies, applying a zoning regulation to a specific property may be unreasonable for either the property owner or the city

or both. For example, a residential lot in the inner city might not be large enough, under current zoning regulations, for a house to be built. Such a problem may be resolved by the granting of a *variance*, or a “special case” change in zoning regulations. A board of zoning appeals, appointed by the legislative body, hears and acts upon requests for variances from the zoning regulations. If a board agrees that applying a zoning regulation to a specific property is unreasonable, it will grant a variance. Generally, a board of zoning appeals will try to grant the minimum variance necessary to resolve the conflict.

The two types of variances are an *area variance* and a *use variance*. An area variance may permit a property owner to develop a property with narrower yard setbacks, smaller lot size, larger building size, or fewer parking spaces than those otherwise permitted in the zoning district where the property is located. A use variance may allow a property to be used in a way that is not permitted in a specific district (for example, a home-operated beauty parlor operating in a residential district). Use variances tend to be more difficult to obtain because they are often perceived as property re-zoning. In order to grant either type of variance, the board of zoning appeals must apply standards that are incorporated into the zoning regulations. Zoning variances run with the land and will not expire as long as the use continues.

Planned Unit Development

A *planned unit development* (or PUD) is a technique to provide flexibility for new construction in a community. Instead of rigidly dividing land into exclusively residential, commercial and industrial zones, PUDs mix these and other uses. Planners generally agree that a mix of residential and commercial development along with public spaces such as parks can provide a very appealing environment.

Planned unit developments are often part of a zoning code. If they are not, many communities allow them by variance or with a conditional use permit. However, courts can view PUDs as re-

zonings, so local government officials must be careful about using the variance or conditional use procedure to allow PUDs to be implemented. It is better for local governments to enact zoning provisions if they want to allow for PUDs, so that standards are uniform throughout the community.

Some common characteristics of a PUD include:

- a large plot of land that is developed under unified control and planned and developed as a whole;
- a mix of compatible uses such as commercial, residential, governmental (*e.g.*, schools) and public spaces, or mixed single-family and multiple-family units;
- comprehensive plans for developing the particular piece of land from the utilities to the aesthetics and relationship of the buildings to one another (which can be so detailed as to include predetermined site plans, floor plans and building elevations);
- a program for the occupants of the district to maintain the common areas and facilities; and
- restrictive agreements to prevent incompatible changes to the structures and appearance of the development.

The PUD's mixed uses can provide for a more dynamic, vibrant community as well as more green space and public areas. Green space is often gained by clustering residential areas to achieve open space and preserve natural features of the land. Most PUDs require a unified exterior appearance—such as the same color scheme and roofs on all units.

The process for getting a PUD approved is usually very complicated and extensive. The approval process is likely to include a detailed review of the site plan by a local government's planning staff, planning commission, zoning board and often the local legislative body as well

as input from the public. In some communities, public input may include a ballot vote to approve or disapprove the development in question. Additionally, some sites are large and must be developed in phases. Thus, the approval process can be ongoing.

Covenants, Conditions and Restrictions

In addition to government land use restrictions, private party agreements and other restrictions also may control how owners use their property. For example, certain restrictions in a private purchase contract may dictate how a home in a subdivision or a condominium may be built, designed or used. These restrictions are typically referred to as *covenants, conditions and restrictions* (CC&Rs); they set forth conditions on uses, lot size, architectural design, setbacks from the street, fence design or vehicle parking. If the terms of a private party agreement are violated, a suit may be brought against the violator. The violator may have to pay money damages or may be ordered to remove the violation (such as a fence that was prohibited by the terms of the private party agreement). The court injunction to remove the violation also would prohibit future violations.

A unique type of covenant that may arise on residential property is a *transfer fee covenant*. This covenant requires a fee to be paid to a third party (often the original developer) upon each conveyance of the property. As of 2010, a transfer fee covenant cannot be placed on property in Ohio; however, such covenants may already exist in certain parts of the state. Although such covenants may be enforceable, FHA may not insure property burdened by such a covenant. A lawyer should be consulted if a title search reveals a transfer fee covenant on a residential property.

For Journalists: Covering Property Law

Because property law is often extraordinarily detailed and also more locally driven than other aspects of the law, journalists are advised to make time to understand state laws and guidelines. Many local businesses and officials work hard to abide by state laws, and state officials work diligently to regulate all these transactions, but occasionally journalists are the first to expose and report important abuses and problems in the system. Knowing what the state requires of these parties is an important first step in exposing abuses. A second step is gaining access to government records and attending the local meetings of planning boards, town councils, city governments and other public

bodies. Through open records requests and attendance at government meetings, journalists can learn and expose how governments regulate and negotiate property disputes (*See Media Law, Part XV*).

Many rookie journalists are often assigned to local property development stories, about which they may know very little. Or they find themselves covering a major dispute between a landlord and tenant. In such situations, it is often easy for tempers to flare and the law may be lost in the dispute. Journalists are cautioned to spend the time researching Ohio guidelines on these issues to present viewers and readers with what the law requires of the parties in property discussions and disputes. Resources are provided under “Web Links” at the end of this chapter.

Chapter Summary

- Real property law deals with land, fixtures on land, movable property that is not associated with land, and rights and other intangible interests that may be owned.
- The two main classifications of property are *real property* and *personal property*.
- Real property, real estate and realty refer to land, buildings and other fixtures on land. These terms also may refer to different kinds of interests in land and to various rights that go along with land or some interest in it.
- Personal property is anything that can be moved by its owner or possessor. Personal property can be tangible or intangible.
- Full ownership of real property is called *fee simple ownership*, *fee simple title* or sometimes just *ownership in fee*.
- A fee simple owner can grant ownership of his or her property to another person for the duration of the other person's life. This type of ownership is called a *life estate*. The person who holds the life estate is called a *life tenant*.
- In Ohio, there are two different forms of property ownership where two or more own the property: *tenancy in common* and *survivorship tenancy*.
- Ohio also recognizes *transfer-on-death* (TOD) affidavits that allow an owner to designate one or more persons to whom the property will be transferred automatically upon the owner's death.
- A property owner may give temporary possession and use of a particular property to another individual in return for the payment of rent or something else of value. If the owner does this by means of a written agreement called a *lease*, the party to whom possession of the property is given acquires a *leasehold interest* or *leasehold estate*.
- A *lien* is an enforceable claim against property to secure the payment of a debt or the performance of some act. A mortgage is a lien on the real estate. Three other types of liens are tax, judgment and mechanics' liens.
- Sometimes a landowner will grant another person permission to use a portion of his or her property for a specific purpose. Such permission may be either an easement or a license.
- Rights to explore for and develop minerals and harvest timber are among important real property interests that may be owned separately from the real estate itself.
- Property is a commodity, meaning it often changes hands from one individual to another. There are many methods individuals use to acquire interests in real property.
- Fee interest in land is granted through a deed. A *leasehold estate* is granted by means of a lease.

Continued on page 130

Chapter Summary *continued*

- A *mortgage* is an interest in land where the land is pledged to secure or guarantee payment; it is created by a document called a *mortgage deed* or, simply, a mortgage.
- A *conveyance* is the transfer of an interest in real property.
- When someone dies owning or holding some interest in real property, that individual's interest must be transferred to another person or to an entity. That other individual may be a beneficiary named by the original owner's will, or entitled by law to the property when there is no will. The other individual also may acquire the property of the deceased because he or she owns the *remainder interest* to a life estate or because of a *right of survivorship*. The transfer may also be made to the named beneficiary in a transfer-on-death affidavit.
- Sometimes the title to real property or an interest in real property is transferred because the original owner neglects his or her rights. *Adverse possession* is simply taking possession and keeping possession continuously for 21 years, provided that the possession is obvious and open, and that the landowner does nothing significant to assert his or her rights as owner.
- Ownership of real property is a matter of public record. Every state maintains public records of land and transactions and events affecting the ownership of land. In Ohio, the county recorder of each of the state's 88 counties maintains these records for the land within its geographical borders.
- The most common real estate transaction is the purchase or sale of a home. The elements involved in the purchase or sale of a home include a contract of sale, financing, title examination and closing.
- The Environmental Protection Agency (EPA) is the federal agency charged with implementing the environmental laws passed by Congress and the Ohio Environmental Protection Agency (OEPA) implements state laws and regulations regarding air and water quality standards; solid, hazardous and infectious waste disposal standards; water quality planning, supervision of sewage treatment and public drinking water supplies; and cleanup of unregulated hazardous waste sites. Any property purchase should include an environmental inspection.
- The first time many people encounter aspects of real property law is when they rent their first apartment or house. The law respecting such transactions is addressed by sections of the *Ohio Revised Code* reviewing particular aspects of the rights, obligations and remedies of landlords and tenants.
- A *rental agreement* or *lease* is a written or oral contract between a *landlord* (lessor) and *tenant* (lessee).
- A rental agreement benefits and protects both parties and is an efficient way of handling a business transaction. A written agreement may create a fixed term or a tenancy from week to week, month to month, or year to year.
- *Zoning* is the process by which political subdivisions (cities, villages, townships and counties) regulate land use by dividing themselves into districts or zones and enacting regulations to control the buildings and uses within each district.
- A *planned unit development* (or PUD) is a technique to provide flexibility for new construction in a community. Instead of rigidly dividing land into exclusively residential, commercial and industrial zones, PUDs mix these and other uses.

Web Links:

From the OSBA's Law Facts pamphlet series:

www.ohioabar.org/lawfacts (search by title)

“What you should know about ... Tenant/Landlord Rights and Obligations”

From the OSBA's “Law You Can Use” column:

www.ohioabar.org/lawyoucanuse (search by title or topic)

“After Foreclosure: What You Should Know”
“Agricultural Districts Protect Farms and Farmers”
“Agricultural Easements Help Protect Farmland”
“Ask Questions When Using Title Insurance Agencies”
“Be Careful When Using Home Equity Loans”
“Before Foreclosure: What You Should Know”
“Brownfields Development on the Rise – But There's Good Reason for Caution”
“Circumstances Determine When Tenants Can Terminate Lease Agreements”
“Eminent Domain: What Every Property Owner Should Know”
“Home-Buyers Should Determine Asbestos and Lead Paint Risks”
“Home-Buyers Should Determine Environmental Risks”
“Home-Buyers Should Investigate Water and Septic Systems”
“Homeowners' Insurance Covers Wide Range of Goods and Services”
“Joint Economic Development Districts Aid Local Development”
“Joint Ownership of Property: Common Sense Advice for Older Persons”
“Know about Eviction Procedures in Ohio”
“Know about Evictions of Month-to-Month Tenants in Ohio”
“Know Basics of Condominium Law”
“Land Contracts Provide Financing Alternative for Some Homebuyers”
“Landowner or Tenant Could Be Responsible for Harm to Trespassing Children”
“Laws Govern Gardening”
“Medicaid Recipients Should Know Rules before Making Real Estate Decisions”
“Mold: An Old Contaminant Creates New Concerns for Homeowners”
“Ohio Law Protects Property Owners from ‘Recreational User’ Liability”
“Ohio Law Says Private Property Sometimes Can Be Taken for Economic Development”
“Ohio Line Fence Law Says Who Is Responsible for Fences”
“Planned Unit Developments Provide Flexibility for New Construction”
“Quitclaim Deed Transfers Property Without Ownership Guarantee”
“Realtors May Act as Agents for Both Buyers and Sellers”
“Reverse Mortgages Convert Home Equity into Cash”

Continued on page 132

Web Links *continued*

- “Sorting Out Housing Options for Seniors”
- “State Law Regulates Most Ohio Cemeteries”
- “Tax Abatements Exempt Real Estate Taxes for Improvement Projects”
- “Tenants Have Security Deposit Rights”
- “Tenants Should Look Out for Intent-To-Vacate Clauses”
- “Title Insurance Protects Owners and Lenders”
- “Transfer-on-Death Affidavit Avoids Probate of Real Estate”
- “Understand How Joint Economic Development Districts Work”
- “Understanding Landowners’ Water Rights”
- “Use Caution When Considering Foreclosure and Debt Mitigation”
- “What College Students Should Know about Apartment Leasing”
- “What You Need to Know about Renter’s Insurance”
- “What You Should Consider When Granting an Oil and Gase Lease on Your Land”
- “What You Should Know about ‘Fracking’ in Ohio”
- “What You Should Know about Annexation”
- “What You Should Know about Buying and Keeping a Home”
- “What You Should Know Before Using ‘Free’ Gas”
- “When the Rains Come ... What You Should Know about Surface Water Laws”
- “Zoning Laws Aid Community Planning”



“Men may die, but the fabrics of free institutions remain unshaken.”

– Chester A. Arthur

The probate division of the court of common pleas (often referred to simply as the “probate court”) in each of Ohio’s 88 counties is one of the busiest in the court system.

Most people think of probate law as governing the administration of estates left behind when people die. Such administration includes, among other things, the payment of debts and taxes, and the transfer of estate property to the appropriate individuals or entities.

But probate law is much more than that. Generally, the probate division is responsible for protecting people who need care, safeguarding personal and property rights, and supervising people in positions of trust. For example, the probate division handles:

- the issuance of marriage licenses;
- adoption;
- appointment of guardians to care for children and other persons who cannot care for themselves or their property;
- proper care and treatment for the mentally ill, mentally retarded, or persons suffering from developmental or physical disabilities; and
- name changes.

Protecting Individuals in Need of Care

Some people need special protection, including children who are orphaned or whose parents are unable to care for them, and individuals suffering from mental illness, developmental disabilities and physical disabilities. Age or illness also can affect a person’s physical ability or mental capacity, or both, including the ability to care for one’s self or one’s property. In Ohio, the probate court has the *jurisdiction* (the obligation and authority) to supervise the protection of minors and those with physical or mental disabilities. For example, the probate court

appoints guardians for both minors and adults, manages adoptions and handles applications to hospitalize persons for treatment of mental illnesses.

Safeguarding Personal and Property Rights

When an individual dies, his or her property must be transferred to:

- the person or persons named in that individual’s last will and testament;
- heirs designated according to Ohio law, when there is no will; or
- the person(s) identified in a will substitute, such as the survivor designated in a survivorship deed or the person(s) designated in a payable-on-death or transfer-on-death arrangement.

Supervising Those in Positions of Trust

Individuals serving in positions of trust, whether they are executors, administrators, guardians, conservators, trustees, attorneys-in-fact or other persons who act on behalf of third persons, are called *fiduciaries*. Fiduciaries owe a special duty to those whose interests and property they control or manage. When, for example, an executor or administrator is appointed to settle an estate, or when a guardian is appointed to look after the affairs of a child or a person who has become incompetent, it is important that the fiduciary’s conduct be supervised. Fiduciaries must regularly report their activities to the probate court, particularly their financial activities. However, trustees serving under trust agreements created outside a will generally won’t need to regularly report to the probate court; their acts are reviewed by the court only upon request of a beneficiary or other interested party.

Wills

As we explained in Part VIII, the current owner of private property can dictate who will be the future owner of the property when he or she dies. The most common device to transfer ownership upon death is a *will*, or more formally, a *last will and testament*. Increasingly, people are using will substitutes, such as revocable (“living”) trusts or joint accounts to transfer private property to surviving spouses, children or other beneficiaries without going through the probate process.

Who Can Make a Will?

Under Ohio law, any person age 18 or older who has a sound mind and memory and is not under restraint can make a valid will.

The requirement of sound mind and memory does not mean that the *testator* (the individual making the will) must be in total possession of his or her faculties. The testator’s mind may be dulled by pain or sickness or enfeebled by age. He or she may even suffer, to some extent, from mental deficiency or mental illness. The testator has the legal capacity to make a will as long as the testator knows who his or her family members are, generally knows the nature and extent of what he or she owns and understands that the document is a will.

The fact that a will makes an apparently unfair or unequal distribution of a testator’s property does not necessarily indicate that the testator lacked the mental capacity to make the will. A testator’s will may disregard family and friends of long standing and still be valid.

The requirement that a testator not be under restraint means that testator must be free to choose to make a will and to make it the way he or she wants, and is not coerced, defrauded or improperly influenced to do so.

Requirements for Making a Will

1) For a will to be valid, it must be in writing and signed by the testator. (A narrow exception to this requirement is explained in item number 5 on

the next page.) Also, the signing must be confirmed by two competent and impartial witnesses. (These witnesses do not have to know the contents of the will, but only that the testator signed it voluntarily.) These basic requirements are strictly enforced, although there is some leeway in how the requirements can actually be met.

2) The will may be typed or handwritten, or both. Another individual may sign the will for the testator, provided this person does so at the testator’s specific direction and in the presence of the testator and the two independent witnesses. Please note that a will does *not* have to be notarized.

3) There may be a problem with potential beneficiaries under a will serving as witnesses to that will. The problem is that a witness to a will may not receive more under the will than he or she would have received as an heir if there were no will. This could significantly reduce the amount the witness/beneficiary receives in comparison to what the testator had intended to leave that person. This rule affects only the particular witness/beneficiary; it does not mean that the entire will becomes invalid simply because a witness is named in the will to receive a gift.

Further, a murderer cannot inherit from his or her victim. A gift to such a murderer in the deceased person’s will is ignored when the estate is distributed.

4) While people can draft their own wills, certain precise concepts and legal language must be used to ensure that the will is valid and complete. Some “do-it-yourself” forms and computer programs may be adequate, but these one-size-fits-all documents often are prepared for nationwide distribution, and they may not fully conform to Ohio law or to the testator’s wishes. Clearly, use of such forms does not give the testator the benefit of the interview process and the ideas that a professional can bring to the estate planning process. Therefore, an individual should consult a lawyer about writing and signing a will. It should be noted that lawyers who draft wills are under professional limitations similar to those of witnesses. In general, the lawyer who drafts a will

cannot be a beneficiary of it, unless related to the testator.

5) There is only one exception to the requirement that a will be in writing. An oral (or *nuncupative*) will is valid to transfer personal property—not real property—under certain conditions. The conditions are:

- the will is made in a “deathbed” situation by a testator who knows he or she is dying;
- the testator states his or her intended property distributions to two competent, impartial witnesses of the testator’s choosing;
- the witnesses write out the will and sign it within 10 days of the testator’s statement; and
- the written will is filed with the probate court within six months after the testator’s death.

A testator can modify the terms of an earlier written will (for example, to change the beneficiary of a particular item of personal property) by making an oral will during his or her last illness, but he or she cannot revoke a written will by making an oral will.

A Will Must Be Probated

Ohio law states that a will cannot govern the distribution of the testator’s property unless the will is filed with the probate court. Because the court must admit a will to probate before it can control the distribution of a testator’s property, a will left in a drawer at home is not effective. Under the law, anyone knowing of a deceased’s will is required to notify the probate court of its existence and location.

Lost, Damaged or Destroyed Wills

People usually keep wills in safe places. Sometimes these places are so safe that wills cannot be found, or sometimes a will is destroyed or damaged in a fire or flood. If a will cannot be found, or is totally or partially destroyed, copies of the original often are available. Attorneys generally keep copies of the wills they have prepared.

When an original will is misplaced or destroyed in some way, a copy can be admitted to probate, provided it can be proven that the lost

will was valid and was the last will of the testator, and that the testator did not know the will had been misplaced, damaged or destroyed.

How Wills Are Revoked

A will can be revoked in a number of ways. The most common way is by making a new will. One of the standard statements in a will is that the testator revokes all previous wills.

A testator also can revoke a will by purposely cancelling it, tearing it up, obliterating it or destroying it. The testator must personally take such an action, be present when such an action is taken or give another person written instructions to take such an action on the testator’s behalf. A will can be revoked by cancelling, tearing, destroying or obliterating only when there is proof of the testator’s actions and intent to revoke the will.

If the testator is competent, the revocation of a prior will is absolute. The best way to explain this concept is by example: Tom writes a will. Later, he writes, “CANCELLED,” or words having a similar meaning, on all the pages of the will and through his signature. Tom then makes a second will. Later, he tears up the second will and makes a third will, which he subsequently obliterates with permanent black marker. Tom then makes a fourth will, which he later burns. Assuming that Tom was competent at all times, and that he clearly took the above actions to revoke the various wills, Tom does not have a will. If Tom dies, none of the wills he made can be revived.

Under Ohio law, a divorce or dissolution can affect the provisions of a will. When a court issues its decree or order in a divorce case, or approves a settlement in the dissolution of a marriage, the court’s order automatically revokes the provisions in a will for a former spouse, unless the testator has indicated a clear intent in the will that the former spouse should remain a beneficiary despite the end of the marriage.

Wills may be amended by a *codicil*, a document that meets the same requirements as an original will. That is, the amendment must be in writing, signed by the testator and witnessed by

two competent and impartial people. A will cannot be amended by writing changes on it.

Limitations on Wills; Special Provisions

The general rule is that a testator can use a will to dispose of his or her property in any way, to any persons. There are some important exceptions to this general rule. Further, the law makes special provisions for circumstances that are often overlooked by people when they make wills or when circumstances change after they have made their wills.

The law gives a surviving spouse certain choices that prevent total disinheritance of *probate assets*—that is, assets subject to probate administration. (Certain assets that do not have to be administered through probate court are called *non-probate assets*. For example, assets derived from contractual agreements, such as revocable (living) trusts, insurance policies, payable-on-death accounts, joint and survivorship accounts, pensions or security accounts with transfer-on-death or joint and survivorship provisions, function independently of wills and may not be subject to probate administration. These devices are sometimes called *will substitutes*.) While a testator can disinherit others in a will, a testator cannot entirely disinherit his or her spouse, or leave only a token inheritance. The surviving spouse can accept the will and take whatever share of the estate the will provides, or reject the will and take whatever share he or she is entitled to under the law. Generally, a surviving spouse is entitled to one-half or one-third of a testator's net estate, depending on the number of testator's children who survive the testator. (See the "Statute of Descent and Distribution" section, page 137.)

A surviving spouse and surviving children also are entitled to a living allowance of \$40,000 (which is treated as one of the debts of the estate) and to live in the family home for one year. If the family home is sold to pay debts, the surviving spouse may be entitled to the fair rental value of

the family house. (The surviving spouse is not always entitled to the entire \$40,000 living allowance. The probate court is required to make an equitable distribution of the allowance among the surviving spouse and any minor children. Therefore, the surviving spouse receives the entire amount if the children are also the deceased's children. However, if, for example, there are children of a previous marriage, a portion of the money may go to those children or to their surviving parent for the children's benefit according to their needs.)

In addition to the living allowance, the surviving spouse also has the right to have two automobiles (or trucks, if used for family transportation), provided they were not specifically bequeathed and the combined value of both vehicles is less than \$40,000. These vehicles are not subject to probate administration. The surviving spouse is also entitled to claim one watercraft and one outboard motor not specifically given in the will. He or she also has the right to be reimbursed for the deceased spouse's funeral expenses.

The surviving spouse may have a *dower* (widow's or widower's) *interest* of one-third of any real property owned by the testator during the marriage for the balance of the surviving spouse's life. This dower interest also can be claimed by the surviving spouse with regard to real property that was sold or disposed of during the deceased's life without the spouse's consent. Today, the possibility of a dower interest is limited because buyers rarely buy real property without requiring the release of the dower interest in the deed.

The law has special provisions that automatically change a will in some situations, such as when:

- an additional child is born after the will was made;
- a person named as a beneficiary in the will dies before the death of the testator or within 30 days of the testator's death; or
- the testator is divorced or granted dissolution of marriage after the will was made.

When children are born to the testator after a will has been made, the general rule is that these children (called *after-born children* or *pretermitted heirs*) are entitled to share in the estate the same as the testator's other children. The testator, however, is not bound by this general rule, since testators are not required to leave anything to their children. Like children who were alive when the will was made, after-born children can be specifically disinherited or treated differently from their siblings. A testator's directions will be followed by the court if the will clearly shows that after-born children are not to share in the estate, or are to share in a different way from the children who were alive when the will was made.

Similarly, when an individual named as a beneficiary in a will dies before the testator (called a *predeceased beneficiary*), the gift is not automatically invalidated (or *lapsed*) unless the will makes it clear that the beneficiary must survive the testator. Ohio's "anti-lapse" statute says that, if the will does not specifically state that a gift to a predeceased beneficiary is invalid, then the gift goes to the lineal descendants of the predeceased beneficiary, as long as that beneficiary is a relative of the testator. If the predeceased beneficiary is not related, no gift passes to his or her lineal descendants.

The property of a lapsed gift becomes part of the *residuary estate*, to be distributed to the (other) *residuary beneficiaries*—those people who are named to receive the balance of the estate after all debts are paid and specific bequests are distributed.

When an individual named in the will dies within 30 days of the testator, that individual is considered to have died before the testator, unless the testator says otherwise in his or her will.

A will does not take effect until the testator's death and addresses only property that the testator owned at death. The fact that the testator disposed of some property and acquired other property after the will was made does not necessarily affect the will. A will can still be valid and control distribution of estate assets even though, at death, the testator owned none of the specific property

mentioned in the will. Of course, if the testator does not own the specifically mentioned property or have any interest in it when he or she dies, then a gift of that property would be invalid. For example, if Peter's will states, "Mary will receive my 1920 Rolls Royce," and the Rolls Royce was sold before the testator's death, Mary obviously would not be able to receive that Rolls Royce through Peter's will.

What Happens When There Is No Will?

Some individuals choose not to make a will. The reasons vary: perhaps they are concerned about offending their relatives or they believe that the distribution required by law is appropriate for their situations. Others may feel wills are important, but never get around to writing them. Some people make wills that dispose of only part of their property, while some wills are invalid in whole or in part. Even when a valid will exists, a named beneficiary may choose not to take the share that the will provides.

In any case, when an individual dies owning property not governed by a valid will, Ohio law dictates how his or her property must be distributed.

Statute of Descent and Distribution

The basic provisions governing inheritance of *intestate property* (or property not governed by a will or will substitutes) are found in a law called the *statute of descent and distribution*. For the most part, the statute (*Ohio Revised Code* §2105.06) favors the nearest relatives surviving the deceased. It provides for distribution of intestate property as follows in the chart on page 139.

Those who are entitled to inherit from a testator by intestacy are called the testator's *heirs*. If a testator leaves a will, then the testator has *will beneficiaries* as well as heirs; these two groups might or might not consist of the same people.

Share of Descendants and Next-of-Kin or Heirs

In all of the above cases in which lineal descendants inherit part of an estate, their respective shares are determined according to their place in the family tree and through the ancestor who “represents” them (this representation is known as *per stirpes*). For this example, assume Mary and Peter have four children, Peter dies. Three years later, Mary dies without a will (*intestate*). Three of her four children (Abe, Ben and Carol) are alive at her death. A daughter (Diane), who died before Mary, had two children who are alive.

In this instance, the estate would be divided into fourths. Mary’s three surviving children would each take one-fourth and her two grandchildren would share equally in their deceased parent’s (Diane’s) one-fourth. These grand-

children would each get one-eighth of the estate, since their mother (Diane) is said to represent them.

The members of the nearest generation of descendants with a living member inherit equally.

For example, if Mary’s only living relatives were seven grandchildren—Abe had one, Ben had none, Carol had four and Diane had two—Mary’s estate would be divided into seven equal portions. But if Ben and the seven grandchildren all survived Mary, then Mary’s estate would be divided into four equal portions: one share for Ben, one share for Abe’s child, one share to split four ways among Carol’s children, and one share to divide equally between Diane’s two children.

You can see that whether Abe’s child receives one-fourth or one-seventh of Mary’s estate depends on whether his Uncle Ben survives Mary, which might be by as little as 30 days.

Statute of Descent and Distribution

Situation	Heirs and Distribution
1. No surviving spouse, but a surviving child or children or the lineal descendants of a deceased child.	Each living child receives an equal share of the estate and the descendants of a deceased child will divide that deceased child's share.
2. A surviving spouse (who is the natural or adoptive parent of all of the decedent's children) and one or more children of the decedent or the lineal descendants of a deceased child.	The entire estate goes to the surviving spouse.
3. A surviving spouse (who is not the natural or adoptive parent of the decedent's child) and one child or the lineal descendants of a deceased child.	The first \$20,000 goes to the surviving spouse plus one-third of the balance of the estate; the remainder goes to the child or the child's lineal descendants.
4. A surviving spouse (who is the natural or adoptive parent of one but not all of the decedent's children) and two or more children or the lineal descendants of any such deceased child.	The spouse receives \$60,000 plus one-third of the balance of the estate and the remainder goes to the children, equally; the lineal descendants of a deceased child divide the deceased child's share.
5. A surviving spouse (who is not the natural or adoptive parent of any of the decedent's children) and two or more children or the lineal descendants of any such deceased child.	The spouse receives \$20,000 plus one-third of the balance of the estate and the remainder to the children equally; the lineal descendants of a deceased child divide the deceased child's share.
6. A surviving spouse, but not surviving children or lineal descendants of a deceased child.	The entire estate passes to the surviving spouse.
7. Surviving parents, but no surviving spouse, children or lineal descendants of a deceased child surviving.	The estate goes to the parents in equal shares or the entire estate goes to the surviving parent.
8. Surviving siblings of the decedent, but no surviving spouse; no children nor lineal descendants of a deceased child and no parents surviving.	The estate goes to the surviving siblings (whether whole or half blood) with the lineal descendants of a deceased sibling dividing the deceased sibling's share.
9. One or more grandparents surviving, but no surviving spouse; no child nor the lineal descendants of a deceased child; no parents and no siblings surviving.	One-half of the estate goes to the paternal grandparents, equally, and one-half goes to the maternal grandparents, equally.
10. No surviving spouse, no children or deceased children, no parents, no siblings, no grandparents and no lineal descendants of grandparents.	Estate goes to the next of kin, if living, or to the step-children of the decedent with the lineal descendants of a step-child taking the step-child's share, or, if none, then "escheat" (pay) to the state.

Administration of Estates

The purposes of the administration of estates are to ensure that all of a deceased individual's property is identified and assembled, that his or her debts are paid, and that the balance of his or her property is distributed to those entitled to it.

Estates Subject to Administration

All estates must be settled according to the standard probate procedures for administering estates, established by Ohio law. However, estates totaling \$35,000 or less (or \$100,000 or less if everything is going to a surviving spouse) may be relieved from most of the formal steps of administration when the probate court is satisfied that the deceased individual's debts will be paid and his or her property will be given to those entitled to it. Relief from administration can mean substantial savings in time and court costs. Similarly, estates totaling \$5,000 or less (or \$40,000 or less if everything is going to a surviving spouse) may be summarily released from administration. For a non-spouse to obtain such a summary release from administration, the amount of the funeral bill must exceed the value of the assets being released. Estate administration also can be streamlined when the sole executor and the sole beneficiary of the estate are the same person, regardless of the size of the estate.

Probating the Will

When a person dies leaving a will (*i.e.*, dies *testate*), the first step in administering the estate is to admit the will to probate. Under this procedure, the will is filed in the probate court. The court then examines the document to determine if it is a valid will. It may admit the will or, if there is some doubt about the validity, the court may order the witnesses to the will to appear and testify, for example, about the genuineness of the deceased individual's signature or the deceased's condition at the time the will was signed. If the witnesses

cannot be located, their signatures may be validated by other testimony. The court will accept the will, (*i.e.*, admit it to probate) if and when it is satisfied that the will is valid.

Appointing an Executor or Administrator

Once the will is admitted to probate, the court appoints an *executor* (named in the will) of the estate. The executor is responsible for seeing that the estate is properly settled according to law. If an individual dies without a will (*i.e.*, dies *intestate*) or if the will fails to appoint an executor who is able to serve, the court appoints an *administrator*, whose duties are essentially the same as those of an executor. Executors and administrators are *fiduciaries*, meaning that they are authorized to act on behalf of others and are entrusted to properly handle others' estate assets. Although the probate court is not bound to appoint the person named by the testator, the court will normally appoint that person if the person is qualified to act as executor.

For intestate estates, the court prefers that a relative of the deceased act as administrator. In addition, an administrator must live in the state where the estate is being settled. Residency in the state is usually not technically required for an executor, but the court often prefers it.

Appointment of an executor or administrator is complete when the appointee accepts and acknowledges his or her duties and liabilities and posts a bond for the faithful performance of those duties. The purpose of the bond is to protect the estate's beneficiaries and creditors against the possibility that the executor or administrator will not honestly administer the estate. Wills often contain a provision specifically asking the court to dispense with the bond for the named executor, indicating trust in the executor named in the will to faithfully perform the necessary duties. While the court is not bound by such a request, it will usually grant it. If a bond is required, the premium is paid out of the estate's assets.

When the appointment is complete, the court will send the executor or administrator a written

authorization to act on behalf of the estate. This authorization is called *letters testamentary* or *letters of authority* when issued to an executor and *letters of administration* when issued to an administrator.

If an executor or administrator dies, becomes ill, otherwise is unable to complete his or her duties or does not properly perform those duties, he or she must be replaced. A successor or replacement executor is often named in a will. If the will does not name a successor, or if individuals named in the will as successors can not serve or are not suitable to serve as executor, the court will name an individual, called an *administrator*, *W.W.A.*, or *administrator with the will annexed*, to perform those duties.

Finding, Assembling and Appraising the Estate Property

The first duties of the executor or administrator are to locate all estate property, take an inventory of the property and, if necessary, have the property appraised or valued by one or more impartial appraisers. Although professional appraisers are not required if the property is easy to value (stocks, bank accounts, etc.), their services may be required when the estate includes real estate, jewelry, antiques, etc. When the inventory and appraisal is complete, it is filed with the probate court.

Most of the deceased's assets include non-probate assets. These assets include revocable (living) trusts, insurance policies, joint and survivorship and payable-on-death (POD) accounts, transfer-on-death (TOD) affidavit, and deeds and securities or pension plans with named beneficiaries. The proceeds of these assets are part of the gross "estate" for federal and (usually) Ohio estate tax purposes, but generally are not part of the probate "estate" and need not be listed on the inventory filed with the court.

The executor or administrator also has other duties. For example, the deceased may have been involved in a lawsuit as a plaintiff or defendant at the time of death, or the deceased (or the estate) may have a legal claim or cause of action against

another party. The executor or administrator must see that the pending lawsuit is prosecuted, defended or settled. Similarly, where the deceased had a claim or cause of action, which was not asserted or only partially asserted, the executor or administrator must finally assert the claim and, if necessary, file a lawsuit in a timely manner. For example, if the deceased was killed in a traffic accident, the executor or administrator may have to file a lawsuit to collect damages for wrongful death.

Paying Debts, Taxes, Costs and Other Expenses

The executor or administrator must determine what, if any, debts the deceased owed. Creditors have six months after the deceased's death to present claims against the estate. Most claims not made within six months are barred forever. Tax obligations, funeral expenses and other obligations incurred after death in administering an estate are not subject to the six-month bar on claims.

Debts of the estate may include debts the deceased incurred before death or debts incurred by the estate after death, such as utility bills, real estate taxes and other expenses for maintaining estate assets. Examples of common estate debts are hospital and funeral expenses. Common estate administration expenses and taxes also include probate court costs, attorney fees, accountant fees, appraiser fees, income taxes with respect to the deceased final income tax returns (as well as taxes with respect to income earned during the estate administration) and the compensation the executor or administrator may take for his or her services. Depending on the net value of the estate (including, for this purpose, all assets or accounts in which the deceased had a financial interest or control at death), federal or state estate taxes may be payable.

Certain debts have priority. Generally, taxes, funeral expenses, and costs and expenses of administering the estate must be paid first. Usually, debts, costs and expenses will be paid out of cash in the estate. If there is not enough

cash, it will be necessary to sell some of the estate property. Personal property will be sold first. If there is not enough personal property, then real property (house/land) will be sold. The sale of personal property may be conducted in various ways. The sale might be a public or private sale of individual items or it might be some form of auction. Unless the deceased authorized the executor to sell assets, the probate court must grant permission to conduct a sale.

Distribution of Estate Assets

When all debts, taxes, costs and expenses have been paid, the balance of the estate must be distributed to the individuals named in the will or, if there is no will, to those identified in the statute of descent and distribution (the heirs). Distribution may be in cash or in kind, if the will authorizes the executor to distribute in kind. Distributions may be made in kind in intestate estates if the administrator gets court permission to do so.

In-kind distribution refers to the transfer of something in particular to a beneficiary. For example, the will may state that the deceased's daughter is to receive a wedding ring and a silver tea service. If a sale is not necessary to obtain funds to pay debts, taxes, costs and expenses, the executor or administrator may transfer the wedding ring and tea service directly to the daughter. Sometimes a will explicitly authorizes the executor to make distribution in kind. The executor or administrator will usually consult the heirs to determine if they want cash or the particular property.

When authorized by the will or by the probate court, partial distribution of the estate property may be made to one or more heirs before the estate is completely settled and closed. Partial distribution is often made when the property involved is such that it should not go unused until the estate is settled. Automobiles are often transferred under a partial distribution because they lose their value quickly and may suffer if not driven. Also, partial distribution is common in large estates, which may remain open for some

time. Partial distribution, however, should not be made unless the administrator or executor is sure that enough property will be left in the estate to pay debts, taxes, costs and expenses.

The administrator or executor must notify those who receive partial distribution of estate assets that they might have to return those assets or their value if funds are later needed to satisfy a claim against the estate. For example, creditors have six months to make a claim against an estate. If a partial distribution is made before the six-month deadline and then an unexpected large claim is made against the estate, beneficiaries of the partial distribution may have to return those assets or their value so the claim can be paid.

Accounting of Estate Assets

The executor or administrator is required to file an account showing the estate assets, income, costs, expenses and distribution within six months. This period is extended to 13 months in certain circumstances, including cases subject to a will contest or other litigation, or if the estate is required to file an Ohio or federal estate tax return. When the probate court approves the final account of an executor or administrator, some courts will explicitly release the executor or administrator from his or her fiduciary duties.

Estate, Health and Financial Planning

Estate Planning

Estate planning is the process of preparing for the disposition of a person's assets and execution of his or her wishes during life or at death, as well as preparing for alternate decision-makers in the event of one's incapacity. Wills, trusts, powers of attorney, life insurance policies, pension plans and bank accounts are some tools used in estate planning. The general purposes of estate planning are to:

- transfer an owner's assets to the people or organizations selected by the owner;

- minimize the effects of taxes; and
- allow the owner to choose an agent or trusted person who will carry out the owner's plan.

In general, trusts are legal agreements in which the trust maker (called a *grantor* or sometimes a *settlor*) transfers property to himself or herself, or to another person (a *trustee*) who manages the trust for the grantor's benefit and for the benefit of third persons.

A *revocable trust*, sometimes also known as a "living" trust, is created (signed and funded) when the grantor is alive and may be amended (changed) or revoked (cancelled) at any time during the grantor's life. Through the terms of the revocable trust, the grantor keeps all the benefits of any property placed into it for the rest of his or her life. The grantor also can be the trustee, but the grantor's spouse or a trust company also often serves as trustee. In general, a court-filed accounting for a revocable trust is not required unless a beneficiary requests one, so the trustee customarily reports the financial transactions of a revocable trust solely to the grantor (during his or her life) and then to the beneficiaries once the trust becomes irrevocable at the grantor's death. A revocable trust can be funded with any property such as bank and brokerage accounts, stocks and bonds, a home and other real estate. Some revocable trusts may not be funded initially, but rather at a later time or at the grantor's death. An attorney can help advise when a revocable trust should be funded and with what property. The terms of a trust are described in writing in a document often called the *declaration of trust* or *trust agreement*. This document is signed by both the grantor and the trustee.

A revocable trust is the opposite of a *testamentary trust*, which is only created after the grantor's death. A testamentary trust is a trust that is established by the grantor's will. Because a testamentary trust is only created after the grantor's death, it cannot be amended or revoked. Unlike a revocable trust, a testamentary trust is subject to the ongoing supervision of the probate court, and accountings for the financial activities

of a testamentary trust generally must be filed by the trustee with the court every two years.

Revocable trusts have become popular in recent years because they have many advantages, including:

- avoiding the cost and difficulties of probate administration and accountings;
- avoiding the costs and court intrusions of traditional guardianships during the grantor's life if the grantor should become incompetent;
- providing a vehicle for implementing a tax plan to reduce or defer estate taxes; and
- permitting confidentiality regarding the trust assets and financial transactions.

However, these advantages can be overstated. Estate planning requires individuals to make informed choices. They must investigate the various tools available and understand their effects. For example, while revocable trusts are very flexible, they are not cure-alls, nor are they applicable in every situation. For example, consider that while there are expenses involved in the probate administration of a deceased's assets, expenses also are involved in establishing and administering either a revocable trust or a testamentary trust. In addition, a will and, thus, some probate administration, is necessary for most individuals who have a revocable trust because some assets are not placed in a revocable trust. Also, probate administration can be helpful in some estates and guardianships because of the probate court's supervision and required regular reports, and the court can replace fiduciaries that do not do their jobs.

One thing that a revocable trust *cannot* do, contrary to some advertising, is to help an individual qualify for public assistance programs, such as Medicaid and Supplemental Security Income (SSI). These programs create special estate-planning considerations for individuals who are trying to provide for themselves as senior citizens, or are trying to provide for someone with a disability. Public assistance programs have strict and complex asset and income requirements. To meet these requirements, individuals sometimes

transfer assets to their children or to *irrevocable* trusts so that their children will receive an inheritance. The federal government has responded to this kind of transfer by establishing a period after such a transfer in which an individual is ineligible for public assistance (for example, the look-back period for Medicaid eligibility after a transfer is five years).

On the other hand, government rules make it possible for an individual, with proper planning, to go to a nursing facility without impoverishing his or her spouse. In addition, the state of Ohio has made it possible to create a *supplemental services trust* for an individual with mental illness or mental retardation, or other developmental disability. The trust allows certain assets to be sheltered for limited purposes but, upon the death of the beneficiary of the trust, a portion of the assets goes to the state of Ohio to be used by other Ohioans who have disabilities.

A *revocable trust* (as opposed to an *irrevocable trust*) is not directly relevant to public assistance planning because it can be revoked or cancelled. For this reason, the trust assets are considered to belong to the trust owner for public assistance planning purposes. A revocable trust might, however, be very useful to, say, a mother who wishes to use it as part of a general estate plan to provide a trust for the care of her disabled son after her death.

Estate planning is a detailed process that must be tailored to the needs of particular individuals. An individual who is contemplating the use of a revocable trust, or other estate-planning device, should consult an attorney for assistance in this complex area.

Incapacity and Health Care Planning

While advanced medical techniques have made it possible to prolong the lives of individuals with health conditions, they also raise practical, moral, and legal questions. Concern for these life-and-death issues, as well as the burden and potential liability they place on the family and medical providers, has led to the development of

various legal devices. The *health care power of attorney* and the *living will* are among these devices.

Durable Power of Attorney

The word *attorney* simply means representative agent. A *power of attorney* is a document that appoints someone as an agent, either for limited purposes or for very broad, all-inclusive purposes.

Effective in March 2012, Ohio law makes all powers of attorney “durable,” meaning that the agent can act even if the principal becomes incapacitated (for example, when injury, age or a condition such as Alzheimer’s disease takes away the person’s ability to handle his or her own financial affairs and make medical decisions), unless the power of attorney document says otherwise.

Health Care Power of Attorney (HCPOA)

One type of durable power of attorney is called the *health care power of attorney* (HCPOA, also sometimes called a “DPOA”). An HCPOA permits an agent to make health care decisions if the principal’s physician has determined that he or she is unable to make and communicate his or her own health care decisions. Anticipating the inability to make health care decisions at some time in the future, the principal grants this power in the HCPOA and gives the agent guidance on what to do.

Unlike a living will, discussed on page 145, the agent’s powers are not limited to the time of the principal’s terminal illness or permanently unconscious state. The agent may be given broad powers over every type of medical, or medically related, situation or decision (provided that the principal is unable to make and communicate his or her own health care decisions). However, the law imposes certain restrictions. For example, the agent cannot authorize the removal of treatment that the principal has previously authorized unless circumstances have changed substantially. Also, the agent cannot authorize the removal of life-sustaining treatment unless the principal is in a

terminal condition or permanently unconscious state.

To be a valid document, the HCPOA must be:

- executed by a competent adult;
- signed and dated by the person granting the power; and
- witnessed by two disinterested and legally competent individuals OR acknowledged before a notary public who will attest the individual appears to be of sound mind and not under or subject to duress, fraud or undue influence.

Living Will

The *living will* is an individual's own statement and choice about the specifics and the extent of treatment he or she wishes to receive when in a terminal condition and/or permanently unconscious state and no longer able to make and communicate those decisions. The living will does not appoint another person to make such decisions.

As with the HCPOA, a living will has certain limitations. A living will becomes operative only when:

- the attending physician and a second physician determine that the person (*declarant*) is in a terminal condition or a permanently unconscious state; and
- the attending physician determines the person is not able to make informed decisions regarding treatment, and there is no reasonable possibility that he or she will regain the capacity to make these decisions.

Any competent adult may execute a living will with the same formalities described above for the HCPOA.

A living will may include the declarant's intent to make an anatomical gift (such as organs or tissues) upon his or her death. The declarant with this intent also should complete a Donor Registry Enrollment Form and send it to the Ohio Bureau of Motor Vehicles so his or her name can be added to Ohio's official donor registry.

Both the HCPOA and living will documents are also known as *advance directives* because

they state an individual's wishes about medical and end-of-life treatment *before* such treatment may be needed. Anyone interested in creating an HCPOA or a living will should review the forms for each that were developed by the Ohio State Bar Association with the Ohio State Medical Association, the Ohio Hospital Association, the Ohio Osteopathic Association and the Ohio Hospice & Palliative Care Organization. The forms conform to the requirements of the law and are available from the Ohio Hospice & Palliative Care Organization (now Midwest Care Alliance) through its website at www.midwestcarealliance.org (click on "advance directives" box at the bottom of the home page).

It is not necessary to use the standard forms. However, for either document to be valid, it must include certain specific language spelled out in the *Ohio Revised Code* and included in these forms. Physicians and attorneys will have copies of the standard forms, as will many organizations.

A person's advance directives should be updated every few years, for changes in both the law and in personal circumstances. In September 2010, new standard forms were issued to conform to changes in Ohio law. Documents executed before 2010 are still valid, but those signed since 2010 should use the current standard forms or have met with an attorney to make sure changes in the law are reflected in the documents. Other, less common, types of advance directives are described below.

Mental Health Declaration

A Declaration of Mental Health Treatment is a document that allows an individual to state his or her own preferences regarding mental health treatment and to appoint a person to make mental health care decisions when he or she is unable to do so.

A regular HCPOA can address both physical and mental health issues and is sufficient for many Ohioans. In comparison to physical health care issues, however, mental health issues can be more complex and their specific treatments (*e.g.*, medications and therapies) generally are not

addressed in a general HCPOA. Those who would benefit from creating a mental health declaration include people who have been diagnosed with mental illness or people who think they might need mental health treatment at some point (for example, those of advanced age or those who have a progressive illness that is likely to involve mental health issues).

The mental health declaration lets health care professionals know the principal's own preferences regarding mental health treatment. It also allows the agent (or *proxy*) to advocate for these choices and make other decisions in the principal's best interest if no preference is stated.

DNR Orders

In medical terminology, "DNR" stands for "do not resuscitate." A DNR order is a physician order written into a patient's medical records that says cardiopulmonary resuscitation (CPR) is not to be administered. Doctors are required by their code of ethics to do everything they can to keep a patient alive, unless the patient will not be able to recover any kind of meaningful life and the patient specifically requests that he or she should not be revived in the event of a catastrophic illness.

A person can obtain a DNR order by asking his or her physician to write such an order. If, after consulting with the patient, a physician determines that both of the necessary conditions exist, the physician will write the DNR order into the patient's medical records. It will go into effect immediately.

A person also can preauthorize a physician to write a DNR order in the event that he or she becomes terminally ill or permanently unconscious. A person may use the following two documents to authorize and request that his or her physician write a DNR order:

- a living will; or
- a health care power of attorney authorizing an agent to request such action.

It is important to understand, however, that a person's authorization or request does not con-

stitute an actual DNR order. Such an order is actually in place **ONLY** when a physician has specifically written a DNR order into the patient's medical records at the time of the patient's terminal illness or permanent unconsciousness.

Because a living will takes effect only if and when a person is terminally ill or in a permanently unconscious state, a DNR order that is authorized by a living will cannot be issued until the person is determined to be so afflicted in the opinion of two physicians, one of whom must be a specialist. Similarly, a person may give an agent the authority, through an HCPOA, asking a physician to issue a DNR order, but that authority takes effect only when the patient is unable to communicate his or her own wishes.

Other Duties of the Probate Court

Commitment of the mentally ill and retarded, appointment and supervision of guardians, supervision of adoptions, and the issuance of marriage licenses are among the important duties of the probate court.

Commitment of the Mentally Ill or Retarded

When an individual suffering from mental illness or mental retardation poses a danger to himself or herself or others, or needs special care that he or she refuses or is unable to get, then that individual may be asked to come before the probate court for the purpose of being committed to a hospital or institution for care or treatment. The probate judge may commit such an individual to a public or private hospital or institution only after carefully assessing the evidence of that person's mental status.

Guardianships

A *guardian* is an individual appointed by the probate court to be responsible for another person,

or for another person's property, or both. (The individual for whom the guardian is appointed is called the *ward*.) A guardian will be appointed if the ward is unable to handle his or her affairs. The disability may be due to youth, advanced age, mental condition or physical condition. A guardianship may be voluntary (that is, the guardian is appointed at the ward's request) or it may be involuntary. A guardian is a fiduciary and must take charge of his or her ward's property and give a periodic accounting of the ward's condition and financial affairs to the probate court.

Under the law, the court must take the "least restrictive alternative" in establishing the appropriate care for the ward.

Ohio allows the probate court to appoint *limited guardians* and *conservators*. In general, when a person is legally incompetent, but the nature of what he or she owns or his or her personal situation does not require the guardian to perform all of the duties of living, the court can appoint a limited guardian to perform only those functions that are necessary. This might be the case, for example, when a person has only an interest in real estate that needs to be managed, and the cost and mechanics of his or her personal care is being covered by a spouse. In such a case, the court might appoint a limited guardian who is only responsible to take care of the real estate and does not have to handle other affairs. A family member or friend might be willing to assume this kind of limited duty, but not other duties that a guardian normally would have to perform.

When an individual is mentally capable but physically infirm, the court can appoint a conservator to assist the individual in handling his or her affairs, either temporarily or permanently. Where a conservatorship is established, the judge sets forth the particular duties that the conservator is to perform. Thus, if someone were injured in an automobile accident and were in a full body cast for four months, the court might appoint a conservator to make deposits, sign checks, handle mail and do other day-to-day things (with input from the injured person) until the cast was

removed and the injured person was able to resume control.

The court also may appoint an *interim guardian* or an *emergency guardian* in special situations, such as a temporary disability, or until a full hearing can be arranged to determine whether a full guardianship is necessary. Interim and emergency guardians only serve for short periods.

Adoptions

Adoption is the legal method by which a single adult, a husband and wife, or life partners gain full responsibility for rearing and caring for someone else's minor child. Through adoption, the child legally becomes the child of the adoptive parent or parents following approval by the probate court.

The probate court evaluates the prospective parents (or parent) to determine if the proposed adoption is in the child's best interest. If so, the probate court approves the adoption. A child of any age up to 18 can be adopted. (Under certain circumstances a disabled adult can be adopted.)

Adoptions occur in various situations. For example, a stepchild may be adopted by his or her stepparent. Also, orphans, abandoned children, children placed for adoption by their parents, and children whose legal relationship with their parents has been ended by a court may be adopted.

Marriage Licenses

The probate court supervises the issuance of marriage licenses. (*Marriage licenses are examined in more detail in Part X at "The Marriage License."*) In summary, the probate court will not issue marriage licenses to a prospective married couple if either:

- is underage;
- is under the influence of alcohol or a controlled substance at the time of application; or
- suffers from a communicable form of syphilis.

Blood tests are not required to obtain a marriage license in Ohio. If an applicant is underage, a license can be issued if appropriate parental consent is provided and the court is satisfied that suitable counseling has been received. If a girl is under 16 and pregnant, the juvenile court may grant permission to marry.

For Journalists: Covering Probate Law

Journalists and other writers who cover probate law issues should understand the responsibilities of the probate court. Covering families involved in probate conflicts requires special attention to detail and to the impact such stories may have on those whose lives are affected by these disputes.

Since probate matters generally involve families and disputes may be matters of public

record, traditional journalists have generally consulted with their editors, producers and legal counsel because of concerns about privacy and prevailing journalistic ethics.

Non-traditional journalists, citizen journalists, bloggers and those without formal training or education in journalism and journalism ethics may not know or care about the ethics of publishing stories regarding probate legal matters. When it comes to disclosing legitimately private information, courts to date have not offered any additional protections for the new and emerging categories of journalists in the Internet age. (For more detail on privacy and reporting, see Part XV.) The Supreme Court of Ohio has, however, attempted to address general privacy concerns in its Rules of Superintendence. As a result, most probate courts now have “personal identifier/confidentiality” forms that provide for Social Security numbers and bank account numbers (and, in some instances, the names and addresses of beneficiaries) to be kept private.

Chapter Summary

- The *probate division* (or probate court) of the court of common pleas in each of Ohio’s 88 counties is one of the busiest in the court system.
- *Probate law* covers the proper administration of the estates of individuals who have died, including the payment of taxes and court-approved debts, and the transfer of all probate estate property to the appropriate individuals or entities.
- Probate law also governs the issuance of marriage licenses, adoptions, appointment of guardians to care for children and other persons who cannot care for themselves or their property, and proper care and treatment for persons suffering from mental illness, mental retardation, or from developmental or physical disabilities.

Continued on page 149

Chapter Summary *continued*

- Individuals serving in positions of trust, whether they are executors, administrators, guardians, conservators, trustees, attorneys-in-fact or other persons who act on behalf of third persons, are called *fiduciaries*.
- The current owner of private property can determine who is to be the future owner when the current owner dies. The most common device to transfer ownership upon death is a *will*, or more formally, a *last will and testament*. An individual making a will is called a *testator*.
- A will cannot govern the distribution of the testator's property unless it is filed with the probate court.
- When an original will is misplaced or destroyed in some way, a copy can be admitted to probate, provided it can be proven that it is the last will of the testator, and that the testator did not intentionally damage or destroy it in order to revoke it.
- A will can be revoked in a number of ways. The most common way is by making a new will.
- The basic provisions governing inheritance of *intestate property* (or property not governed by a will or will substitutes) are found in a law called the *statute of descent and distribution*. For the most part, the statute favors the nearest relatives surviving the deceased.
- Estates are administered through the probate process to ensure that all of a deceased individual's property is identified and assembled, his or her debts are paid and the balance of his or her property is distributed to those entitled to it.
- Once the will is admitted to probate, the court appoints an executor of the estate. An *executor* is someone who is responsible for seeing that the estate is properly settled according to law.
- If there is no will, the court appoints an *administrator* to handle the estate's administration.
- Estate executors and administrators must locate and take inventory of all estate property, determine and pay any debts owed by the deceased, pay any estate taxes that are required, and distribute the balance of the estate to individuals named in the will or designated by the statute of descent and distribution. When an estate is closed, the executor or administrator must file an account of assets, income, costs, expenses and distribution with the court.
- *Estate planning* is the process of managing a person's assets and decisions during life or at death. Wills, trusts, powers of attorney, life insurance policies, pension plans and bank accounts are some tools used in estate planning.
- Concern for life-and-death issues and the burden and potential liability they place on the family and medical providers have led to the development of various legal devices. The *health care power of attorney*, the *revocable (living) will* and the *mental health declaration* are among these devices.
- Commitment of those with mental illness or retardation, appointment and supervision of guardians, supervision of adoptions and the issuance of marriage licenses are among other important duties of the probate court.

Web Links:

From the OSBA's "Law You Can Use" column:

www.ohiobar.org/lawyoucanuse (search by title or topic)

- "Ask Questions To Decide if a Revocable ('Living') Trust is Right for You"
- "Consumers Should Seek Legal Advice before Establishing Trusts"
- "Keep DNR Orders Where Emergency Squads Can Find Them"
- "Know Legal Steps To Take after Someone Dies"
- "Know Risks before Using Joint and Survivor Bank Accounts"
- "Make Sure Your Assets Go To Intended Beneficiaries"
- "Ohio Law Helps You Provide for Fido After You're Gone"
- "Ohio's Income Tax on Trusts Is Here To Stay"
- "Probate Court Screens Prospective Parents in Private Adoptions"
- "Recognized Advance Directive Forms Simplify Health Care Planning"
- "State Recovers Medicaid Costs from Estates"
- "Transfer-on-Death Designation Affidavit Avoids Probate of Real Estate"
- "Trust-Owned Life Insurance Policies Help Avoid Federal Estate Taxes"
- "Using Trusts To Improve Quality of Life for Individuals with Disabilities"
- "What Are the Residency Requirements for Ohio Guardians?"
- "What Is Charitable Planning?"
- "What You Should Know about the Declaration of Mental Health Treatment"
- "What You Should Know about Do Not Resuscitate (DNR) Orders"
- "What You Should Know about Guardianships and Advance Care Planning"
- "What You Should Know about Health Care Powers of Attorney"
- "What You Should Know about Living Wills"
- "What You Should Know about Organ and Tissue Donation"
- "What You Should Know about the Declaration of Mental Health Treatment"
- "When A Loved One Dies ... Who Pays the Bills?"

From the OSBA's Law Facts pamphlet series:

www.ohiobar.org/lawfacts (search by title)

- "Administering an Estate without a Will"
- "Do Not Resuscitate (DNR) Orders"
- "Financial Powers of Attorney"
- "Guardianships"
- "Living Wills and Health Care Powers of Attorney"
- "Revocable ('Living') Trusts"
- "Probate"
- "Wills"

From Cornell Law School Legal Information Institute:

<http://law.cornell.edu/wex> (type key words in search box)



“Character is the only secure foundation of the state.”

– Calvin Coolidge

The family is the basic unit that ensures the biological and cultural continuation of society. So that families function as well as possible, the law establishes rights and duties for family members (generally parents and their children) and a method to enforce these rights and duties. For example, the state sets rules for creating marriages and, through a court, the state approves (or grants) a divorce or dissolution of marriage.

The rights and duties of the people involved in the family and the process of enforcing these rights and duties are often grouped together under the term *family law*.

Marriage

Marriage involves a man and a woman who are responsible for each other’s well-being and the well-being of their children. Because the relationships between spouses and between parents and their children are so important to a healthy society, the state encourages people considering marriage to be cautious and wise.

Pre-Marriage Counseling

Pre-marriage counseling is advisable for all couples, regardless of their ages or any previous marriages. Conferences with an experienced counselor help prepare the couple to manage the problems that arise in any marriage. However, if both of the prospective spouses are 18 or older, pre-marriage counseling is not mandatory. If either of the parties is under 18, Ohio law requires the couple to have pre-marriage counseling.

Couples who belong to a religious organization can arrange counseling with their religious or spiritual leader. (Some religious bodies require pre-marriage counseling.) Pre-marriage counseling is also available from many social agencies

and from professional marriage or family counselors. The probate court also might provide information about local sources for pre-marriage counseling.

Marriage as a Three-Way Contract

Marriage is a three-way contract involving the state and the two people who are joined in marriage. The parties’ marriage vows create a binding contract. Under Ohio law, the state is automatically a party to the contract because of the importance of the family, and because the methods generally used to enforce other types of contracts do not work with a marriage contract. For example, a court can order payment of child support or grant visitation rights, but the orders likely would be unenforceable without the power of the state. The state’s presence helps protect the interests of the state, society and any “third-party beneficiaries,” such as children.

Who May Marry

Under Ohio law, unmarried men 18 or older and unmarried women 16 or older are legally permitted to marry. A person under 18 years of age must obtain the consent of his or her parents, guardian, or custodian. Parental consent is unnecessary in situations where the parent whose consent is required:

- lives in a foreign country;
- has neglected or abandoned the minor who wishes to marry;
- is an inmate in a mental or penal institution; or
- has been deprived of custody of the minor by the court.

In addition, a woman who is under 16 and pregnant may obtain permission to marry from the juvenile court. (Note that the juvenile court is not required to grant permission.) Someone who already is married cannot legally enter into another marriage. A married person who know-

ingly enters into another marriage is a bigamist. *Bigamy* is a crime that automatically makes any later marriage(s) invalid. Even so, Ohio law permits the later spouse to get a *court-ordered divorce* or *annulment*, which officially ends a bigamous relationship and helps resolve questions of spousal support, legitimacy of children and child support.

The Marriage License

A marriage cannot occur unless the parties have a license. A couple may apply for a license in the probate court of the county where either party lives, or in the county where the ceremony is to be performed. Before February 2001, Ohio couples had to wait at least five days from the date of application for their marriage licenses to be issued unless, for a good reason, the probate judge waived this “waiting period.” Now, couples no longer have to go through a waiting period before obtaining a marriage license.

A blood test is not necessary to obtain a marriage license. However, probate courts do not issue a marriage license to any person who, at the time of the application, is under the influence of alcohol or a drug of abuse, or who is suffering from a communicable form of syphilis. Once issued, a marriage license is valid for 60 days. If the couple does not marry within that time, they must get a new license.

The Marriage Ceremony

The law does not prescribe the actual words of the marriage ceremony. In Ohio, only a person authorized to perform marriage ceremonies can solemnize a marriage. Authorized persons include:

- anyone who produces credentials as a regularly ordained or licensed minister of any religious society or congregation, and is licensed by the secretary of state to solemnize marriages;
- municipal, county and probate court judges;
- mayors; and
- the superintendent of the state school for the deaf.

Further, a religious society may perform a marriage. The provision allowing a religious society to perform a marriage ceremony recognizes the practice of having couples publicly exchange marriage promises and then proclaim to the congregation that they are wed. The person officiating at a marriage ceremony must sign the marriage certificate and file the certificate with the probate court within 30 days after the ceremony.

Ceremonial Versus Common-Law Marriages

Historically, the law has recognized two methods of establishing the marital relationship: *ceremonial marriage* and *common-law marriage*. In a ceremonial marriage, the couple obtains a license from the probate court and a person authorized by the state conducts the marriage. Once the ceremony is finished, the authorized person completes the certificate of marriage and files it with the probate court within 30 days.

Common-law marriage, recognized in Ohio until 1991, was established by the conduct of the parties and was not dependent on an official license, ceremony or certificate. Before 1991, Ohio allowed persons who claimed to have entered into a common-law marriage the opportunity of proving that such a marriage did exist. Once a court—or sometimes an agency—decided that a person claiming marriage had offered sufficient proof, the common-law marriage was established, at least for the purposes of that court or agency.

Couples claiming to have entered into a common-law marriage must prove:

- competence to marry (each party must have been the appropriate age and not married to another person);
- cohabitation;
- that they have conducted themselves publicly as a married couple;
- that they have developed a reputation in the community as a married couple; and

- their intent—or their agreement, at some point during their relationship—to live as husband and wife.

Ohio no longer accepts proof of common-law marriage in relationships that were entered into in Ohio on or after Oct. 10, 1991. In some circumstances, however, Ohio will accept proof of a common-law marriage if the couple entered into such a relationship in another state that recognized common law marriages at the time the couple committed themselves to one another.

The question of the existence of a common-law marriage usually arises when one of the parties dies and the surviving party claims the rights of a surviving spouse. For example, the surviving party may make a claim for inheritance, Social Security, insurance or workers' compensation.

Just as with a ceremonial marriage, a divorce or dissolution is necessary to end a common-law marriage.

Same-Sex Marriage, Cohabitation Agreements, and Custody of Children

Ohio is one of 30 states that excludes same-sex couples from marriage by state constitutional amendment. Eleven states exclude same-sex couples from marriage by statute only.

The following states issue marriage licenses to same-sex couples as of December 2011: Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York and the District of Columbia. Marriage equality is also available in two tribal nations, the Coquille Indian Tribe and the Suquamish Tribe. Three states, California, Maryland and New Mexico, recognize out-of-state marriages between same-sex couples, even though they don't issue their own marriage licenses.

Ten jurisdictions make available civil unions or other comprehensive domestic partnership status, including California, Delaware, Illinois, Hawaii, New Jersey, Nevada, Oregon, Rhode Island and Washington. Six others provide limited

rights to same-sex couples, including Colorado, Hawaii, Maine, Maryland, New York and Wisconsin.

Although there has been no reported decision as of December 2011, it is doubtful that the state of Ohio would recognize the civil unions of same-sex couples from other states. However, some trial-level decisions have permitted same-sex couples who were married or had established civil unions in other states or abroad to terminate their marriages or civil unions in Ohio courts. In these cases, the couples agreed about the terms of termination. It is questionable whether any Ohio courts would permit contested litigation to determine the rights and obligations of the parties who seek to terminate marriages and civil unions established elsewhere between same-sex couples.

Because same-sex couples in Ohio have few or no legal rights through the family law statutes, same-sex couples generally use private contracts, sometimes called partnership agreements or cohabitation agreements, to define the financial rights and obligations each party has to the other, particularly regarding property they may acquire during their relationship.

A *cohabitation agreement* typically defines each right and obligation, property, support and any other issue an unmarried couple may face while living together and in the event of a dispute or break-up. This type of agreement may address issues such as property ownership division, financial resources, a partner's death or disability and sharing of household expenses. Such contracts cannot be enforced in domestic relations courts. However, they are generally enforceable in common pleas court as a contract or partnership dispute, depending on all the circumstances of the case. At this time, a cohabitation agreement is the best available means for unmarried same-sex or heterosexual partners in Ohio to determine their own legal future and protect their interests.

Unmarried couples, whether same-sex or heterosexual, cannot jointly adopt children in Ohio. However, Ohio courts have, since 1997, generally approved shared custody agreements submitted to establish a legally recognized

relationship in the context of same-sex parents between the child and the parent who is not the child's legal parent. Such agreements were specifically sanctioned by the Supreme Court of Ohio in 2002. The rights of a same-sex partner who is not a child's legal parent to maintain a relationship with a child born to or adopted by the other partner in the absence of formal agreement are in flux, with conflicting decisions arising from Ohio courts depending upon the factual circumstances.

Persons in same-sex partnerships who want their partners or children to inherit from them are strongly encouraged to prepare standard estate planning documents, such as wills, nominations of guardian, designation of remains and powers of attorney. Without such planning, same-sex couples do *not* inherit through each other under the statutes of descent and distribution, and their children do not inherit through a parent figure who is not their legal parent. In the absence of a designation of remains, the partner may not be able to determine funeral arrangements or, in some cases, may even be barred from attending funeral services organized by traditional "next of kin." These results are not changed by the establishment of shared custody.

In addition, persons in same-sex relationships who want their partners to make medical decisions for them in the event they are not competent to do so (such as in the event of emergency, debilitating illness or other significant medical problem), can prepare health care powers of attorney and living wills naming the partner. Without such formal designations, treatment of the same-sex partner by medical providers and family members in time of medical difficulty will be unpredictable.

Because of the complexity of these issues and the uncertainty surrounding this constantly changing area of law, same-sex couples are strongly advised to consult an attorney who has experience working with same-sex couples to discuss the legal options available to them, especially if the couple plans to own real property or raise children together. None of the rights and planning options

potentially available to same-sex couples in Ohio is available without formally establishing such protections, preferably well in advance of any disputes or difficulties that may arise.

Family Rights and Obligations

Ohio law establishes a variety of rights and duties for married couples concerning their relations with one another and with their children. Similarly, the law establishes a variety of rights and duties for children concerning their relations with their parents.

Rights and Obligations of a Married Couple

According to Ohio law, married partners are expected to give each other mutual respect, fidelity and support. Each spouse must support himself or herself, the other spouse and any minor children. This support is described in the law as the provision of *necessaries*. Necessaries generally are defined as food, clothing, shelter and medical care.

Providing support is considered so important that spouses or parents found guilty of neglecting their duties may face civil and criminal liability with stiff penalties. For example, a spouse may be held liable for the enormous medical expenses incurred during a lingering illness of his or her spouse, even though the healthy spouse had no contract with the medical providers.

Historically, a wife had few rights apart from her husband. When a woman married, most of her property became her husband's and she was almost totally under his control. Under older versions of the common law, a husband could, within certain limits, physically assault his wife.

Today, married partners are on equal footing with respect to personal and property rights. With certain limited exceptions, each may own and dispose of property as if unmarried. Each has the

right to enter into contracts without the other. Neither can be excluded from the family home, except by court order. Also, physically assaulting a spouse is currently punishable as a crime (domestic violence).

Obligations of Parents to Their Children

Parents are obliged to support their children. This obligation includes:

- ensuring that the children have food, clothing, shelter and medical care;
- ensuring that they attend school;
- supervising their behavior and using appropriate discipline when it is necessary to achieve proper conduct; and
- fostering and protecting their physical, mental and moral well-being.

Failure to meet any of these obligations may result in various kinds of criminal and civil liability for the parents.

In a practical sense, parents are obligated to provide adequate support to their children, at least until the children are through high school. The question of what is “adequate support” is answered on an individual basis. “Adequacy” depends upon the parents’ ability and financial resources. Support may be considered to be adequate if the parents are doing the best they can, given their particular circumstances.

The legal obligation to support children applies whether the parents are married to each other, married to a subsequent spouse or were never married at all. This obligation applies to both parents regardless of who has custody of the children. Non-support of children is a criminal offense.

This obligation to provide child support may be enforced through a variety of court actions. An action may be brought by the mother of an illegitimate child to force the father to provide support. Other actions may be brought in connection with

divorce, dissolution of marriage, annulment or spousal support lawsuits. In some cases, a welfare agency will file lawsuits. The state of Ohio also helps enforce the support obligations of out-of-state parents. Each county maintains a child support enforcement agency to establish and enforce child support orders administratively. Objections to the agency’s actions are heard in court.

Note: The Family and Medical Leave Act of 1993 (FMLA) provides certain employees with up to 12 weeks of unpaid, but job-protected, leave per year. Employees may take leave for a number of qualifying reasons, including the birth or care of a newborn, adopted child or foster child and the care of an immediate family member. To learn more about the FMLA, see Part XI, Workplace Law, page 174.

Obligations of Children to Their Parents

Children have certain responsibilities to their parents. Children are obligated to respect their parents and perform, within their abilities, the family duties that are asked of them. They must:

- obey their parents, teachers and other authority figures;
- apply themselves the best they can to master the instruction and schooling given them; and
- behave according to acceptable standards.

An adult child also is obliged to provide support if a parent is financially unable to support himself or herself, either due to sickness or old age. As with parents’ obligation to support minor children, this obligation is conditioned by the adult child’s ability and financial means. An adult child’s obligation to support a parent does not apply if the parent has abandoned the child or failed in his or her obligation of support to the child.

Minors and Their Rights

For most purposes, a person is considered an adult at age 18. Persons under 18 are called *children, minors* or *juveniles*. While minors have many personal rights, they do not have all the rights of adults.

The Age of Majority

The age at which a child (minor or juvenile) becomes an adult is known as the *age of majority*. Under federal law, every person is allowed to vote at age 18. In Ohio, 18 is the age of majority for voting and most other purposes. The major exception to that rule involves liquor control laws. Persons under 21 are not permitted to purchase any alcoholic beverage.

Minors in General

The law often treats minors differently from adults, since minors frequently lack the knowledge, experience and judgment to truly fend for themselves.

Some rights and obligations do not apply to minors the same way that they apply to adults. For example, society does not hold very young children responsible for criminal acts. Older children who commit criminal acts are also treated differently from adults in most cases. For instance, a person under age 18 is allowed a substantially lower blood alcohol concentration than an adult when operating a motor vehicle. (While persons under 21 may not buy any alcohol, they are permitted to consume it for ceremonial purposes within the family.) One rationale for allowing a lower alcohol concentration for minors is that a combination of alcohol and judgment that already may be reduced due to their age makes juveniles more likely to be involved in accidents.

Apart from the criminal law, minors may be subject to more, and different, controls on their behavior than adults. For example, minors must have parental permission to do certain things,

such as to marry or to obtain medical treatment. While minors can own property, it is often necessary that a guardian hold and manage such property. The right of minors to enter into contracts also is limited. (*See Part VI, "Contracts," for a discussion of a minor's capacity to enter into a contract.*)

Minors are barred from certain occupations and their employment in other occupations is subject to legal limits on child labor. For example, minors may not engage in occupations that are hazardous or detrimental to their health and safety, such as meat packing and slaughtering, mining, and the manufacture of chemicals, explosives or radioactive material. Certain licenses cannot be granted to minors. For example, to obtain a license to practice law in Ohio, an applicant must be at least 21 years of age. Other licenses, such as a driver's license, can be granted to minors only under certain conditions. The ability of minors, especially very young children, to act as witnesses in court also is limited. Under the Ohio Rules of Evidence, a child under age 10 cannot be a witness unless the judge determines, after separately questioning him or her, that the child's testimony is likely to be honest and truthful and not the result of what someone else may have instructed the child to say.

Parents can be held responsible or liable for up to \$10,000 if their children willfully damage property or willfully and maliciously assault another person. Moreover, an adult who signs for a minor's driver's license may be held liable for any amount of damage the minor causes in an accident if the minor is driving without insurance.

Constitutional Rights of Minors

While minors do have rights under the constitution, they are somewhat restricted. For example:

- Minors do not have complete freedom of speech and assembly under the First Amendment to the U.S. Constitution. For instance, the state can limit access to books, magazines, movies and other materials adults can freely

obtain, view or possess. Ohio law places restrictions on matter that is not obscene from an adult viewpoint, but is considered unsuitable for juveniles.

- Minors cannot freely keep and bear arms. Under federal and Ohio law, a minor cannot buy any kind of firearm and a person under 21 cannot buy a handgun. A minor under 16 years of age cannot hunt without an accompanying adult. Except for lawful hunting, no minor of any age can possess a firearm unless it is used for instruction in firearms safety, care, handling or marksmanship under competent adult supervision.
- Searches and seizures that would be unconstitutional if they involved an adult may be constitutional when they involve a juvenile. For example, it may be proper, under certain circumstances, to search a school locker. Schools have a duty to take weapons, drugs and other dangerous items away from students.
- A minor accused of juvenile delinquency may be held without bail before trial if the court finds there is a serious risk that the minor may commit an act that would be a crime if committed by an adult. (A minor does not have the right to bail in a juvenile proceeding.)
- Minors have certain other rights that, at least partially, make up for the fact that they don't have the right to bail. For example, the law favors releasing minors into the care of their parents. In such a case, the minor does not have to stay in jail while awaiting trial and the minor's parents do not have to pay bail for the minor's release. Also, a minor who is held in jail while awaiting trial must be kept separate from adults and must be given a detention hearing within 12 hours of admission or the next court day after admission. Further, a minor who is held *after* the detention hearing must be kept separate from adults and is entitled to a court hearing within 10 days of the filing of the complaint.
- A minor may lose his or her liberty for actions that would not be considered criminal offenses

if committed by an adult. For example, a minor who engages in sexual relations may be committed to a juvenile institution as an unruly child.

- Finally, a minor does not have the right to a jury trial in juvenile proceedings.

Contractual Rights of Minors

Minors do not have full rights to enter into contracts. A minor who enters into a contract with an adult has the option to either honor or cancel the contract before complying with (or performing) the terms of the contract. By complying with the terms, the minor is acting in a way that honors the contract, so the contract will be binding on the minor as well as the adult.

A minor who chooses to cancel a contract must take action to cancel the contract before becoming 18 years of age. However, a minor cannot cancel a contract if the cancellation would cause an unfair result or allow the minor to benefit from his or her own wrongdoing. For example, a minor cannot purchase a car, wreck it, and then cancel the contract and expect not to have to pay for the car.

Finally, in some situations, a minor can enter into a binding contract and not have the right of cancellation. These situations generally involve contracts for necessities such as food, clothing, shelter and medical care. The minor's parents may be held liable on contracts for necessities. Contracts for medical care raise special questions and are addressed below.

Seeking Medical Aid

While the general rule is that minors cannot be given medical treatment without the consent of a parent, guardian or custodian, there are major exceptions to the rule, such as the following:

- Permission for treatment of a minor need not be obtained in an emergency.
- A minor age 16 or over may voluntarily enter a mental hospital for treatment for a mental illness arising from drug abuse.

- A minor of any age can obtain medical treatment for any condition arising from drug abuse or for venereal disease.
- Pregnant minors may have abortions in certain circumstances.

Ohio has a parental notification law covering the rights of unemancipated pregnant minors seeking an abortion. (Unemancipated minors are still under the authority of their parents.) A simplified summary of that law is stated below.

The Ohio parental notification law defines an unemancipated, pregnant minor as a woman under 18 years of age who has not entered the armed services, has not been employed and self-subsisting or has not been otherwise independent from the care and control of her parents, guardian or custodian. Under the law, an unemancipated pregnant minor must notify at least one parent, or her guardian or custodian, of an intention to have an abortion. If the parent, guardian or custodian consents in writing, the minor may have the abortion. In certain circumstances, the minor may avoid notifying her parents, guardian or custodian by requesting that notice be given to a sister or brother who is 21 years old, or to a stepparent or a grandparent. Notice is not necessary if the minor is found to be mature and well enough informed to intelligently decide for herself whether or not to have an abortion. Further, in certain circumstances, such as in cases where the minor fears abuse from whoever would normally receive notice, the minor may avoid giving notice to anyone.

Where notice is to be given to a sister, brother, stepparent or grandparent, or where no notice will be given to anyone, the minor must file an application with the juvenile court. Application forms are available from juvenile courts without charge.

Where notice is to be given to someone other than the parent, guardian or custodian because the minor fears harmful consequences of notifying the parent, guardian or custodian,

the application must specify who should receive notice. Also, the child must sign an affidavit stating that the applicant is in fear of physical, sexual or severe emotional abuse from her parent, guardian or custodian and that her fear is based on a pattern of physical, sexual or severe emotional abuse exhibited by the parent, guardian or custodian.

Similarly, if the minor wishes to avoid giving any notice at all, the application must be accompanied by an affidavit stating that she is in fear of physical, sexual or severe emotional abuse from her parent, guardian, custodian or any other person who would otherwise be entitled to receive notice. The juvenile court must consider any application requesting that notice not be given to the parent, guardian or custodian. The entire process is confidential and the applicant is not required to pay filing fees or court costs.

The juvenile court will issue an order authorizing an abortion without notice to the parents, guardian or custodian in cases where: 1) the court finds that the minor is sufficiently mature and well enough informed to intelligently decide to have an abortion without notifying a parent, guardian or custodian; or 2) the minor's parents, guardian or custodian have demonstrated a pattern of physical, sexual or emotional abuse, and that, under the circumstances, notification would not be in the best interest of the minor. If the court does not hold a hearing within five business days after the filing of the application, then it is assumed that the court has consented to the abortion. Further, the court must make its decision immediately after the hearing. If the court does not grant consent it must dismiss the application. The applicant may appeal such a dismissal.

This area of the law is in flux and federal legislation may be enacted. Because of the confidential relationship between doctor and patient, a doctor does not have to inform the parents that he or she is treating their child. However, the

parents are not bound to pay for treatments unless they consent to them.

Finally, there is some case law in Ohio establishing that a minor can consent to any kind of medical treatment as soon as he or she has reached sufficient age and discretion to understand the consequences of consent. This case law applies to “necessary” as well as “elective” treatment, such as cosmetic surgery. As a practical matter, doctors seldom treat a minor without parental consent, except in the situations described above.

Juvenile Delinquency, Unruly Children and Juvenile Traffic Offenders

In Ohio, the juvenile court has jurisdiction over minors who commit offenses that would be crimes if committed by adults and over minors who present behavioral problems. The court also has jurisdiction over abused, neglected and dependent children. The juvenile court has a wide range of options in dealing with children and usually can tailor its dispositions (sentences, fines, treatment orders, to name a few) to meet the needs of the particular child. In addition, the juvenile court may deal with adults guilty of neglecting, abusing or contributing to the delinquency or unruliness of minors.

The Juvenile Court

In 1902, Ohio became the fifth state to create a juvenile court. Before the juvenile court existed, children as young as age seven were considered criminally responsible for their actions and, if convicted, were treated as adult offenders. The main emphasis of the juvenile court’s work is providing for the care, protection and mental and physical development of children, as opposed to punishing them. In certain cases, the court is also

charged with protecting the public interest and safety, holding the offender accountable for his or her actions, restoring the victim and rehabilitating the offender. The juvenile court has exclusive jurisdiction over delinquent and unruly children; juvenile traffic offenders; and neglected, dependent and abused children.

When a minor is accused of a crime, whether serious or petty, the general rule is that the minor can be tried and dealt with only in the juvenile court. Under certain circumstances involving very serious offenses, however, a minor over age 14 may be transferred to the common pleas court for trial and punishment as an adult. Adults accused of contributing to the delinquency or neglect of a minor are tried in the juvenile court. Other adult crimes against minors, such as non-support, may be tried in the juvenile court as well as in other courts.

In addition to addressing criminal matters, the juvenile court has the power to determine and provide for custody and care of neglected, dependent or abused children. This power is subject to the authority of the domestic relations court to determine custody and support questions in divorce and similar cases, and to the authority of the probate court in guardianship and adoption proceedings. The juvenile court also has the power to consent to the marriage of pregnant minors under 16 and to consent to abortions for unemancipated, pregnant minors.

Detention of Juveniles

Minors may be taken into custody for various reasons. For example, they may be taken into custody because:

- they are accused of committing offenses that would be crimes if committed by adults;
- a juvenile court orders them to appear and they fail to do so;
- there is reason to believe they are runaways;
- they are suffering from illness or injury and are not receiving proper care; or
- they are in immediate danger from their surroundings.

After being taken into custody, a minor may be released to his or her parents, guardian or custodian on their written promise to bring the minor to court when required. If the minor is not brought to the court hearing, the court may issue a warrant compelling the parents, guardian or custodian to bring the child to court. If it appears that a minor taken into custody should be detained or given shelter care, the minor may be placed temporarily in a detention home, children's home, juvenile shelter or other suitable facility, or with a temporary custodian.

Detention is not favored under juvenile law. Detention (including shelter care) is used only where:

- it is necessary to protect the person or property of the minor or of others;
- the minor may run away or be removed from the court's jurisdiction;
- there is no suitable person to supervise and care for the minor; or
- the court determines that detention is in the minor's best interest.

A minor alleged to be delinquent, unruly, or a juvenile traffic offender may be detained in a jail only if there is no available juvenile detention home or similar facility. In such cases, the minor must be kept in a separate room where he or she cannot come in contact with adult offenders. A neglected or dependent minor who is detained cannot be kept in jail under any circumstances without a specific court order authorizing such detention.

Delinquent Children

A *delinquent child* is one who commits any act (other than a juvenile traffic offense) that would be a crime under state, municipal or federal law if committed by an adult, or who fails to obey an order of a juvenile court. For example, a child is charged with delinquency whether the offense in question is murder or merely disorderly conduct.

Juveniles have most of the rights of adults charged with criminal offenses. For example, in delinquency proceedings, a minor has the right to:

- be represented by counsel (if the minor or the minor's parents cannot afford an attorney, the state will provide one at no cost to the family);
- have a clear and explicit statement of the offense;
- have the state prove each of the elements of the offense beyond reasonable doubt; and
- have applicable rights explained at significant stages of the proceeding.

A major way in which the law governing children differs from the law governing adults is that minors traditionally have not had the right to jury trial or the right to bail. However, with *blended sentencing* (discussed on page 162), certain juveniles accused of serious offenses have the right to bail and a jury trial.

A child who the court finds has committed the acts as charged is classified as delinquent. Because juvenile courts seek to rehabilitate children rather than to punish them, judges impose *dispositions* rather than to hand down sentences in juvenile cases. The seriousness of an offense comes into play when the court imposes its disposition (fine, order for treatment or other disposition order). For example, a minor who has been classified delinquent for disorderly conduct may only be required to perform community service, whereas the minor who has been classified delinquent for robbery may serve a term in a state-run juvenile facility. Beginning in 2004, a juvenile could be sent to a local juvenile detention facility for up to 90 days. If the offense would be considered a felony if committed by an adult, the juvenile can be sent to a state-run juvenile facility. Where there is a heinous offense, such as murder, the court may transfer the child to the common pleas court to be tried and punished as an adult, provided that the child was at least 14 years old when the act occurred.

If a minor is found to be delinquent, the juvenile court has many options in its disposition of the minor. For example, the court may:

- allow the child to stay at home but place the child on probation;
- require restitution to the victim (to make up for the damage, loss or injury);
- send the child to a school, camp, institution or other facility;
- send the child (for certain offenses) to a facility operated by the Ohio Department of Youth Services (ODYS);*
- revoke the child's driver's license;
- suspend or revoke the registration of all motor vehicles registered in the child's name;
- impose a period of electronically monitored detention;
- require that the child attend a drug or alcohol abuse program;
- impose a fine plus court costs; and
- order appropriate treatment or education for a child who suffers from physical, psychological, developmental or other problems.

* Note: A child who commits an offense that is a felony of the 3rd, 4th or 5th degree if committed by an adult can be committed to ODYS for a minimum period of six months. A child who commits an offense that is a felony of the 1st or 2nd degree if committed by an adult can be committed to ODYS for minimum period of one year. The maximum time a juvenile delinquent can be held in an ODYS facility is until his or her 21st birthday. The juvenile court's jurisdiction over the person ends when that person turns 21. This is true not only for delinquents, but also for unruly, abused, neglected and dependent children and juvenile traffic offenders.

Even though trial procedure in juvenile court may be somewhat less formal than in other courts, the power of the court is obvious. The court building is a secure place served by the sheriff and the police. Detention facilities, and some shelter care facilities, are staff secure (meaning a staff member keeps track of who comes and

goes) and limit the freedom of their inhabitants. Whatever the court decides to do can dramatically affect the freedom and life of the minor and the minor's family.

Transfer for Trial as an Adult

The juvenile court may transfer a minor to the common pleas court for trial and punishment as an adult in serious cases and under limited circumstances. (This transfer is often called a *bindover* because the child is "bound over" to the adult court.) The court has this option when:

- the minor was 14, 15, 16, or 17 when the offense occurred;
- the offense would be a felony if committed by an adult;
- there is probable cause to believe the minor committed the offense; and
- after full investigation, including mental and physical examinations, the juvenile court finds either of the following:
 - 1) that the minor will not comply with or benefit from rehabilitation offered by any facility or program in the juvenile system; or
 - 2) the safety of the community requires that the minor be placed under legal restraint, even after the person turns 21.

As a practical matter, juvenile courts exercise the discretion to transfer juveniles to adult courts only in serious cases where the accused minor has a long history of delinquency. In no case can a minor under age 14 be transferred to adult court. Also, in no case can a minor of any age who is accused of a misdemeanor be transferred to adult court. Once a minor has been bound over to, and convicted in, a common pleas court, he or she will not go through the bindover process again. If later charged with a felony while still a minor, he or she automatically will be treated as an adult and tried in adult court.

In addition to discretionary bindovers, juvenile courts must transfer juvenile offenders who are accused of certain serious offenses to adult courts. This mandatory bindover occurs when:

- a 16- or 17-year-old child is accused of aggravated murder, murder or attempted murder;
- a 16- or 17-year-old child, with a prior commitment to ODYS for a serious offense, is accused of another serious offense (including manslaughter, aggravated robbery and rape) or used, displayed, brandished or indicated a firearm in committing the offense;
- a 14- or 15-year-old child, with a prior commitment to ODYS for a serious offense, is accused of aggravated murder, murder or attempted murder.

A special rule applies to minors who are accused of an offense that would be murder or aggravated murder if committed by an adult. Under the special rule, the court must transfer the minor to the appropriate common pleas court for trial (and possible punishment) as an adult, as long as the court finds, after an appropriate hearing, that there is probable cause to believe the minor committed the offense. This is also true if the minor had been judged a delinquent before for an offense that would have been murder or aggravated murder if committed by an adult. Under this special rule, the minor's age is not a factor. The current charge and the past judgment are the issues that matter.

Blended Sentencing

For years, when a juvenile court faced a child accused of a very serious offense, it had two choices. If the child was age-eligible, the court could transfer the child to adult court, essentially admitting that the juvenile system could not help the child. Or, it could keep the child in the juvenile system with the knowledge that the offender would have to be released by age 21, even if still dangerous. This often was a quandary for courts, since the future conduct of a 14- or 15-year-old child is difficult to predict. Based on proposals from the Ohio Criminal Sentencing Commission, the General Assembly enacted a third option in 2002: blended sentencing.

Since 2002, juvenile courts have had the option to give both a juvenile disposition and an adult sentence to certain *serious youthful offenders* (SYOs). Eligibility for this “blended” juvenile/adult sentence depends on the age of the offender and the severity of the offense. In imposing a blended sentence, the juvenile court first gives a juvenile disposition (for example, a term in an ODYS facility). Next, the court gives a sentence as if the offender were before an adult court. However, the court must then suspend the adult sentence. If the offender makes it through the juvenile disposition without serious incident, that is the end of the sentence. However, if the offender commits certain other offenses and engages in certain threatening conduct while under the juvenile term, the court may invoke the adult sentence after a hearing on the new violation.

Unruly Children

A minor may be deemed an *unruly child* for a variety of reasons, including:

- waywardness or persistent disobedience, including running away from home;
- habitual truancy from school;
- conduct that injures or endangers the minor's, or another's, health or morals; or
- violating a law that applies only to minors (such as a curfew).

Unruly children are also sometimes referred to as *status offenders* because of their status as minors.

A child who is judged unruly may be dealt with in a number of ways. For example, the court may use any of the remedies available for neglected, dependent or abused children. These dispositions include, among others, placement with parents under conditions designed to ensure proper care, supervision and behavior, or placement in the temporary or permanent custody of a children's services agency or approved private agency, community service work, probation with

conditions established by the court, suspension or revocation of the child's driver's license and any vehicle registration that has been issued to the child.

If the court finds that its original disposition is not effective because the child has not responded to treatment or rehabilitation, the court may use any of the dispositions available for delinquents. Further, if the offense would have been a drug-abuse offense or a "disorderly conduct while intoxicated" offense if it had been committed by an adult, the court may require the child to participate in a drug- or alcohol-abuse counseling program. The court also may suspend or revoke the child's driver's license until he or she turns 18 or successfully completes an approved drug or alcohol abuse treatment program.

Juvenile Traffic Offenders

A *juvenile traffic offender* is a child who violates any traffic law or regulation of Ohio or any other state. For any moving violation that occurs before the youth's 18th birthday, the youth is subject to a mandatory minimum driver's license suspension as follows:

- first moving violation before age 18: zero days to two years;
- second moving violation before age 18: three months to two years;
- third moving violation before age 19: one year to two years.

While a youth may be entitled to driving privileges while serving a driver's license suspension, these likely will be limited to work and school. In addition to mandatory license suspensions, the court also may impose one of the penalties listed below, which are generally available in all traffic cases:

- imposition of fines generally ranging from \$50 to \$250 plus court costs;
- suspension or revocation of the child's driver's license or the registrations of any motor vehicles that may be registered in the child's name;

- placement of the child on community control sanctions (such as probation, community service, a drug and alcohol treatment program, a curfew or house arrest);
- requirement that the child make restitution for all or part of the damages caused by the offense; and/or
- placement of the child in the temporary custody of an approved facility, such as a camp or school, for a period of not more than five days, as long as the child was ruled a juvenile traffic offender for committing an offense which, if committed by an adult, would have been "operating a motor vehicle under the influence of alcohol or drugs" or "alcohol and/or drugs."

Neglected, Dependent and Abused Children

Neglected Child

A neglected child is one:

- who has been abandoned;
- who lacks proper care because of the faults or habits of the child's parents, guardian or custodian;
- whose parents, guardian or custodian neglect or refuse to provide proper or necessary subsistence, education, medical or surgical care or treatment or other care necessary for the child's health, morals or well-being;
- whose parents, guardian or custodian neglect or refuse to provide the special care required by the child's mental condition;
- whose parents, guardian or custodian illegally gave, or attempted to give, custody of the child to another; or
- who suffers physical or mental injury that harms, or threatens to harm, the child's health or welfare because of the failure of the child's parents, guardian or custodian to perform their duty according to Ohio law.

When a parent, guardian or custodian fails or refuses to provide adequate medical or surgical care or treatment to a child *only* because of religious belief, the law that defines a neglected child does not consider this a criminal offense. However, the statute dictates that, in such instances, proper authorities must be notified so the state or political subdivision, if necessary, can ensure that the child is given the required medical or surgical care or treatment despite the parents', guardian's or custodian's religious beliefs.

Dependent Child

The concept of *dependency* is similar to that of neglect, except that the dependent child's condition or situation is not, in general, the fault of the parents, guardian or custodian. This kind of dependency should not be confused with "dependents" that are named by parents for tax purposes. A dependent child is one:

- who is homeless, destitute or without proper care or support;
- who lacks proper care or support because of the mental or physical condition of the child's parents, guardian or custodian;
- whose condition or environment is such that the state must assume the guardianship of the child; or
- who is in danger of being abused or neglected because he or she lives in a household where another household member has abused or neglected a child who lives in the household.

Abused Child

An *abused child* is one:

- who is the victim of a criminal sexual offense;
- who is endangered as defined in the criminal law;
- who shows evidence of any intentionally caused physical or mental injury, or is the victim of an injury for which there is no reasonable explanation;
- who suffers physical or mental injury harmful or potentially harmful to the child's health or

welfare because of the acts of the parents, guardian or custodian; or

- who is subjected to abuse outside the home.

Offenses that the law considers to be criminal sexual offenses against minors include rape, sexual battery, corruption of a minor, and sexual imposition. The person who committed the offense does not have to be convicted before the court can determine that the minor involved in the sexual activity is an abused child; the child can come under the court's protection as soon as the charge is made.

The definition of child abuse also incorporates the criminal offense of endangering children. Under Ohio law, the offense of *child endangerment* covers physical abuse as well as emotional and psychological abuse, and may be committed by:

- a parent, guardian, custodian or person standing in place of a parent—such as a teacher, scoutmaster or babysitter—who places a child in imminent danger of serious harm by violating a duty of care, protection or support;
- anyone who inflicts torture or cruelty, or creates an imminent risk of serious harm to the child by administering excessive physical punishment or restraint in a cruel manner or for prolonged periods, or repeatedly administers unwarranted discipline to the child that, if continued, endangers the child's mental health or development;
- anyone who entices, permits, encourages, compels, employs or allows a minor to participate in any way in the development, advertisement or presentation of any material or performance that is obscene, sexually oriented or nudity oriented; or
- anyone who allows, encourages or forces a child to solicit for prostitution, or to engage in prostitution.

Child abuse based on the offense of endangering children is normally a misdemeanor. However, endangerment that results in serious physical harm to the child is a felony. The statutory definition of “serious physical harm” includes mental illness as well as serious physical illness or injury. The offense of child endangerment may be tried in any court having jurisdiction, including juvenile court. However, felony cases must be tried in common pleas court. Just as in a sexual abuse case, the person who committed an endangerment offense does not have to be convicted for the juvenile court to determine that the minor child involved is an abused child. A child who has been physically disciplined by a parent, guardian or custodian is not considered abused if child-endangering laws do not forbid the method of discipline. For example, spanking a child does not automatically constitute abuse.

The definition of child abuse also addresses the battered-child syndrome. For example, a child may show physical injury or mental injury that appears to have been intentionally inflicted or is not adequately explained by the child, parent, guardian, custodian or others. Doctors, dentists, nurses and other health-care professionals, child-care professionals, and teachers, attorneys and others commonly in contact with children must report suspected cases of child abuse to law enforcement authorities. Further, Ohio law requires anyone who knows that a felony has been committed to report the basic facts to law enforcement authorities. Because child abuse is a felony, anyone who observes a child suffering from serious injury or illness and has substantial reason to suspect child abuse must report the facts to law enforcement authorities.

The court has multiple options in deciding what to do with a child determined to be dependent, neglected, or abused. The options include, among others:

- placing the child under protective supervision;
- committing the child to the temporary custody of an approved public or private agency, either parent, a relative or a probation officer for further court-approved placement;

- granting legal custody of the child to either parent or another person;
- committing the child to the permanent custody of an approved public or private agency;
- placing the child in long-term foster care with an approved public or private agency; or
- placing restrictions on the child, the child’s parents, guardian, custodian or any other person.

Dealing with Adults Contributing to Delinquency or Neglect

Under Ohio law, it is an offense for an adult to contribute to, or encourage in any way, the delinquency, unruliness or neglect of a minor. The juvenile court has jurisdiction to try adults accused of this offense. Typically, “contributing” cases arise when parents fail to take reasonable measures to control their child’s delinquent or unruly behavior, or when an adult has sexual relations with a minor or encourages or aids a minor in having sexual relations. Encouraging a minor to frequent bars, brothels or places where drugs are used also may constitute the offense of contributing. Parents who fail to provide their child with food, clothing, shelter, medical attention and education may be charged with contributing or with non-support of dependents. These are only some of the possible ways of contributing to the delinquency or neglect of a minor. While many “contributing” cases are handled in juvenile court, non-support cases may be tried in any court having jurisdiction. Further, some non-support cases are felonies and must be tried in the common pleas court.

Divorce and Related Matters

Society wants to protect the unity of the family. The courts are interested in preserving marriages when possible, and Ohio’s common pleas courts include a process for hearing *con-*

ciliation cases to help settle marital differences. Courts also recognize, however, that sometimes relationships between spouses can deteriorate so much that it is best to allow the orderly and fair termination of the marriage or marital relationship.

Under Ohio law, a marriage, or marriage relationship, may end through divorce, dissolution of marriage or annulment. *Mediation*, in which a neutral third party assists couples to reach voluntary agreements, has become an increasingly popular method of resolving disputes arising from domestic relations matters related to the termination of marriage. When spouses can agree about their marriage termination and have signed a separation agreement regarding all property, spousal support and any child-related issues, the court, if satisfied that all issues have been resolved, will grant a *dissolution of marriage*. For disputes that cannot be resolved by voluntary agreement, Ohio law allows a spouse to bring a civil lawsuit called a *divorce*, in which the court will decide how any unresolved disputes are to be addressed. While divorce and dissolution end a valid marriage, *annulment* ends a union that, based on one of a variety of grounds, is found not to have been a valid marriage.

Unlike divorce, dissolution and annulment, *legal separation* does not end the marriage, although it suspends the duties of spouses to each other. In essence, legal separations allow the husband and wife to live apart from one another once the court determines all of the parties' rights and responsibilities.

Whether a couple seeks a divorce, dissolution of marriage, annulment or legal separation, the domestic relations court terminates the marriage, or marital relationship, and manages the issues of child custody, support, parenting time, spousal support and property division.

Continuing Jurisdiction

In most situations, a case is over once a court makes a decision. In domestic relations cases, the court retains the ability to change orders con-

cerning such matters as custody, parenting time and child support, depending on changes in the family's circumstances. This is referred to as the court's *continuing jurisdiction*. A domestic relations court generally does *not*, however, retain continuing jurisdiction to alter a property division that it has made.

Divorce

A long-recognized way to end a marriage is through *divorce*. Divorce is a civil lawsuit to end a marriage that arises when the husband and wife cannot resolve their problems and are asking the court to make final decisions and issue orders concerning property division, spousal support and matters regarding any children of the marriage.

A divorce is started by one spouse, the *plaintiff*, who files a *complaint* with the clerk of court. In this initial complaint, the plaintiff must claim, and eventually prove, the appropriate statutory grounds against the other spouse, the *defendant*.

In Ohio, a divorce may be granted based on any of 11 separate reasons, or *grounds*. There are grounds for divorce when:

- 1) either party had a spouse living at the time of the marriage from which the divorce is sought (called *bigamy*);
- 2) a spouse has been willfully or deliberately absent for one year or more;
- 3) a spouse commits adultery;
- 4) the spouses are incompatible, unless one of the spouses denies that this is true (*incompatibility* is used frequently these days as a final ground for divorce);
- 5) a spouse practices extreme cruelty;
- 6) the marriage was based on fraud;
- 7) a spouse grossly neglects his or her duty as a partner to the marriage;
- 8) a spouse is habitually drunk;
- 9) a spouse is imprisoned in a penitentiary;
- 10) one spouse gets a divorce outside Ohio (for example, a "quickie" divorce) that ends the marriage itself, but does not resolve issues relating to property division, payment of debt, parenting, support or other issues;

- 11) the spouses have been living apart, continuously and without cohabitation, for one year.

People in divorce cases most often use the grounds of incompatibility, extreme cruelty and gross neglect of duty. *Incompatibility* recently has been added as a ground for divorce. Its use is growing among couples that agree the marriage should end, but cannot agree on the terms. Couples who do not wish to make public a more offensive ground for divorce also may use incompatibility. *Extreme cruelty* includes both physical and mental cruelty. *Gross neglect of duty* takes in a wide range of unacceptable conduct by a husband or wife. Typical examples are the failure of a spouse to contribute to the support of the family or the failure of a spouse to meet his or her obligations to the family unit.

Dissolution of Marriage

Dissolution is a substantial departure from the traditional concept of divorce. In a dissolution, the parties agree to end the marriage. They also agree, before filing any papers, to property division, payment of debts, allocation of parental rights and responsibilities and child and/or spousal support, and other such matters. In dissolution cases, the parties do not have to allege or prove any grounds for divorce. To obtain the court's approval for a dissolution, the husband and wife must enter into a separation agreement that both parties sign and that is attached to the request for dissolution.

When the court reviews the separation agreement and the dissolution request, it is concerned that the separation agreement is fair to both parties and that the agreement makes appropriate provisions for any children. If the court approves the separation agreement and the dissolution request, it issues an order dissolving the marriage.

Annulment

While divorce and dissolution end a valid marriage, *annulment* declares that a marriage is

not valid. In Ohio, there are grounds for annulment when:

- 1) the party seeking the annulment was under age at the time of the marriage;
- 2) a former marriage of either party was and still is valid (bigamy);
- 3) either party was mentally incompetent;
- 4) the consent of either party to the marriage was obtained by fraud;
- 5) the consent of either party was obtained by force; and
- 6) even though the marriage was otherwise valid, the parties never consummated the marriage (engaged in sexual relations as husband and wife).

Bigamy is the only ground that makes the marriage *void* (invalid from the start). The other grounds must be asserted within a specified time. Further, grounds one, three, four, and five (above) are lost if the parties live together after the party who was underage reaches age 18, the party who was incompetent regains competence, the fraud by which consent was obtained was discovered or force was used to obtain consent. In an annulment action, just as in a divorce action, the court can award temporary spousal support and can make an order concerning custody, care, maintenance and education of any children. Permanent child custody and support may be granted and an annulment does not affect the legitimacy of children.

Legal Separation

When a court grants a *legal separation*, a couple remains legally married, but most aspects of the marital relationship are terminated. In this action, the court will settle all property rights existing between the couple, address custody issues and may resolve all other issues relating to the marriage, including spousal support and child support issues. If spousal support and child support are granted, the court may enforce the support payment as if it had been granted in a divorce action. The grounds for legal separation

are virtually the same as the grounds for divorce with one exception: “Procurement of a divorce outside Ohio,” a ground for divorce, is not a ground for legal separation.

Even if one spouse files for legal separation, the other spouse still may seek a divorce or annulment. Once a legal separation has been granted, there is nothing in the law that prevents either spouse from seeking a divorce or annulment.

Conciliation

The law requires the common pleas courts to establish a process for hearing *conciliation* cases. In counties where a conciliation court exists, either a husband or wife, or both, may file a petition asking the court to help settle marital controversies. While that action is pending, neither spouse may file or proceed with an action for divorce, annulment or legal separation.

In Ohio, a husband or wife may file a legal action asking that both spouses be ordered to engage in a conciliation process in an effort to save the marriage. Spouses do not use this process often. Most people who are interested in saving their marriage use private methods, such as marriage counseling, before coming to the court.

A second type of conciliation proceeding may be started only after the first publication of the notice of a divorce, annulment or legal separation action or 30 days following the service of a summons. A conciliation proceeding also may be started at any time after the filing of a petition for dissolution of a marriage. The court may order conciliation on its own initiative or based on either spouse’s written request (called a *motion*). The court that processes divorces handles this second type of conciliation. The court’s conciliation order must detail the process and state how expenses will be paid. If children are involved, the court may require family counseling for a reasonable period of time. If there are no children, the conciliation period cannot exceed 90 days.

The court has wide discretion in specifying the details of the conciliation/family counseling process. The conciliator may be a conciliation

judge, a public or private marriage counselor, a family service agency, a community health service, a physician, a psychologist or a clergy person. The underlying action for divorce, annulment or legal separation cannot be heard or decided until the conciliation or family counseling has been completed and the results reported to the court.

Mediation

Mediation is any process in which a neutral third party, the *mediator*, facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute. In Ohio, mediation is generally governed by the Uniform Mediation Act found in Chapter 2710 of the *Ohio Revised Code* (ORC).

Mediation has become the most common alternative dispute resolution method for parties to attempt to resolve issues arising out of domestic relations matters. Under ORC 3109.052, the court may order parties into mediation for issues concerning the parental rights and responsibilities of minor children. Additionally, many courts, either by local rule or with the consent of the parties, order domestic relations matters such as division of assets, division of debt and spousal support to be mediated.

Rule 16 of the Rules of Superintendence for the Courts of Ohio outlines the qualifications family law mediators are expected to possess. Those who serve as mediators in domestic relations matters for a court must meet these qualifications. These qualifications should also be considered when hiring a mediator outside the court system.

The ORC outlines the mediator’s privileges as well as prohibited actions. Mediators are prohibited from making a report, assessment, evaluation, recommendation or finding, or from providing to the court any other communication regarding a mediation. Mediators may, however, disclose whether or not the mediation occurred or has terminated, whether a settlement was reached, who attended the mediation and certain other mediation communications specified in ORC 2710.06. Parties wishing to keep their medi-

ation confidential should enter into a confidentiality agreement before the mediation session.

Because mediators cannot make orders, mediation is successful only if the parties are able to reach a voluntary resolution of the issues to be mediated. However, even when there is substantial disagreement, proper use of mediation techniques has been shown to be very effective in helping people to reach voluntary agreements. It can be especially beneficial for parties who must continue to work together in parenting their minor children.

For information about court mediation, contact the Supreme Court of Ohio, Dispute Resolution Section at (614) 387-9420.

Property Division and Spousal Support

Ohio statutes define how property is divided when a marriage is terminated. *Marital property* is property acquired during the marriage, including real estate, personal property or intangible property such as stocks and bonds, bank accounts and retirement plans. Marital property also may include increases in the value of separate property due to either spouse's work effort, labor or contribution of marital money that helped to increase the property's value. Separate property is property owned by only one of the spouses, and includes:

- all real, personal and intangible property from an inheritance;
- property owned before the marriage;
- income or appreciation from separate property that did not come from the labor or substantial effort of either party during the marriage;
- a gift after the marriage date that is proved to be made to only one spouse; and
- an award for personal injury, except any part of the award that compensates for lost wages occurring during the marriage or medical bills from the injury paid with marital funds.

By applying the rules in the statute as well as appropriate case law, the court determines what is and what is not marital property. The marital property is to be divided equally, unless the court

explains in writing why an equal division would not be fair. In making the award, the court must apply the eight specific factors listed in the statute and any other factor it finds relevant and equitable. The eight statutory factors are:

- the duration of the marriage;
- the assets and liabilities of husband and wife;
- whether it is appropriate to award the family home (or the right to live there for a certain period of time) to the spouse who will have principal custody of the children;
- whether the property can be easily converted into cash, if necessary (*liquidity*);
- whether it would destroy the value of a certain type of asset (such as a set of fine china) to divide it;
- the tax consequences of the division;
- the cost of sale of any asset that has to be sold—such as real estate commissions, advertising, etc.; and
- any agreement that the parties might have reached between themselves.

The court also has the authority to make a distributive award from separate property of either party to the other to achieve equity between the parties. When a party has engaged in financial misconduct such as hiding property, dissipating money or funds or disposing of funds fraudulently, the court may make an award out of the separate property of the offending spouse or make a greater award of marital property to compensate the other party.

In determining whether spousal support (formerly called *alimony*) is appropriate and reasonable, and in determining the amount, terms of payment and duration of spousal support, the court must consider the following factors:

- income and relative earning abilities of the parties;
- ages and physical, mental and emotional conditions of the parties;
- retirement benefits of the parties;
- length of the marriage;
- standard of living established during the marriage;

- extent to which it would be inappropriate for the custodian of a child to seek work outside the home;
- educational background of the parties;
- property and debts of the parties, including any court-ordered payments;
- contribution of each party to the education, training or earning ability of the other;
- time and expense needed for the person seeking spousal support to acquire education, training or job experience;
- lost income production capacity of either party resulting from that party's marriage responsibilities; or
- tax consequences for each party of an award of spousal support.

The court may also consider any other factor that it finds to be relevant and fair.

Parental Rights and Responsibilities (Child Custody) and Child Support

When a couple is married and living together, both parties share parenting responsibilities equally. In the eyes of the law, both parents have equal authority to make decisions concerning the care, discipline and support of their children.

When the court terminates a marriage, one spouse will have primary responsibility over the children unless a court orders shared parenting. The parent with primary responsibility is called the *residential parent* and the other parent is called the *non-residential parent*. If the couple cannot agree who will be the residential parent or upon a parenting time schedule, the court will decide for them or require them to mediate the issue under the procedures adopted by the court. (See "Mediation" on page 168.)

Shared parenting involves a plan where the parents both have a role in making decisions for their children. Although the parents sometimes share parenting time equally, most often one parent has physical custody of the children more often than the other, even when the parties have shared parenting. Both parents or either parent may request shared parenting. If only one of the

parents wants shared parenting, a good shared parenting plan is difficult to achieve. Although the parties do not have to agree on shared parenting, if the parents cannot cooperate, the courts frequently reject the shared parenting plan and determine childcare arrangements based on the child's best interests.

When a court decides a custody issue, its primary focus is, "What is in the best interests of the child?" The court must decide whether, under all circumstances, it would be in the child's best interests to be placed with the father or with the mother, or whether a shared parenting arrangement would be more appropriate. When trying to decide the best interests of a child, the court must consider all relevant factors including the various guidelines specified in state law.

State law instructs the courts to consider, in determining the best interests of a child for custody purposes:

- the parents' wishes;
- the child's wishes;
- the child's interaction with parents, siblings and others who significantly affect the child;
- the child's adjustment to home, school and community;
- the mental and physical health of all concerned;
- which parent will promote court-ordered time between the child and the other parent;
- whether a parent has made court-ordered support payments;
- whether a parent has been convicted of abuse, neglect or domestic violence;
- whether a parent has purposely denied the other parent court-ordered time with the child; and
- whether a parent has moved or plans to move from the state.

While a child's wish about custody is one of the factors used to determine the best interests of a child, Ohio law forbids people from trying to get any type of statement from the child setting forth the child's wishes and concerns regarding parental rights and responsibilities. If a person does obtain

such a statement, the court will not consider it. Nevertheless, a court may interview the child (usually in private) to determine the child's wishes and concerns about custody. While the court considers the child's preference, the court determines how the child will be cared for based on what will be best for the child.

When custody is granted to one parent, *parenting time* (formerly called *visitation*, a term that now applies to grandparents' rights) is normally granted to the non-residential parent. Each court is required to adopt standard guidelines to decide parenting time issues, but individual situations (such as one parent who travels for a living) may dictate a non-standard parenting time schedule.

Under Ohio law, a husband and wife are equally charged with providing for their children's care, welfare and education. The obligation of both parents to support their children normally continues until each child turns 18 or as long as the child attends high school on a full-time basis until the child reaches the age of 19. The obligation can end earlier if the child marries, joins the armed forces or leaves home and becomes self-supporting. It can also be extended in a separation agreement, by court order or if the child has a disability.

To help courts and parents decide how much support a child needs, the Ohio General Assembly has established the Ohio Child Support Guidelines. Ohio courts use these guidelines, along with other factors spelled out in state law, to help establish or modify child support. Under the Ohio Child Support Guidelines, a parent can calculate the amount of child support that he or she should pay, given all the factors the law requires the court to consider, by filling out a child support worksheet. Courts require parents involved in domestic relations matters to complete and file such worksheets. The amount determined by the worksheet is presumed to be correct unless certain limited

deviation factors (such as extraordinary medical expenses or support of other children) can be proven or the parents agree to modify the amount based on one of these factors. In a contested hearing, any party presenting a worksheet has the burden of proving that the numbers used are accurate.

Visitation Rights of Grandparents and Other Persons

In general, a court will not interfere with an intact family to settle disagreements about the right to see or visit a child. For example, a court will not become involved in a conflict between parents and grandparents (mother, father-in-law, mother-in-law, etc.) if a parent refuses to let a grandparent see the minor grandchildren. However, the court may grant reasonable companionship or visitation with minor children to grandparents, relatives or other persons if:

- there is a pending divorce, dissolution, legal separation, annulment or child-support proceeding;
- the court has continuing jurisdiction over the proceedings listed above;
- a parent has died and left a minor child;
- an unmarried woman has a minor child; or
- a father, who is not married to his child's mother, either has acknowledged paternity or has been found to be the father of the child.

In determining whether to grant any of the above requests for companionship or visitation, the court considers all relevant factors. The best interests of the child is the paramount factor, but the court also considers, among other things, blood and social relationships, interactions, geographical location and distance, the character of the requester, the availability of parents and schedules.

For Journalists: Covering Family Law

Journalists regularly present issues of family law in the news and often are the sources of information about the law for families. As with other parts of the law, journalists should familiarize themselves with Ohio's specific regulations so that readers and viewers can fully understand why, for instance,

a minor is being tried as an adult or why and how the state is taking custody of children from their parents. While many family law issues or disputes may be matters of public record, journalists are advised to consult with their editors, producers and legal counsel on issues of privacy and standard journalistic ethics. Covering families involved in legal conflicts requires special attention to detail and to the impact of such stories on the minors whose lives are affected by these disputes.

Chapter Summary

- Recognizing the importance of the family, the law establishes rights and duties for family members (generally parents and their children) and ways to enforce these rights and duties.
- The rights and duties of the people involved in the family and the process of enforcing these rights and duties are often grouped together under the term *family law*.
- *Marriage* is a three-way contract involving the state and the two people who are joined in marriage. A couple's marriage vows create a *binding contract*.
- The law states that only males 18 years old (or older) and females 16 years old (or older) may enter into marriage.
- A marriage cannot be *solemnized* (that is, completed by means of a marriage ceremony) unless the parties have a license. A license is obtained by applying in the probate court of the county where either party lives or in the county where the ceremony is to be performed.
- Ohio law establishes a variety of rights and duties for married couples concerning their relations with one another and with their children. Similarly, the law establishes a variety of rights and duties for children concerning their relations with their parents.
- The age at which a child (minor or juvenile) becomes an adult is known as the *age of majority*. Under federal law, every citizen is allowed to vote at age 18. In Ohio, 18 is the age of majority for voting and most other purposes.
- Under the law, minors are treated differently from adults in many situations, chiefly to protect both minors and society from the minors' lack of experience, skill and judgment.
- In Ohio, the juvenile court has jurisdiction over minors who commit offenses or present behavioral problems. The court also has jurisdiction over neglected and dependent children, and has a wide range of options in dealing with children.

Continued on page 173

Chapter Summary *continued*

- In 1902, Ohio became the fifth state to create a juvenile court. Before the juvenile court existed, children as young as age seven were considered criminally responsible and, if convicted, were treated as adult offenders.
- A *delinquent child* is one who commits any act (other than a juvenile traffic offense) that would be a crime under state, municipal or federal law if committed by an adult, or who fails to obey an order of a juvenile court.
- The juvenile court may transfer a minor to the common pleas court for trial and punishment as an adult in serious cases and under limited circumstances.
- A *juvenile traffic offender* is a child who violates any state, municipal or other law or regulation governing motor vehicle use.
- Under Ohio law, the marriage, or marriage relationship, may be ended through divorce, dissolution of marriage or annulment. A legal separation suspends the duties of spouses to each other but does not end the marriage.
- The domestic relations court is interested in preserving marriages when possible. When that is not possible, the court is concerned with the orderly and fair termination of the marriage relationship and with the associated questions of parenting time, visitation, child and spousal support and division of property.
- When a couple is married and living together, both partners have equal custody of their children. When the court terminates a marriage, one spouse will have primary responsibility over the children unless a court finds that circumstances are appropriate for the success of shared parenting, which is the favored approach to rearing children.

Web Links:

From the OSBA's "Law You Can Use" column:

www.ohioabar.org/lawyoucanuse (search by title or topic)

- "A Guardian Ad Litem Protects Best Interest of the Child"
- "Adoptions Raise 'Right to Know' Questions"
- "Alternative to Divorce Court Hearing: Hire a Private Judge"
- "Child Support Enforcement Agencies Assist Parents"
- "Child Support: How Is It Enforced?"
- "Child Support Orders Are Terminated for many Reasons"
- "Child Support Orders Can Be Modified"
- "Children Services Places Protection of Children First"
- "Children's Wishes Are Considered in Custody Matters"
- "Circumstances Say Whether Minors Are Emancipated"
- "Collaborative Family Law Promotes Divorce with Dignity"
- "Commonly Asked Questions about Divorce"
- "Courts May Order Custody Evaluation When Parents Cannot Agree"
- "Divorce and Dissolution: What's the Difference?"
- "Divorce Courts Divide Assets and Liabilities Equitably"
- "Divorce Decrees Enforced in Several Ways"
- "Divorce, Separation Raise School-Related Concerns"
- "Family Support Act Standardizes Handling of Child Support Cases between States"
- "Federal Tax Refunds Can Be Intercepted to Pay Back Child Support"
- "Grandparents Can Exercise Authority When Caring for Grandchildren"
- "Guns at Home Can Make Parents Liable for Child's Criminal Actions"
- "How Do Courts Determine Child Support?"
- "How Does a Legal Separation Differ from a Divorce or Dissolution?"
- "How to Avoid an Adoption Scam"
- "Insurance May Cover Medical Expenses in Adoption Cases"
- "Know Legal Requirements to Marry"
- "Know Rights and Duties of Marriage"
- "Law Requires Parental Consent for Treatment of Minors"
- "Ohio Law Allows Attorney-Arranged Adoptions"
- "Ohio Law Does Not Recognize Same-Sex Marriages"
- "Ohio Law Permits Adult Adoptions"
- "Parents Have Rights When Dealing with Children Services Caseworkers"
- "Parents May Be Liable for Child's Actions"
- "Parents May Network To Find Child Available for Adoption"

Continued on page 175

Web Links *continued*

From the OSBA's "Law You Can Use" column:

www.ohiobar.org/lawyoucanuse (search by title or topic)

"Pending Divorce Does Not Change Marital Status for Income Tax Filing"

"Power of Attorney Can Help Grandparents Get Authority To Care for Grandchildren"

"Prenuptial Agreements Protect Pre-Marital Assets"

"Probate Court Screens Prospective Parents in Private Adoptions"

"Relationship Agreements Provide Protection"

"Retirement Benefits Are Divided at Divorce"

"Social Networking and Your Divorce: What You Need to Know"

"Spousal Support Determined Case by Case"

"Surrogate Parenting Provides Alternative to Adoption"

"Terminating Your Marriage: Litigation and Settlement"

"Terminating Your Marriage: The Discovery Process"

"Unhappy with the Terms of Your Divorce Decree? You Have Options"

"U.S. and Ohio Law Make Adoption More Affordable"

"What Birth Parents Should Know about Adoption Process"

"What Rights Do Grandparents Have after Divorce?"

"What You Should Know about Alternative Dispute Resolution Options in Divorce"

"What You Should Know about Termination of Parental Rights in Ohio"

"Working with your Divorce Lawyer Can Save You Money and Enhance Your Settlement"

From the OSBA's Law Facts pamphlet series:

www.ohiobar.org/lawfacts (search by title)

"Divorce, Dissolution & Separation"

"Divorce Mediation"

"Ohio's Marriage Laws"

"Sharing Responsibilities After Separation"

From Nolo.com:

www.nolo.com

Click on "Divorce & Family Law" tab



“The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property.”

– *Barsky v. Board of Regents*, 347 U.S. 442, 472 (1954)(Douglas, J. dissenting)

In modern society, many people spend as much or more time at work than they do at home. Therefore, no legal handbook would be complete without an examination of the laws governing the workplace. This section will examine various aspects of workplace law, including the rights and responsibilities of employers, employees and even job applicants.

The Relationship Between State and Federal Workplace Laws

Employment is regulated to a great extent by both state and federal laws. In many instances, federal laws are limited in the scope of their coverage. Some federal workplace laws may apply to companies of a certain size or dollar volume of business while others are limited to a particular industry. For example, Title VII, a federal statute prohibiting discrimination in employment, applies only to employers with 15 or more employees and the Surface Transportation Assistance Act (STAA) applies to the entire trucking industry. It is not practical to write about every federal law regulating employment. Please keep in mind that the laws addressed here are not exhaustive.

States have authority to adopt workplace regulations affecting employers of any size, so long as they do not intrude into areas of exclusive federal jurisdiction or conflict with federal laws covering the same subject matter. States may enact laws that provide employees with more rights than federal law gives, but they may not take away federal rights.

State and federal laws interrelate in other ways:

- **Preemption:** Federal law may preempt states’ attempts to regulate certain conduct. Where preemption exists, states cannot pass any laws that regulate conduct already regulated by federal law. For example, under the federal Employee Retirement Income Security Act (ERISA), states are preempted from regulating pensions.
- **Supplementation of coverage:** Some federal laws set a floor of protections below which states cannot go, but allow states to provide greater protections. For example, the federal Family and Medical Leave Act requires employers subject to the law to provide 12 weeks of unpaid leave to employees under certain circumstances. State law could require the same employers to provide 12 weeks of paid leave or to provide more than 12 weeks or some other benefit.
- **Absence of federal law:** States are free to enact laws that regulate an activity that is unregulated by any federal law. For example, there are no federal laws that prohibit the dismissal of employees called for jury duty. States can and do step in to protect these employees.

Major Workplace Laws: Statutory and Case (or “Common”) Law

Both state and federal laws regulate the conduct of employers and, in so doing, give rights and protections to employees. There are two

sources for these laws. Some, such as Title VII and the Ohio Civil Rights Act, are statutory, that is, laws enacted by the legislature. The second type evolves from case law as decided by the courts. Court-created laws are called *common law*.

Federal Law

Federal law covers a variety of employment issues, including discrimination and harassment based on age, race, religion, color, sex, national origin or physical or mental disabilities. Ohio law also addresses civil rights issues that arise in the work place; some of these are discussed later in this chapter. These laws are intended to prevent discrimination and to make victims of discrimination “whole” (so that, insofar as possible, the victims might regain what they had lost). They are not intended to regulate behavior or to be a civility code for the workplace.

Title VII of the Civil Rights Act of 1964

Title VII prohibits employers from discriminating against applicants and employees on the basis of race, color, religion, sex, pregnancy, childbirth or national origin. It also prohibits employers from retaliating against job applicants or employees who assert their rights under the law. Title VII’s prohibition against discrimination applies to all terms, conditions and privileges of employment, including hiring, firing, compensation, benefits, job assignments, shift assignments, promotions and discipline.

Title VII also prohibits employer practices or qualifications that appear neutral, but disproportionately impact those individuals protected by the law. For example, requiring a high school diploma for a janitorial job may hurt racial minorities or other protected classes. Such a practice is only legal if the employer has a valid reason for using it. That is, a job qualification must be a bona fide occupational qualification (for example, requiring that someone being hired to play a male character in a play actually be male, or hiring only females to conduct body searches on female passengers at the airport).

Title VII’s Prohibition on Harassment

Title VII makes it illegal to harass an individual based on race, color, religion, sex, pregnancy, childbirth or national origin. *Sexual harassment* is any unwelcome, unwanted or uninvited sexual advance, any conduct of a sexual nature, or any conduct based on sex that is severe or pervasive and creates an intimidating, hostile or offensive working environment. Any such conduct that an employee finds unwelcome has the potential to be sexual harassment. The harasser can be a supervisor, a manager, a co-worker or even a non-employee who is on the premises with permission. The U.S. Supreme Court ruled, in 1998, that Title VII also bars sexual harassment between members of the same sex. Harassment based on age is prohibited by the Age Discrimination in Employment Act of 1967, as amended. Harassment based on disability is prohibited by the Americans with Disabilities Act.

Employers Subject to Title VII

Title VII applies to:

- private employers with 15 or more employees;
- state governments and their political subdivisions and agencies;
- the federal government;
- employment agencies;
- labor organizations; and
- joint labor-management committees and other training programs.

The Civil Rights Act of 1964 established the U.S. Equal Employment Opportunity Commission (EEOC) to enforce Title VII and other principal federal statutes prohibiting employment discrimination.

Genetic Information Nondiscrimination

Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA) generally prohibits employers from making employment decisions based on the genetic information of

an employee or applicant or the employee's/ applicant's family members. Generally, an employer with 15 or more employees is also prohibited from requesting, requiring or purchasing such genetic information.

There are limited exceptions to GINA. For example, in the process of complying with the certification provisions of the Family and Medical Leave Act (FMLA), employers may learn of genetic information through public documents other than court and medical records or an employee voluntarily may give written authorization for the employer to receive such information. If, however, an employer obtains the genetic information of an employee or his/her family member, that information must be kept in a separate and confidential medical file.

Effective Jan. 10, 2011, the EEOC's final regulations implementing the employment provisions of Title II of GINA went in effect. Some of the key provisions of the final regulations include:

- Clarification that no specific intent to acquire genetic information is required in order to establish a GINA violation.
- Creation of a "safe harbor"¹ exception for those responding to a request for medical

information on notice of GINA. (The regulations provide an example of specific language that can be used to give notice; see below.) Clarification that, while general inquiries about health or wellbeing by supervisors or managers are not prohibited in casual conversation or social media interactions, follow-up questions are probably prohibited.

There are some exceptions to the prohibition on requesting, requiring or purchasing genetic information. One of those is the exception for wellness and disease management programs that are voluntary. GINA also expressly includes an exception that allows employers to ask for "family medical history" when seeking certification of a family member's serious health condition for FMLA purposes.

Employers should therefore *not* use the "safe harbor" language when they are requesting information to certify a family member's serious health condition under the FMLA. This is because the employer needs the information to determine whether an employee is entitled to FMLA. The exception does not apply when seeking information with respect to the employee's own serious health condition.

In addition, while GINA permits employers to require employees to submit to medical examinations, it does impose new limitations on these rights. For example, although the Americans with Disabilities Act (ADA) allows employers to require a post-offer medical examination for all employees for a particular job, an employer may no longer ask for family medical history or genetic information as part of the examination. The same rule applies for fitness-for-duty or return-to-work exams. GINA's prohibition against the acquisition of genetic information will also govern an employer's ability to ask specific questions during the ADA's interactive process. As such, an employer should not proactively ask questions or seek information from a physician

¹ The regulations create a "safe harbor" for employers who use the following language when requesting medical information to certify an employee's own serious health condition under the FMLA: *The Genetic Information Nondisclosure Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you do not provide any genetic information when responding to this request for medical information. "Genetic Information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held*

by an individual or family member receiving assistive reproductive services.

during the interactive process which may involve genetic information. The “safe harbor” language should therefore be included when requesting information for these purposes.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) prohibits most employers from discriminating against a person perceived as disabled or against a person with a *non-disqualifying disability* (a disability that does not affect the person’s qualifications for or ability to perform the job). The ADA applies to private employers with 15 or more employees, state and local governments and their agencies, employment agencies and labor unions. It does not apply to the federal government and its agencies. The ADA protects “qualified individuals with disabilities” (QUID), that is, people who have disabilities and are qualified for the jobs they are either seeking or holding and are able to perform it with or without a reasonable accommodation.

The ADA prohibits such discrimination in any aspect of employment, including job application, interviewing, testing, hiring, job assignments, evaluations, disciplinary actions, training, promotion, medical exams, layoffs, firing, compensation, leave and benefits. The ADA requires every covered employer to provide reasonable accommodations to a qualified individual with a disability. In addition, the ADA prohibits employers from refusing to hire someone or discriminating against someone because that person has a record of having a disability or is related to or associates with someone with a disability.

Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA) prohibits discrimination against employees who are age 40 or older. It also prohibits employers from retaliating against applicants or employees who assert their rights under the ADEA.

The ADEA’s prohibition against discrimination applies to all terms and conditions of employment, including hiring, firing, compensation, job assignments, shift assignments, discipline and promotions. The ADEA applies to the federal and state governments and its agencies, private employers with 20 or more employees, employment agencies and labor unions. The ADEA does not apply to private employers with fewer than 20 employees.

Equal Pay Act

The Equal Pay Act requires that employers give men and women equal pay for equal work. To be considered “equal,” a job must require substantially equal skill, effort and responsibility and be performed under similar working conditions. An employer may, however, pay different salaries to a man and a woman for equal work if the difference is based on a bona fide seniority, merit or an incentive system, or factors other than gender.

All employers must comply with the Equal Pay Act, including all public and private employers (regardless of the number of employees).

Immigration Reform and Control Act of 1986

The Immigration Reform and Control Act (IRCA) prohibits employers from discriminating against applicants or employees on the basis of their citizenship or national origin. It prohibits discrimination with regard to the terms, conditions and privileges of employment, including hiring, firing, compensation, benefits, job assignments, shift assignments, harassment, promotions and discipline. The IRCA applies to all persons or entities that hire, recruit or refer employees.

The IRCA also makes it illegal for employers to knowingly hire or continue to employ people who are not authorized to work in the United States. Employers must keep records verifying that their employees are authorized to work in the United States.

Uniformed Services Employment and Reemployment Rights Act

The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits discrimination based on an employee's or applicant's past, current or future military obligations. It also requires employers to reinstate employees to their former jobs, upon honorable completion of their military duty in the uniformed services. USERRA applies to all public and private employers.

Uniformed service includes active duty, active duty for training, inactive duty training (such as drills) and initial active duty training, as well as the period an individual is absent from a job for examinations to determine fitness to perform his or her military duty.

USERRA guarantees pension plan benefits that accrued during military service, as well as health benefits for military personnel and their families during military service for up to 18 months.

Separately, the Servicemembers' Civil Relief Act of 2003 (SCRA) requires a delay of any legal proceeding if military service impairs a military member's ability to appear in the proceeding.

Family and Medical Leave Act of 1993

The Family and Medical Leave Act (FMLA) provides certain employees with up to 12 weeks of unpaid, but job-protected, leave per year. While the FMLA does not require the employer to provide paid leave, it does require the employer to continue group health benefits during the leave, provided that the employee pays its portion of the premium.

Employees are entitled to family and medical leave under the FMLA if:

- their employer employs 50 or more employees, their employer has 50 or more employees within 75 miles of the work site or they work for a public agency or private elementary or secondary school;

- they have worked for their employer for at least 12 months; and
- they worked at least 1250 hours during the 12 months before the beginning of the leave.

Employees may take an FMLA leave for:

- the birth or care of a newborn, adopted child or foster child;
- the care of an immediate family member (spouse, child or parent) with a serious health condition; or
- their own serious health condition that prevents them from performing their job; and
- the care of an injured or ill service member (up to 26 weeks leave in any 12-month period).

The FMLA also provides for exigency leave, a type of military family leave available for a spouse, parent or child of a service member who is on active duty or has been notified of an impending call or order to active duty. Exigency leave can be used for handling matters such as child care (up to 12 weeks in a single 12-month period), tending to financial arrangements, and rest and relaxation when the service member is home.

Recent regulations make it clear that calling in "sick" without providing more information will not be considered sufficient notice to trigger an employer's obligations under FMLA. Employees must comply with the employer's call-off procedures unless it is not practicable to do so.

An employee may be able to take "intermittent" FMLA leave in small blocks of time that are spaced apart. For example, an employee may need to take one week per month of leave time for treatment of an illness. The employee must demonstrate that taking intermittent leave is medically necessary.

Upon an employee's return from FMLA leave, he or she must return to the same job, or be given an equivalent job. If an employee takes intermittent leave, he or she may be transferred temporarily to a position that better accommodates the need for short blocks of leave time.

The FMLA does not cover “key” employees (top executives, for example). These key employees must be given leave but not reinstatement when it would cause substantial economic harm to the employer. The theory behind this is that key employees are essential to the smooth functioning of the workplace. If key employees take leave anyway, they are still eligible for continuing health benefits. However, the employer is not obligated to take them back or guarantee that a job suited to their experience will be available if they do return.

Worker Adjustment and Retraining Notification Act

The Worker Adjustment and Retraining Notification Act (WARN) is a federal statute that requires employers of 100 or more full time employees to provide written notice to employees subject to a “mass layoff” or plant closing. This notice must be given in writing 60 days before the layoff or closing. The law defines a “mass layoff” as a reduction in force that results in an employment loss at the *site of employment* of at least 33 percent of the employees during any 30-day period for at least 50 employees. In interpreting the scope of the WARN Act, federal circuit courts have held that it applies to quasi-public employers such as housing authorities as well as private employers.

State Laws

Employment at Will

In Ohio, an employee is an *employee at will* unless the employee’s relationship with the employer is governed by a contract or protected by law. Most employee handbooks contain a notice that employment is considered at will.

At will means the employee serves at the will of the employer, and the employer is free to terminate the employee at any time, for no reason or for any lawful reason, with or without notice. It is not necessary for the employer to “have cause” to terminate an at-will employee. The employer has

no duty to treat employees fairly, only lawfully. By the same token, an at-will employee is free to resign at any time, for no reason or for any reason, with or without notice.

Employees who do not have a contract with the employer, are not in a union, or are not in the classified service of public employment are at-will employees subject to termination at any time, regardless of fairness. For example, an employer can retain a bad employee or terminate a good employee, as long as the employer does not use age, race, national origin, physical or mental disability or some other protected status as the reason for the termination.

An employer’s ability to terminate an employee can be restricted through the use of a contract. A contract can be verbal or even implied from the circumstances of the parties. For example, an employer may be bound by promises made to an employee with respect to termination procedures, reasons for termination or length of employment. If the employee reasonably relies on these promises and is harmed as a result, the employer may be held responsible. Generally, the burden is on the employee to prove he or she is not an employee at will or that an enforceable promise has been made. A written employment contract may make a clearer statement that the employee is not an employee at will.

There are exceptions to employment at will. As mentioned earlier, an employer cannot terminate an employee for any reason prohibited by law, such as on the basis of race, national origin, gender, religion, disability, age or other protected status. There are also laws that prohibit termination based on retaliation in certain circumstances. For instance, an employer may not retaliate against an employee who exercises his or her legal right to file for workers’ compensation or to report workplace abuses such as overtime violations, discrimination or sexual harassment. An employee’s exercise of legal rights is protected conduct and retaliation is a tangible, adverse employment action an employer might take against an employee for engaging in any form of protected conduct. *Whistleblowing*, or

turning in an employer for breaking the law, describes a certain kind of protected conduct. (Retaliation and protected conduct are discussed more fully in the next section.)

An employer also may not terminate an employee at will when the reason for termination would violate public policy. For example, an employer may not terminate an employee for, among other things, serving on a jury, refusing to break the law, exercising a legal right to hire an attorney to represent the employee in an employment matter or having his or her wages garnished for child support or Chapter 13 bankruptcy payments.

Ohio's Employment Discrimination Laws

Ohio's employers, employment agencies, employees and job applicants must comply with all applicable federal laws regarding discrimination. However, Ohio also addresses some discrimination issues in its state laws. The *Ohio Revised Code* makes it illegal for employers, labor unions or employment agencies to discriminate against an employee or applicant based on race, color, religion, sex, national origin, non-disqualifying disability, age or ancestry. In fact, it is unlawful, for those reasons, to discriminate against any person directly or indirectly with respect to hiring, tenure, employment terms, conditions or privileges or by firing any person without just cause.

The law contains a number of provisions designed to prevent such discrimination in employment or union membership. One provision prevents employers from trying to get information about race, color, religion, sex, national origin, handicap, age or ancestry from job applicants, except when such information is related to a legitimate job skill certified in advance by the Ohio Civil Rights Commission. An example of this exception would be a job for which the employer wishes to require a female to monitor a woman's dressing room at a department store or a male to monitor a men's locker room at a school.

Labor Law

Some trace the origins of the labor movement to the guilds in medieval Europe. Trade unions, as we know them, started in the 19th century during the Industrial Revolution, when groups of employees would band together to demand better wages and working conditions. Employers fought back with injunctions and legislation. In 1935, Congress passed the National Labor Relations Act.

In 1984, the State Employment Relations Act gave public employees (who did not previously have the right to bargain collectively or strike) the right to organize and bargain collectively.

National Labor Relations Act

The National Labor Relations Act (NLRA) imposes rights and obligations on employers, employees, and employees' bargaining representatives. Section 7 of the NLRA gives employees the right to form and join unions, to bargain collectively, to engage in concerted activity and to refrain from all such activities, except to the extent that such rights may be affected by the provisions of a collective bargaining agreement that requires union membership as a condition of employment. The existence of a union is not necessary for NLRA protection. While a single employee complaining about job conditions is not protected, an employee who complains *on behalf of himself and others* about job conditions is protected by the NLRA.

The NLRA is enforced by the National Labor Relations Board (NLRB), whose main functions are to determine appropriate bargaining units, conduct representation elections and handle unfair labor practice charges brought by unions and employers.

Once a union is recognized or certified by the NLRB as the exclusive bargaining representative of a group of employees, both the union and the company are obligated to bargain in good faith over wages, hours and conditions of employment.

Each side has the right to pick its negotiators. If bargaining reaches an impasse, either side may engage in economic action. For example, the union may strike and the employer may lock out its employees or replace strikers with other workers.

Most collective bargaining agreements contain certain key elements:

- the jurisdiction of the union (both geographically and with respect to the types of work affected);
- a requirement that covered employees either join or pay dues to the union;
- a management rights provision;
- provisions covering wages, hours and conditions of employment;
- a grievance and arbitration provision; and
- a no-strike clause.

The grievance procedure and the no-strike clause help to maintain labor peace during the term of the collective bargaining agreement.

Both employers and unions are prohibited from discriminating or retaliating against employees for exercising their Section 7 rights. Unions are prohibited from engaging in certain types of activities, such as secondary boycotts and mass picketing, and they are obligated to represent their members fairly.

Government Employment

Government or public employees are those who work for the federal, state or local government. Public employees have additional protections in civil service laws as well as the U.S. and Ohio constitutions.

Civil Service Laws

Federal and state civil service laws require that employment decisions are based on merit. Such laws attempt to eliminate political considerations that might be factors in hiring, firing

and other employment decisions. Some jobs, however, are exempt from civil service laws, including high-level policy-making positions. Those without protection, called “unclassified” employees, are those higher-level employees who are appointed by the governor or state agency director or whose responsibilities include carrying out the policies of a current political administration. The thinking is that the governor, director or other officeholder ought to be able to select those high-level employees who will implement their particular policies and terminate those who will not.

Civil service systems include guidelines for recruiting and screening applicants, job classifications based on job duties and protection against arbitrary discipline and discharge. A civil service employee who has completed a probationary period may usually be fired only for cause (for a good reason, such as failing to carry out the duties of the job or violating a workplace rule). This differs from employment at will, where an employer may fire an employee for any lawful reason or for no reason.

Ohio State Employment Relations Act

The Ohio State Employment Relations Act (OERA) is substantially similar to the NLRA and is enforced by the State Employment Relations Board (SERB). The major difference between the OERA and the NLRA is that certain Ohio public employees (including police, fire and other safety forces) are prohibited from striking. If agreement cannot be reached with these employees, the matter is submitted to a conciliator to attempt to mediate the dispute. If mediation fails, then the conciliator conducts a hearing and resolves the disputed issues.

State Employment Relations Board

The State Employment Relations Board (SERB), established by statute in 1983, has the exclusive right to remedy alleged unfair labor

practices between Ohio's public employers and employee's unions.

Where an employee's claims are founded on rights created or addressed in a *collective bargaining agreement* (union contract), the employee may file a grievance seeking a remedy. Employees can challenge a failure to promote, wrongful discharge or retaliation. If a union refuses to pursue a grievance, the employee may have a claim against the union for breach of the duty of fair representation.

Constitutional Protections

All public employees in Ohio are protected by the U.S. and Ohio constitutions. Public employees have rights to freedom of speech, association, religion and freedom from unlawful search and seizure. In some cases, a government employee also may have a "property" interest, such as a continuing employment contract or tenure, in his or her position, which the government cannot take away without due process. Due process requires notice to the public employee about any disciplinary action to be taken against him or her and a chance to answer charges before the discipline is administered.

Workplace rules lawfully limit a public employee's speech or conduct only when the government's interest in establishing the rules outweighs the interest of the individual. For example, if the speech or conduct disrupts the efficient operation of the government, the employee may lawfully be disciplined.

Wages and Hours

Both federal and state laws govern minimum wages and overtime pay for Ohio employees. When federal law does not cover an employee's claim, state law applies. When both state and federal laws cover a claim, the law with the higher standard prevails. For instance, if the state sets a minimum wage that is higher than the federal minimum wage, the state's minimum wage would prevail.

Federal Wage and Hour Laws

The federal Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, record keeping and child labor standards affecting full-time and part-time workers in the private sector and in federal, state and local governments. The FLSA covers employees who produce, handle or sell goods moved in interstate commerce.

The Wage and Hour Division of the U.S. Department of Labor administers and enforces the FLSA for private, state and local government employees, and most federal employees. Special rules govern the use of compensatory time off in place of overtime pay.

Minimum Wage

Covered, nonexempt workers in Ohio are entitled to a minimum wage of no less than \$7.70 per hour as of 2012. The 2012 federal minimum wage is \$7.25 per hour, but since the Ohio minimum wage is higher, it trumps the federal minimum wage.

Different rules apply to tipped employees. Nonexempt employees who work more than 40 hours in a work week generally are entitled to overtime pay at the rate of one-and-one-half times their regular rates of pay. However, some alternative pay plans are available in specific circumstances.

Some employees are exempt from coverage under the FLSA. To be exempt, the employee must meet certain duty requirements and typically be paid a salary. The "white collar exemptions" include executive, administrative or professional workers whose salaries, with some exceptions, are at least \$455 per week. Also, certain outside sales people and professionals are considered exempt employees even though they are not paid a salary. For example, computer specialists can either be paid a salary of at least \$455 per week or earn at least \$27.65 per hour, and outside sales people can be paid on a commission basis, as long as certain requirements are met. Exempt employees are not entitled to overtime pay under federal law.

There are a number of employment practices that FLSA does not regulate. These include:

- vacation, holiday, severance or sick pay;
- meal or rest periods;
- premium pay for weekend or holiday work;
- pay raises or fringe benefits; and
- discharge notices, reasons for discharge or immediate payment of final wages to terminated employees.

The FLSA does not limit the number of hours in a day or days in a week an employee may be required or scheduled to work, including overtime hours, as long as the employee is at least 16 years old and the employer pays one-and-one-half times the regular rate for overtime work.

Tip Credit

An Ohio employer may credit tips that employees receive against the employer's minimum wage obligation. In such cases, the employer's cash-wage obligation must be at least \$3.85 an hour. If an employee's tips and cash wages do not equal the minimum hourly wage (\$7.70), the employer must make up the difference.

Overtime

An employer must pay a nonexempt employee premium pay for overtime work. Employees covered by the FLSA generally must receive overtime pay for time worked in excess of 40 hours in a single workweek at a rate not less than one-and-one-half times their regular rate of pay. Some alternative pay plans are available in certain circumstance, however. There is no legal limit on the number of hours employees aged 16 and older may work in any workweek. The FLSA does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest. This means that the federal law does not require extra pay just because the employee works on a particular day. Overtime is only required by the FLSA if the non-exempt employee works more than 40 hours in a one-week period. There are exceptions for certain employees (firefighters, for example).

The FLSA also does not require breaks or meal periods.

Child Labor

The FLSA requires that children must be at least 14 years old before they can work at a "real" job. Those younger than 14 can work around the home, baby-sit on an informal basis and deliver newspapers. Children ages 14 and 15 cannot work in manufacturing, mining, construction or the transportation industries. Further, children under the age of 18 cannot work around machinery or in certain unsafe jobs. Unsafe jobs include cooking or baking in restaurants and working on ladders or scaffolds. The FLSA limits both the number of hours and the time of day that 14- or 15-year-old children can work. Those children may not work during school hours or more than 18 hours per week during the school year. However, they may work:

- up to three hours on a school day;
- eight hours on a non-school day;
- 18 hours a week while in school; and
- up to 40 hours in a week when school is not in session.

Children ages 14 and 15 may not work before 7 a.m. or after 7 p.m., except between June 1 and Labor Day, when they may work until 9 p.m.

Ohio Wage and Hour Laws

The Wage and Hour Bureau of the Ohio Department of Commerce administers and enforces Ohio's minimum wage, child labor and prevailing wage laws. When the FLSA does not cover a matter, then state law applies. When the FLSA sets a higher standard than the state, the FLSA prevails. Likewise, if a state sets a higher standard than federal law, the state law prevails.

Ohio Minimum Wage

Ohio sets a separate minimum wage rate for employees. Effective in 2012, Ohio employers must pay a minimum wage of \$7.70 per hour, which is to be increased by the rate of inflation

annually. Almost every Ohio employer is covered by the Ohio minimum wage law since it is higher than the federal minimum wage. The law also has new record-keeping requirements for employers. Employees covered by only the Ohio minimum wage and not the federal minimum wage are entitled to the Ohio minimum wage. Employees covered by both the Ohio and federal minimum wages are generally entitled to the higher of the two minimum wages.

Prevailing Wage Law

Ohio's *prevailing wage law* applies to construction projects undertaken by certain public authorities and requires that the public authorities pay the locally prevailing rate of wages to workers on the project. The director of the Ohio Department of Commerce determines Ohio's prevailing wage rate.

Workplace Safety

Federal and state laws protect the safety and health of workers while on the job. They also exist to ensure that no job causes long-term health or safety complications.

Occupational Safety and Health Act

The Occupational Safety and Health Act (OSHA) is a federal law designed to ensure, to the extent possible, safe and healthful working conditions for all employees. The act applies to almost all private-sector employees and federal workers, except military personnel. State employees are covered by PERRP, as explained below.

The Act requires employers to:

- provide a workplace that is free of known hazards that are likely to (or do) subject employees to death or serious physical harm;
- comply with the safety and health standards adopted by OSHA; and
- maintain a log and summary of all occupational injuries and illnesses.

The Act protects a worker who refuses to perform a job that is likely to cause imminent death or serious injury. An employer may not discipline an employee who, in good faith, refuses to work if:

- a reasonable person in the employee's position would also conclude that there is a real, immediate danger of death or serious injury;
- there is insufficient time to eliminate the danger through regular OSHA channels; and
- the employer does not respond to the employee's requests to fix the problem.

The Act also protects a worker from retaliation for reporting unsafe conditions.

Surface Transportation Assistance Act

The Surface Transportation Assistance Act (STAA) is a federal law that says an employer may not fire or discipline an employee for refusing to operate a commercial motor vehicle (CMV) if the employee reasonably believes that, by operating the vehicle, he or she would violate a federal regulation, standard or order regarding commercial motor vehicle safety or health.

The regulations, which are issued by the Department of Transportation, require:

- specific marking of cargo containing hazardous materials;
- hazmat training for employees;
- marking of vehicles with identifying information; and
- limits on the number of hours a driver may work.

Ohio Workplace Safety Laws

The Public Employment Risk Reduction Program (PERRP) ensures that public employees in Ohio are provided with a safe and healthful working environment. The law does not cover peace officers, firefighters or correctional officers in county or municipal correctional institutions.

Ohio law is similar to OSHA in that it allows a public employee, acting in good faith, to refuse to work in conditions presenting imminent danger when the conditions do not normally exist for that particular occupation. While Ohio's private sector employers are subject to federal OSHA regulations, Ohio's PERRP covers public employees, that is, those who work for state or local governments and, thus, are not covered by OSHA.

A public employer cannot discriminate against a public employee for a good-faith refusal to perform assigned tasks if:

- the employee has asked the public employer to correct the hazardous conditions;
- the conditions remain uncorrected;
- there is insufficient time to eliminate the danger by resorting to the enforcement methods provided under the law; and
- a reasonable person in the employee's position would also conclude that there is a real, immediate danger of death or serious injury.

Ohio's Case Law Prohibiting Sexual Harassment

Sexual harassment on the job is prohibited by both state and federal statutes. It is also dealt with in case law, and an employee may bring such a claim to court as a common law tort. In Ohio, an employer has a duty to provide employees with a safe working environment. In 1991, the Supreme Court of Ohio broadly interpreted this duty to require an employer to prevent employees from intentionally harming others or creating an unreasonable risk of bodily harm. An employer that knows or has reason to know that an employee poses a risk may be liable for failing to take appropriate action to prevent the harm.

This duty extends to an employer's obligation to prevent sexual harassment. If there is evidence that an employer knew or should have known that an employee had a past history of sexually harassing behavior, the employer may be liable to an employee who claims workplace sexual harassment.

Workers' Compensation

When an employee suffers a job-related injury or occupational disease, *workers' compensation* laws may provide benefits to pay for medical treatment expenses, compensation to replace lost income due to disability (*i.e.*, inability to work) and funeral expenses or death benefits in case of fatality. An *injury* for workers' compensation purposes can include any physical or mental injury attributable to one's employment. Likewise, an *occupational disease* can be any disease attributable to the peculiarities of the employment. Typically, injured employees give notice of their workers' compensation claims by filing a form entitled "First Report of Injury, Occupational Disease or Death" with the Ohio Bureau of Workers' Compensation.

Workers' compensation is intended to provide quick and certain payment of benefits and compensation as the exclusive remedy of employees who suffer injury or disease that can be attributed to their employment. However, when employers do not comply with the requirements of workers' compensation law (such as by failing to pay premiums or other assessments), they risk exposing themselves to liability outside the workers' compensation system. For example, they may risk being sued by the injured employee for damages over and above the benefits and compensation available through workers' compensation.

While workers' compensation may help protect complying employers from being sued, it does *not* protect *third parties*. For example, in addition to having a workers' compensation claim for an on-the-job injury, a delivery driver hit by a recklessly operated vehicle also may have a personal injury claim against the reckless driver.

Workers' compensation is generally intended to provide coverage for injury or disease that is accidental in some respect. If, however, it is

determined that an employer intended injury or disease to occur, the employee is not limited to recovery within the workers' compensation system and may seek damages through a civil action brought in a court of law.

Like any other type of legal claim, employees wishing to initiate a workers' compensation claim must do so within strict time limits. With the exception of claims involving emergency management workers, which must be filed within one year of injury or death (or re-filed within six months of death), notice of workers' compensation claims based on injury must be given within two years of the date of injury. Notice of workers' compensation claims based on occupational disease must be given within either two years after the occupational disability begins or six months after its diagnosis by a licensed physician, whichever is later. The two-year period for occupational disease claims is shortened to one year for claims involving silicosis, asbestosis, radiation illness, coal miners' pneumoconiosis, cardiovascular and pulmonary disease of fire fighters and police officers, as well as all dust-caused diseases of the respiratory tract (except berylliosis).

If an injury or occupational disease causes death, the deceased employee's dependents may file a claim for compensation. Except for claims involving emergency management workers (which may have to be either filed within one year of death or re-filed within six months of death), surviving dependents' claims must be started within two years of death. This time limit may be extended if, before his or her death, the employee was awarded benefits or compensation or received wages instead of compensation for total disability.

Employees sometimes wish to settle their workers' compensation claims. For example, they may prefer to negotiate for either a lump sum or an annuity. In the event of such a settlement, Medicaid and Medicare may each be entitled to reimbursement for amounts paid through their respective programs for medical treatment expenses that are more properly payable under the workers' compensation claim. The parties

also may be required to set aside a portion of settlement funds to help ensure payment of future medical treatments.

Although workers' compensation systems were originally intended to make it simpler for employees to obtain benefits or compensation for job-related injury or disease, the systems have evolved into an area of law that can be quite complex. Also, the stakes can be significant. It is wise for both employees and employers to promptly consult a workers' compensation attorney whenever issues or concerns arise as a result of known or suspected job-related injury or occupational disease.

Pension and Welfare Laws Affecting Employment

Federal and state laws protect the money that people invest in public and private retirement plans.

Employee Retirement Income Security Act of 1974

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for pension plans in private industry. ERISA does not require any employer to establish a pension plan. It only requires that those who establish plans must meet certain minimum standards. The law generally does not specify how much money a participant must be paid as a benefit.

The ERISA:

- requires a plan to provide participants with information about the plan, including important information about the plan's features and funding;
- sets minimum standards for participation, vesting, benefit accrual and funding;

- requires accountability of the “plan fiduciaries,” who exercise discretionary authority or control over a plan’s management or assets;
- gives participants the right to sue for benefits and breaches of fiduciary duty; and
- guarantees payment of certain benefits, if a defined benefit plan is terminated, through the Federal Pension Benefit Guaranty Corporation.

Social Security

The federal Social Security program allows workers and employers to contribute a part of their earnings to provide financial protection for themselves and their families when and if certain events, such as retirement and disability, occur. Each worker pays Social Security taxes and earns the right to receive Social Security benefits without regard to need. Though the Social Security program is often thought of as a retirement program, nearly 40 percent of current Social Security beneficiaries are non-retirees.

Social Security taxes and benefit levels are related to an individual’s total earnings during working years. As people earn more money and pay more in Social Security taxes, they gain the right to higher benefits. To be eligible for any retirement benefits, workers must have accumulated “enough” work credits. Work credits are measured in quarters worked; the number of credits needed to draw benefits depends upon the worker’s age when applying for the benefits.

The age at which full Social Security retirement benefits will be paid depends on the year in which the worker was born. For workers born between 1943 and 1954, full Social Security retirement benefits will be paid at age 66. For those born between 1955 and 1959, the age at which full benefits can be collected increases incrementally. For example, those born in 1955 can collect full benefits at age 66 and two months, and those born in 1959 can collect full benefits at age 66 and 10 months. Those born in 1960 and later cannot collect full benefits until age 67.

Workers also may begin receiving reduced Social Security benefits after age 62. The percentage by which Social Security benefits will be reduced depends upon the year in which the worker was born and the age at which the worker begins receiving benefits. An individual’s decision as to when to begin receiving Social Security benefits is highly personal and dependent upon specific circumstances and factors such as age, year of birth, current income, spouse’s income, other retirement planning and income sources, cash flow needs and overall financial position. The Social Security Administration’s website (www.ssa.gov) contains a number of helpful resources for considering these issues and the percentage by which Social Security benefits are reduced if they are taken before the age at which full benefits will be paid.

If an individual is receiving retirement benefits, some members of his or her family can receive benefits as well. They include:

- a spouse age 62 or older, unless the spouse is covered by a separate plan (such as the State Teachers Retirement System plan or the Public Employees Retirement System plan);
- a spouse age 62, if he or she is taking care of a child who is under age 16 or disabled;
- a former spouse age 62 or older, unless covered under a separate plan;
- children up to age 18;
- children to age 19, if they are full-time students through grade 12; and
- children over age 18, if they are disabled.

Social Security also pays disability and survivors’ benefits. Children may qualify for benefits based on their mothers’ or fathers’ work if either parent is deceased, retired or disabled. The child may be a natural child, stepchild, adopted child or, under certain conditions, a grandchild. To qualify, a child must be:

- under age 18 (or under 19, if still in high school) or disabled before age 22 and unable to work because of the disability; and
- unmarried.

Survivors' benefits are paid to eligible members of a worker's family, including:

- a widow or widower age 60 or older;
- a widow or widower who is disabled at 50 years of age or older, unless covered under a separate plan;
- a divorced spouse, who may qualify on the same basis as a widow or widower if the marriage lasted 10 years or more, unless covered under a separate plan; or
- a dependent parent 62 or older.

Disability benefits are paid to workers who have a physical or mental impairment that is expected to keep them from working for a year or more or to result in death. Social Security does not pay for partial disability. A spouse and children may qualify for benefits on a disabled worker's earnings record the same way as with retired workers.

For people who have not earned enough work credits under Social Security to qualify for benefits, or whose Social Security benefits are very low, Supplemental Security Income (SSI) payments may be available. The program makes monthly payments to people who have limited income and resources if they are 65 or older or if they are blind or have another physical or mental disability. Children as well as adults can get benefits because of disability. When deciding if a child is disabled, Social Security looks at how his or her disability affects everyday life. People eligible for SSI receive a monthly benefit, Medicaid and food stamps.

Privacy On and Off the Job

Computers and other Electronics

Employees are generally entitled to a "reasonable expectation of privacy" and to be free from wrongful intrusion into their private activities. An example of a legitimate purpose for intruding into private activities would be

searching a prison guard to ensure nothing is smuggled to prisoners. If a legitimate business purpose exists and employees receive clear notice that they are subject to monitoring, surveillance, inspections, searches and testing necessary to enforce company rules and policies regarding their conduct and performance, employers can substantially diminish an employee's privacy rights. For example, in some cases, employers may record their employees' telephone conversations as long as they first let them know of this intention.

Employers also have the right to monitor and control employees' use of the Internet, email or websites. Because employers must comply with federal and state workplace regulations and have duties to protect their employees from certain actions, including sexual harassment, they can prohibit an employee's use of the Internet and email to access or distribute unacceptable content. Employers usually have policies that inform their employees about what activities are permitted and prohibited. Regardless, employees should not expect privacy when using the Internet or email at work. (*Editor's Note: A discussion of electronic monitoring of employees [via email, the Internet, etc.] is found in Part XIII, "Online Law."*)

An employer's right to monitor employee conduct off the job and to make decisions based on that conduct is limited. Employees of government and public entities have a constitutional right to privacy. This right protects employees from most employer monitoring of or inquiry about off-the-job conduct.

In the private sector, it is generally illegal for an employer to unreasonably intrude into the seclusion of an employee, including places an employee has a reasonable expectation of privacy (such as the employee's home), unless there is a legitimate business reason to intrude and the behavior being monitored is related to the employee's job. An employer is never allowed to physically enter an employee's home without consent, even when searching for allegedly stolen employer property.

Employee Testing

Pre-employment tests (skills tests, aptitude tests, psychological tests, personality tests, honesty tests, medical tests or drug tests) can be used in Ohio, but they must comport with the Americans with Disabilities Act (ADA). To be legal, the tests must accurately measure an individual's skills and not his or her disabilities.

Workplace tests of employees already on the job must be relatively non-invasive and designed to predict a worker's actual ability to do the job. More comprehensive or intrusive tests may violate worker privacy rights, particularly if the tests aren't closely related to the particular job. Generally, courts decide whether a test is legal on a case-by-case basis.

Medical Exams and Medical Records

To avoid violating the ADA, employers may not conduct any medical exam or ask an applicant to provide a medical history before making a job offer. Once the employer decides to offer the applicant a job, the employer can make the offer conditional on the applicant passing a medical exam. Any medical exam an employer may require should be required for all entering employees who are doing the same job and, to satisfy the ADA, the results of the medical exam must remain private. Once on the job, an employee can be required to have a medical examination to determine his or her "fitness for duty" in any job requiring special physical skills. For example, positions that have certain unique physical requirements, such as fire fighting, may require employees to submit to medical examinations.

Other laws prohibit health care providers from revealing patient medical information. Employers who obtain medical records from health care providers must also safeguard those records from disclosure to others.

Drug Tests

Many private employers have drug and alcohol testing policies. Typically, these policies

provide for testing after a job offer has been made as well as for testing at any time for any reason including cases involving an accident or a reasonable suspicion of drug or alcohol use. Such policies usually state that the employee must submit to testing within a specific time frame and that failure or refusal to do so will result in employment termination. Tests must be administered by a state-certified laboratory.

The federal and state courts continually shape laws regarding drug use in the workplace and the practice of testing employees for drugs. The Drug-Free Workplace Act, a federal law passed in 1988, requires that workplaces receiving federal grants or contracts must remain drug free to receive federal funding. It does not require testing or monitoring of workers; neither does it generally prohibit employers from testing employees.

In general, employers have the right to test new job applicants for the presence of drugs in their systems as long as:

- the applicant knows that such testing will be part of the screening process for new employees;
- the employer has already offered the applicant the job;
- all applicants for the same job are tested similarly; and
- the tests are administered by a state-certified laboratory.

Most companies intending to conduct drug testing on job candidates provide information on company job applications explaining that they will be asking applicants to submit to such testing.

In Ohio, the laws on drug testing depend on whether an employee works in the private or public sector or is a member of a union. Public and private employers are prohibited from unlawfully discriminating against employees. Therefore, all employers should ensure that any drug testing is conducted on some basis other than age, disability, sex, race, national origin, ancestry or religion. Public employers must also ensure that drug testing complies with the Fourth Amendment to the U.S. Constitution. Thus, in the absence of

special circumstances, a public employer must have a reasonable suspicion of drug abuse based on specific grounds in order to conduct the drug test. An exception arises when the public employee works in a position that affects public safety or security. In this case, the government can perform drug testing under less rigid standards of selection.

Regarding private sector employees, drug testing must be administered on a non-discriminatory basis. Ohio law prohibits employers from requiring applicants or employees to pay the cost of the drug testing and limits what medical records related to the drug testing the employer may release. Employers subject to U.S. Department of Transportation regulations may require drug testing of employees using specific methods of testing.

Regarding employees who are members of a union, the National Labor Relations Board has ruled that an employer must first bargain with the union before implementing an employee drug testing program, since drug testing is a mandatory subject of bargaining. Therefore, testing must comply with the terms established in the collective bargaining agreement. In practice, most unions agree to testing because an impaired employee endangers other employees.

Lie Detector Tests

The federal Employee Polygraph Protection Act generally prohibits private employers from requiring their workers to submit to lie detector tests. However, the law permits testing by businesses that provide armored car services or guard services or that manufacture, distribute or dispense pharmaceuticals. The law also allows employers in those industries to administer polygraph tests to any workers accused of theft or embezzlement, under certain prescribed conditions.

Whistleblowing and Retaliation

Employer Retaliation

Many federal laws that regulate employment contain specific provisions protecting employees from retaliation for a *protected activity*. Employees can sue for economic, emotional and punitive damages if their employer subjects them to an adverse employment action for engaging in protected activities.

Employees engage in protected activities when, reasonably and in good faith, they assert their individual employment rights, such as those under OSHA, STAA, Title VII and the ADA.

Examples of protected activity include:

- asking for overtime pay;
- filing a complaint with the Department of Labor;
- reporting sexual harassment;
- serving in the armed forces or reserve;
- consulting or retaining an attorney; or
- applying for medical benefits or leave.

Generally, an employee engages in protected conduct any time he or she exercises an individual right or does something recognized by law as having public importance.

Whistleblowing in Ohio

Ohio has a general “catch-all” *whistleblower* law. Ohio’s whistleblower statute was passed to protect the right of employees to report violations of the law by employers or fellow employees. The protection is available only if the employee strictly follows the law’s provisions.

To be protected when reporting a violation, the employee must:

- be sure that the alleged violation of a state, local or federal statute, ordinance or regulation is one that the employer has authority to correct;
- reasonably believe that the violation is a criminal offense likely to cause physical harm or is a hazard to public health or safety;
- tell a supervisor or other responsible officer about the violation; and
- file a written report with the supervisor or officer that provides enough detail to identify and describe the violation.

If the employer fails, within 24 hours of the complaint, to notify the employee about good faith efforts to correct the violation, then the employee may report the violation to outside authorities.

The law also protects employees who report co-workers' violations of local, state or federal statute, ordinance or regulation, or any work rule or company policy that is a hazard or a crime.

When the Job Ends

Unemployment Compensation

Ohio's unemployment system is an insurance program that helps unemployed workers who are out of work through no fault of their own (for example, due to a *layoff*). Unemployment benefits are paid out of employer taxes.

An individual may qualify for regular unemployment compensation if he or she worked long enough in covered employment. Most employers are required to pay contributions for unemployment insurance. Work for such an employer is covered employment. Work for a nonprofit or government agency also is covered employment, even though the employer does not have to pay regular contributions. Instead, nonprofit or government agencies may elect to reimburse the cost of unemployment benefits paid to former workers.

To qualify for regular unemployment compensation, the individual must have lost a job

through no fault of his or her own and must be available for work, able to work and actively seeking work. If the applicant quit a job when he or she could have remained employed, then that individual caused the unemployment and is not eligible for compensation.

An individual who is discharged or fired from a job may not be eligible for benefits if the employer can show the discharge was for just cause. For example, if an employee violated established company rules, neglected the responsibilities of the job, disregarded the employer's interests, or performed the work carelessly, he or she may not be eligible to collect unemployment compensation. However, if the worker was fired for refusing to perform duties that endangered his or her health or violated accepted legal standards, that worker may be eligible to collect unemployment compensation on the basis that he or she was not discharged for just cause. If the employer did not follow its own established policy and procedures in terminating an employee or failed to explain job duties, the employee may be eligible for unemployment benefits. The Ohio Department of Jobs and Family Services determines who will receive unemployment benefits.

To be eligible for unemployment compensation an applicant must:

- be unemployed at the time of filing;
- have at least 20 qualifying weeks of covered employment in the base period (first four of the last five completed calendar quarters immediately before the first day of an applicant's benefit year, a 52-consecutive-week period); and
- have earned, at the time of the discharge, a certain qualifying average weekly wage (this amount changes each year due to cost of living increases).

Severance Pay

Severance pay is a payment or benefit provided by employers to terminated employees. An employer has no obligation to provide severance pay unless the employer voluntarily implements a policy. In fact, most employers do not have

severance plans. The only benefit that employers must, by law, provide is unemployment compensation. However, an employer may be obligated to pay severance because of an employment contract, a promise made to an employee or an established severance plan. If an employer does create a severance plan, the employees covered by the plan's terms are entitled to plan benefits when the event that triggers benefits occurs. However, an employer may create, modify or abolish a severance plan as it sees fit. Because a severance package is a type of contract, there may be terms and conditions set forth in it. For example, most severance agreements require a promise by the employee not to sue the employer as a condition of getting the severance payment. For employees over 40 years of age, such a release must comport with the Older Workers' Benefit Protection Act (see page 195) in order for the promise not to sue to be effective against a federal age discrimination claim. The parties must agree to comply with these terms and conditions. If an employee asks for a better package, he or she will be deemed to have "rejected" the employer's offer by making a counteroffer, which the employer can accept or reject. By making a counteroffer, the employee runs the risk of losing the guaranteed offer.

Vacation Pay

Often, at the time employment is terminated, the employee has accrued unused vacation time. The issue arises as to whether or not employees are entitled to be paid for those unused days. In Ohio, there is no law to regulate vacation pay. The employee's right to collect pay for unused vacation days is governed by the employer's policies and is considered to be a matter of contract.

However, courts have ruled that, if the employer's policy does not prohibit accruing vacation time, accrued employee vacation time becomes an entitlement and an employer must pay a discharged employee for any unused vacation time. Courts have viewed vacation pay as a deferred payment of an earned benefit.

If, however, the terms of employment expressly limit the employee's right to accrue vacation wages or to be compensated for unused vacation time upon termination of employment, then the employer does not need to pay. The employer's policies governing vacation time are most often included in the employees' handbook.

Covenants Not To Compete

A *covenant not to compete* or a *non-compete agreement*, as it is more often called, prohibits a former employee from working for a competitor or soliciting customers for a certain period of time after the employment ends. Although these agreements are commonly used for service professionals and commercial salespeople, they are not limited to any particular type of work. Ohio courts enforce non-compete agreements to the extent necessary to protect the employer's legitimate business interest. In Ohio, an employer can require at-will employees to sign a non-compete agreement after their employment has already begun. Continued employment is enough of a benefit to the employee to make the agreement binding. Also, many employers only provide severance packages or enhanced severance packages if the employee signs a non-compete agreement.

Non-compete agreements typically preclude or severely limit employment in the same industry, in a defined geographic area, with a competitor or with a client, for a prescribed length of time. These agreements are valid and enforceable if the restrictions are reasonable and:

- are no greater than required for the protection of the employer's legitimate business interest;
- do not impose undue hardship on the employee; and
- do not harm the public.

Nine factors are considered to determine if a non-compete agreement is reasonable:

- the extent of time and geographic limitations;
- whether the employee represents the sole contact with the employer's customers;

- whether the employee possesses confidential information or trade secrets;
- whether the agreement merely seeks to eliminate competition that would be unfair to the employer or seeks to eliminate ordinary competition;
- whether the agreement seeks to stifle the inherent skill and experience of the employee;
- whether the benefit to the employer is disproportional to the detriment to the employee;
- whether the agreement operates as a bar to the employee's sole means of support;
- whether the employee's talent that the employer seeks to restrict was actually developed during the period of employment; and
- whether the forbidden employment is merely incidental to the main employment.

Unreasonable agreements will not be set aside, but will be enforced only to the extent necessary to protect the employer's legitimate interests. For example, a court may change an agreement and reduce the number of years an employer can prohibit competition (say, from five years to two years) if the employer cannot prove such competition will hurt it after two years.

Older Workers' Benefit Protection Act of 1990

The Older Workers Benefit Protection Act (OWBPA) was passed by Congress to protect the rights and benefits of older workers (workers age 40 and over). The OWBPA amends the Age Discrimination in Employment Act (ADEA). It therefore applies to employers that employ 20 or more people. Under the OWBPA, an employer may obtain a waiver of a departing employee's right to sue the company in exchange for money or some other consideration to which the employee agrees and is not otherwise entitled. The OWBPA creates a series of prerequisites for the employer to follow in order for an employee's waiver to be effective against a claim that the ADEA has been violated. These prerequisites are as follows:

- the waiver must be part of a written agreement;
- the agreement must be clearly written;
- the waiver must expressly refer to claims under the ADEA;
- the waiver must not include future rights or claims;
- the employee must receive something in addition to anything to which he or she is already entitled;
- the agreement must inform the employee to consult with a lawyer;
- the employee must be given 21 days to consider the agreement (or 45 days if it is a termination program offered to a group); and
- the agreement must provide a period of at least seven days during which the employee may revoke the agreement and must specify in writing as to when the revocation can be made.

These prerequisites are not required in waivers signed by departing or former employees who are under the age of 40. They are also not required 1) for employees over the age of 40 who are waiving rights against employers not covered by the ADEA because they have fewer than 20 employees; or 2) for employees waiving any rights other than those for age discrimination under the ADEA.

The Consolidated Omnibus Budget Reconciliation Act of 1985

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) requires employers with 20 or more employees to allow employees and their dependents to keep their group health coverage for up to 18 months after they lose their jobs or have their work hours reduced. However, employees can be required to pay the full premium cost. The COBRA maximum coverage period may be extended for covered employees who become covered by Social Security due to a disability, and may be extended for COBRA-qualified beneficiaries upon the death of the

covered employee, or upon divorce or separation from the covered employee, or when a dependent child ceases to be a dependent.

For Journalists: Covering Workplace Law

There are several challenges for journalists covering workplace law. The first challenge involves the scope of employment law and regulations. With both federal and state statutes guiding employers, the depth and breadth of

regulations may take some time and research for the journalist to sort out. Secondly, the intersection of state and federal law is unique in each state. Journalists are advised to consult with attorneys and other employment experts well-versed in workplace law to understand which laws are controlling and under what circumstances. Finally, explaining these laws and their history to readers and viewers is no small task. The journalists' role in reporting on workplace law is often one of educator as well as storyteller. Most readers and viewers don't spend time reading these statutes, though nearly all are affected by the laws' provisions.

Chapter Summary

- Employment is regulated by state and federal laws that interrelate in a variety of ways.
- In Ohio, employees are employees at will unless their employment relationships are governed by contract or protected by law. Employees at will serve at the will of their employers and may be terminated at any time, for no reason or for any lawful reason, with or without notice. By the same token, at-will employees are free to quit their jobs at any time, for no reason or for any reason, with or without notice.
- The law protects employees from retaliation for engaging in protected activities such as asking for overtime pay, filing a complaint with the Department of Labor, reporting sexual harassment, serving in the armed forces or reserve and applying for medical benefits or leave.
- Ohioans must comply with applicable federal laws regarding discrimination on the basis of race, color, religion, sex, national origin, handicap, age or ancestry. These include Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), the Age Discrimination in Employment Act (ADEA), the Equal Pay Act, the Immigration Reform and Control Act (IRCA), the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). Ohioans also must comply with their own state laws prohibiting discrimination based on race, color, religion, sex, national origin, handicap, age or ancestry that are set forth in the *Ohio Revised Code*.

Continued on page 197

Chapter Summary *continued*

- Laborers are guaranteed the right to form unions and to negotiate as a group with employers about wages, hours and working conditions through the National Labor Relations Act (NLRA) and the Federal Labor Relations Act. Ohio law mirrors federal law by ensuring the right to engage in union activity, but addresses only the activity of public employees.
- Civil service laws as well as the U.S. and Ohio constitutions cover Ohio employees who work for the federal, state or local government.
- The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, record-keeping and child labor standards affecting full-time and part-time workers in the private sector and in federal, state and local governments.
- The Wage and Hour Bureau of the Ohio Department of Commerce administers and enforces Ohio's minimum wage, child labor and prevailing wage laws. Also, Ohio has its own prevailing wage law (*Ohio Revised Code*, Section 4115) that applies specifically to construction projects.
- Federal and state laws, including the federal Occupational Safety and Health Act (OSHA) and the Ohio Public Employment Risk Reduction Program (PERRP), exist to ensure the safety and health of workers while doing their jobs and to ensure that no job causes long-term health or safety complications.
- Workers' compensation laws provide money to pay for medical expenses and replace lost income due to on-the-job injuries and illnesses.
- The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for pension plans in private industry.
- The Social Security program allows workers and employers to contribute a part of their earnings to provide protection for themselves and their families upon retirement, disability or if certain other events occur.
- Employees are generally entitled to a "reasonable expectation" of privacy. Laws affecting workplace privacy include the Americans with Disabilities Act (ADA), the Drug-Free Workplace Act and the Federal Employee Polygraph Protection Act.
- Ohio's unemployment system is an insurance program, funded through employer taxes, that helps unemployed workers who are out of a job through no fault of their own.
- *Severance pay* is a payment or benefit employers may provide to terminated employees.
- The Consolidated Omnibus Budget Reconciliation Act (COBRA) allows qualifying employees to keep their group health coverage for up to 18 months after they lose their jobs or have their work hours reduced.

Web Links:

From the OSBA:

From the OSBA's "Law You Can Use" column:

www.ohiobar.org/lawyoucanuse (search by title or topic)

- "Are Noncompetition Agreements Enforceable in Ohio?"
- "Are Potential Employers Getting Too Much Personal Information from Social Media Sites?"
- "At-Will Employment Is the Rule in Ohio"
- "Business Owners Shoulder Responsibility for Employed Drivers"
- "Civil Rights Commission Investigates Discrimination Cases"
- "Commonly Asked Questions about Employer Retaliation"
- "Eligible Workers Can Receive Income Tax Credit"
- "Employee Blogs Can Create Workplace Problems"
- "Employees Should Not Expect Privacy at Work"
- "Employers Are Liable for Illegal Workers"
- "Employers Can Hire Foreign Workers for Seasonal Jobs"
- "Employers Have 'Qualified Privilege' when Conveying Information about Employees"
- "Employers May Conduct After-Accident Chemical Screens"
- "Employers Must Pay Attention to Expanded Reach of Americans with Disabilities Act"
- "Employers Not Required to Provide Severance Pay"
- "Family and Medical Leave: Rights and Responsibilities"
- "Filing a Workers' Compensation Claim: Know the Basics"
- "Filing for 'Making Work Pay Credit' Provides Tax Savings for Most Workers"
- "Green Cards Allow Foreign National to Live and Work in U.S."
- "How Do Labor Strikes End?"
- "Jurisdictional Disputes Pit Unions Against Each Other"
- "Know the Law Regarding Union Organizing"
- "Know Your Rights When Faced with Layoff"
- "Law Bans Employers from Using Genetic Information to Make Employment Decisions"
- "Law Protects Employees from Employer Retaliation"
- "Legal Doctrine Addresses Unjust Employment Actions"
- "Management Rights Clauses Spell Out Employer Autonomy in Collective Bargaining Agreements"
- "Members of the Military Have Civilian Job Protections"
- "National Labor Relations Board Weighs in on Social Media"
- "Ohio Law Addresses Jury Duty and Employment"
- "Ohio's Minimum Wage Increases with Inflation"
- "Social Security Disability: Rumor vs. Reality"
- "Understand Duties and Rights Regarding Sexual Harassment"
- "Understanding 'White Collar' Overtime Exemptions"
- "Union Strikes: Understanding the Nuts and Bolts"
- "What Ohioans Should Know before Going to Work in Canada"
- "What You Should Know about Unemployment Compensation"
- "Who Is Authorized To Work in the United States?"

Continued on page 199

Web Links *continued*

From the OSBA's "Law You Can Use" column:

www.ohiobar.org/lawyoucanuse (search by title or topic)

"Who Is Entitled to Overtime Pay?"

"Workers' Compensation: When Is An Injury or Disease Covered?"

"Wrongful Termination: Know the Basics"

OSBA's *Legal Basics for Small Business*:

www.ohiobar.org/legalbasics

A compilation of employment-related articles by more than 100 Ohio lawyers

OSBA's "Fine Print" small business newsletter:

www.ohiobar.org/NewsandPublications/Pages/StaticPage-100.aspx

From other sources:

www.myemploymentlawyer.com

Answers to employment law questions from a community of employment lawyers

www.dol.gov

U.S. Department of Labor website

(includes information about a wide variety of employment topics)

www.workplacefairness.org

The Workplace Fairness website

Offers information, education and assistance to workers

www.eeoc.gov

The U.S. Equal Employment Opportunity Commission website

<http://crc.ohio.gov/employment.htm>

Ohio Civil Rights Commission website – employment discrimination

www.com.ohio.gov/laws

Ohio Department of Commerce Bureau of Wage and Hour website

www.com.ohio.gov

Ohio Department of Commerce website

www.ssa.gov

U.S. Social Security Administration website

<http://jfs.ohio.gov>

Ohio Department of Job and Family Services website – unemployment information

www.ohiobwc.com

Ohio Bureau of Workers' Compensation website

<http://das.ohio.gov>

Ohio Department of Administrative Services website – information for state employees

<http://das.ohio.gov>

Ohio Department of Administrative Services website – information for state employees



“All who have meditated on the art of governing mankind have been convinced that the fate of empires depends on the education of youth.”

– Aristotle

Public Education In Ohio

Tuition and Residency

In Ohio, a child may attend school in the school district in which his or her parent lives. The parent is not responsible for paying tuition, though the parent may be responsible for other school-related fees. “Parent” refers to either parent, unless the parents are separated or divorced, in which case, “parent” refers to the residential parent who has legal custody of the child. In cases where custody is shared under a “shared parenting plan,” Ohio law considers both parents “residential parents and legal custodians” no matter where the child physically resides. For this reason, children who are cared for under a shared parenting plan may attend school free in the district where either parent lives, even if the child currently lives outside the district in which he or she was originally enrolled. A child who does *not* live with a parent can attend a public school without paying tuition if:

- the child is in the legal or permanent custody of a government agency or a person other than the child’s natural or adoptive parent;
- the child resides in a “home” for children within the school district; or
- the child receives special education.

If their residential district participates in open enrollment, parents may send their child to a *contiguous* school district without tuition payment as long as the contiguous district also has an open enrollment policy. Each district determines its own policy and must make the policy available to district residents upon request.

In 2004, Ohio adopted a rule to allow grandparents to get physical custody of and control over

their grandchildren. This rule entitles grandchildren to attend school within the district in which the grandparent resides without paying tuition and without requiring a legal change in custody. Instead, the child’s parent, guardian or custodian completes a power of attorney document that allows the child to attend school in the grandparent’s school district. If the child’s parent cannot be located, the grandparent can create a *child caretaker authorization affidavit* to provide the same benefit.

In addition, students may attend school without paying tuition under certain circumstances, as follows:

- All individuals who are at least 18 years of age, who have not received a diploma, who live apart from their parents, and who support themselves, may attend school in the district in which they live.
- Any children under age 18 who are married may attend school in the district in which they live.
- Any child who lives with another adult while the parent(s) are in the military may attend school in the caretaker adult’s district as long as the child’s parent(s) intend to return to that district when the military tour ends.
- Any child under age 22 who moves outside the home district after a parent’s death may attend school in the district he or she attended before the parent’s death for the rest of the current school year.
- Any child under age 22 whose parent(s) are building a new home may attend school in the new school district for up to 90 days without paying tuition as long as the parent(s) give the superintendent of the new district a sworn statement indicating the location of the new home, their intent to live in it and written confirmation by the builder that the house is being built.

- Any child whose parent(s) have contracted to buy a home in a new school district may attend school in that district for up to 90 days if the parents provide a sworn statement indicating the location of the home, their intent to live there and confirmation by the real estate officer or bank officer that the parent(s) are in the process of buying the home.
- A child who, with the parent, is under the care of a shelter for domestic violence may attend school in the district in which the shelter is located.
- Any child whose parent has moved out of the district after the child's senior year of high school has started may complete the senior year within that district, as long as the board of education consents.

Vocational schools (also called career centers or career technical centers) may be open to students in a number of districts. While tuition must be paid to attend these schools, the sending school district, rather than the parent(s), pays the tuition.

Through the *Individualized Education Program* (IEP) process, a district may send a special education child to another district, a private school or arrange a residential placement for educational services. In some cases, these placements are made through other codified special education procedures (commonly referred to as “due process”) or by court order. Tuition obligation is determined at the time of any such placement.

Finally, a district's board of education may allow students who live with their parents in another district to pay tuition to attend its school(s). Each district that accepts tuition-paying students does so under its own plan and with its own requirements.

Custody

Only a parent or guardian may control educational decisions for a child under the age of 18. Ohio recognizes natural or adoptive parents as the rightful decision-makers for their minor children, unless the state has revoked

parental rights through very specific court proceedings. However, courts may become involved in determining who will make decisions for a minor child in several situations, including when parents divorce or die, or when a child is removed from the parents' custody.

Compulsory attendance

Ohio mandates compulsory education for all children living in Ohio who are between six and 18 years of age. Attendance is required until the student meets the state's minimum educational standards and receives a diploma. Ohio's compulsory attendance laws are enforced through the courts.

Attendance Excuses for Physical and Mental Disabilities

Children who have a physical or mental disability and a valid excuse may be excused from compulsory school attendance. An excuse based on a physical disability must be written by a licensed physician. An excuse based on a mental disability may be written by a non-physician mental health professional, including a licensed psychologist or a school psychologist.

A properly excused child may be entitled to have the school district provide home instruction if the child will be out of school for a lengthy period of time. The home instruction program should meet the child's individual needs and be taught by a teacher qualified in the required subject areas. Home instruction should continue until the student is medically able to return to school.

Home Schooling

Parents may wish, for a variety of reasons, to educate their children at home. This is known as *home schooling*. A parent who wishes to home school a child must apply to the county or district superintendent. In the application, the parent must agree to educate the child in all areas prescribed by state standards and must provide details about how this instruction will be done, who will teach the child and what textbook, courses or teaching

materials will be used. Also, the parent must provide assurance that the child will receive a minimum of 900 hours of home education for the school year. The parent must be a high school graduate, but need not be a certified teacher to home school his or her own child.

At the end of the school year, the parent must send an academic assessment report to the superintendent. The report should include the results of a nationally normed, standardized achievement test that was administered to the child by a certified teacher or someone acceptable to the superintendent and the parent. If the child's composite achievement test score is at or above the 25th percentile, then the child's performance level will be considered reasonably proficient. The parent also must submit a written narrative, prepared by a certified teacher or someone acceptable to both the superintendent and the parent. The narrative must state that samples of the child's work have been reviewed and indicate that the child's academic work matches his or her abilities.

Age / Schooling Certificate

A student may be excused from compulsory school attendance if the student must work to help a parent or legal guardian. In order to be excused, a student must submit an application to the district superintendent for an *age or schooling certificate*. This certificate allows the student to work if that student has attended school within the district for the past two years and has diligently attempted to complete the necessary course work.

To be eligible for an age or schooling certificate, the student may not be addicted to drugs or alcohol and must demonstrate that the student's home conditions are such that the student's financial support is necessary. Also, the student must be employed where children are lawfully allowed to work and the employer must provide the school district superintendent with written confirmation of the employment offer. If the student stops working for any reason whatsoever, the employer must notify the superintendent within 48 hours.

While excusing a student from compulsory school attendance, an age or schooling certificate

does not necessarily excuse the student from all educational programming requirements. A student of 14 or more years of age must continue in a part-time educational program through night or day courses offered by the district, if available, or outside the district if necessary. A child of 16 or more years of age may have this requirement specifically waived by the district's superintendent.

General Education Development (GED) Test

Although most individuals cannot take the GED test until they turn 19, a student between the ages of 16 and 18 is permitted to take the GED test and be excused from compulsory school attendance with permission from both a parent, legal guardian or court administrator, and the school superintendent in the district in which the student last attended or currently resides. In order to qualify to take the GED prior to the age of 19, the student must have withdrawn from the public school or been enrolled in home schooling.

Truancy

Truancy is considered a major juvenile offense that subjects both the student and parents to court action. According to Ohio law, parents must make sure their children are not truant from school.

A child who is a chronic truant is subject to the juvenile legal system. *Chronic truant* refers to any child of compulsory school age who is absent from the public school without a legitimate excuse for absence of seven or more consecutive school days, 10 or more school days in one school month or 15 or more school days in a school year. The juvenile court may impose penalties on the parent, the child or both. However, a school district may choose to notify the parent and student before referring the student to juvenile court. The district also may require a parent and the student to appear at school. If the parent and student do not respond to the school's notice to appear, the school may refer the case to the court and to the

registrar of the Ohio Bureau of Motor Vehicles (BMV).

A truant student who has a driver's license may receive a license suspension that will last until the student reaches the age of 18 or satisfies the BMV that he or she is attending school.

Some schools offer mediation programs to help resolve the truancy concerns before a court intervention is necessary. Truancy mediation programs operate in a number of school districts throughout the state.

Alternatives to Public Education

Voucher Programs

Voucher programs, also known as scholarship programs, were established by the state for students who live in a public school district that has been classified as "needing improvement" and has been placed under a federal court order requiring the state superintendent to manage the district. The law presently allows students to use vouchers to help pay tuition costs for private schooling. Ohio is included among the states that have instituted voucher programs, but, as of 2011, Cleveland was the only city in the state to have a voucher program.

Voucher programs give priority to low-income families who cannot afford to pay private school tuition costs or move to another school district. To receive scholarships, which may cover up to 90 percent of private school tuition, students must apply. Students who receive scholarships may choose to attend any private or public school that has applied to participate in the voucher program. However, any student who wishes to attend a participating private school still must apply for admission and be accepted to that school. Students who choose to stay in a school found to be in need of improvement can apply for grants so they can receive help from tutors.

To participate in the voucher program, a private school must be located within the bound-

aries of the failing school district. Another public school district also may apply to participate if it is located next to the failing school district. Because voucher programs are in flux, it is advisable to check current state law for any changes.

Community schools

An Ohio *community school* (often called a "charter school" in other states) is a public, non-profit, nonsectarian public school that operates independently of any school district and is sponsored by an authorized entity. A community school is generally created to provide a unique educational program or to meet the needs of an under-served subgroup of students. Agencies established by the Ohio legislature supervise Ohio's community schools. Community schools are public schools of choice and are state and federally funded.

Community schools may be started *only* in school districts the state has determined to be "challenged school districts" and in Ohio's major urban districts. However, a student need not live within a "challenged" district to attend a community school.

Like traditional public schools, community schools have open enrollment policies and must follow federal and state laws prohibiting discrimination based on race, disability, gender, national origin or religion. Community schools do not require parents to pay tuition and are exempt from state statutes that do not specifically apply to them. Therefore, they have more autonomy than traditional public schools.

There are three major types of community schools: *new start-up community schools*, *conversion community schools* and *Educational Service Center (ESC) conversion community schools*.

New start-up community schools must be located in "challenged school districts." These "challenged" districts include Ohio's eight largest urban school districts as well as districts in academic emergency or on academic watch, and districts identified in Lucas County, the original pilot project area.

A conversion community school is created when a traditional school district converts all or part of an existing public school to a community school that operates independently of the sponsoring district. The conversion community school may be opened by any school district in the state and is considered its own district for many purposes.

An ESC conversion community school is created when an ESC converts all or part of a building it owns or operates into a community school. An ESC-sponsored conversion community school may be opened in any district in the state in which the ESC owns or operates a facility.

A school must enroll at least 25 students in order to qualify as a community school (regardless of community school type) and it may serve only as many students as its sponsorship contract application allows. A community school that receives too many applications must institute a lottery process so that each child who applies is given an equal opportunity for admission. Returning students and their siblings receive admission preference. Each community school establishes its own admission policy within its sponsorship contract.

Like all public schools, students in community schools must take state tests to determine if they have made adequate yearly progress. If students do not perform adequately, Ohio will classify the school as not having met the standard for adequate yearly progress and may sanction the school. Community schools must meet state requirements as well as the federal requirements of the No Child Left Behind Act and the Individuals with Disabilities Education Act. (*See an explanation of these acts later in this chapter.*)

Ohio School Funding & Management

Both traditional public schools and community schools are funded on a per-pupil basis by the state, according to certain complex formulas. Local school districts also receive funding through local property taxes that are not permitted to be passed on to community schools. Public schools,

including traditional and community schools, are eligible for grant programs through state, federal and private foundations. Public schools must adhere to federal and state regulations regarding school districts' operation and management and are governed by locally elected boards of education. All students residing within the boundaries of a school district are eligible for enrollment and cannot be denied an education unless expelled.

Private schools are funded through tuition costs, fundraising, donations and private grants. They also receive money from state grants and by meeting certain federal and state requirements. Because private schools are subject to fewer state and federal regulations than public schools, their administrators can create specialized programs, alter the curriculum of instruction and hire a teacher who holds a bachelor's degree, but not necessarily a teaching degree. Private schools can set admission standards and may refuse admission to any student for non-discriminatory reasons. Private school students must, however, take the Ohio Graduation Test or meet a state-approved alternative requirement.

Parochial schools are private schools that incorporate religious education into their curriculum. Students who enroll in parochial schools are not required to belong to any particular religious organization, but they are expected to participate in the school's religious classes and services.

Student Rights

First Amendment Rights

Students do not lose their First Amendment right to freedom of speech when they enter school, but public, private and parochial schools may limit students' rights to express opinions when the expressions are vulgar or offensive, or interfere with the educational instruction of other students. Also, school administrators may censor student expressions in speech and in writing if they are produced as part of a school activity or curriculum (such as an article for a school newspaper) and if there is a legitimate reason for doing

so (for example, if school officials determine that the subject matter is inappropriate). A school official may not, however, censor only one side of a debated issue.

School officials may exercise censorship control over the speech and written materials of organizations, including religious and political organizations, that are not affiliated with the school, but only if the materials cause a disruption and interfere with the education and environment of the school. School administrators also may ban the distribution of materials that are vulgar, offensive or coercive, or they may limit when and where these materials are distributed.

The First Amendment requires public schools to remain neutral with respect to religion. Teachers and administrators may not force students to pray, read religious text for which there is no approved educational purpose or lead students in prayer. However, public school students *do* have a right to voluntarily pray before, during or after school, and schools may not ban religious clothing. If a public school allows student-run clubs to meet outside of class time, a student-formed religious club also must be permitted to meet. Public schools also may implement a moment of silence, but may not require students to pray. In addition, courts have ruled that reciting the Pledge of Allegiance must be a voluntary act, and it is a violation of First Amendment rights for schools to require students to recite the pledge.

Regulations on dress and hairstyles have caused students to voice concerns about their rights to freedom of speech as guaranteed by the First Amendment. Courts, however, generally have upheld any school dress regulation as long as the adopted codes are specific, do not discriminate and have some basis, such as to promote appropriate behavior and avoid unruly conduct. Hair codes are more difficult to enforce, but may be permitted when implemented for safety or other legitimate reasons.

Student rights also include the freedom of association, which allows students to form clubs

and groups and to meet during non-instructional time without school administration interference. If a school allows any student-initiated groups to form, administrators may not discriminate against or prohibit the formation of a particular student-run group. School officials and staff members may not lead, participate in or control these groups, but most student groups have a faculty advisor assigned by the school to supervise the students during meetings.

Students attending public schools generally have fewer limitations placed upon their freedom of speech than do students attending private or parochial schools. Because the First Amendment right of free speech is protected by the federal government, which funds and regulates public schools, it has greater control over public schools regarding First Amendment rights than over private and parochial schools that receive little or no federal funding.

Student Discipline

In Ohio, school officials generally may discipline a student for conduct that disrupts the school day or endangers the health or welfare of the student or others. Typically, a local school district will, through its board of education, circulate a student code of conduct. A school official typically determines consequences for unacceptable behavior. These may vary greatly and include warnings, corporal punishment (with limitations), detentions, in-school suspensions, Saturday school, out-of-school suspensions and expulsions.

Some school disciplinary codes include broad prohibitions against “willful misconduct,” “disobedience” and “intentional disruption.” Increasingly, schools are using these more general prohibitions to impose discipline for actions that occur outside school.

Out-of-school *suspensions* and *expulsions* are the most severe of the possible consequences. For out-of-school suspensions lasting up to and including 10 days, the student must receive oral or

written notice of the charges. If the student denies the charges, school administrators must provide an explanation and evidence and offer the student a chance to present his or her side of the story at an informal hearing. Frequently, the notice and hearing will take place at the same time in the disciplinarian's office.

If a student poses a risk or ongoing threat, the student may be immediately removed from the school. This is called an "emergency removal." Emergency removals may only last as long as the "emergency" that brought about the removal lasts, or until the school district can initiate formal disciplinary action against the student. Typically, emergency removals last no more than one to two school days.

When a student is removed because of an alleged risk or threat, the school must give the student written notice of the reasons for removal and the right to attend a hearing to challenge the removal or to have the reasons explained. This hearing must be held within three *school* days after the student's removal. If a student is suspended for 10 or fewer days, the school need not give the student an opportunity to retain legal counsel, cross-examine witnesses, or call his or her own witnesses. However, parents who disagree with a suspension of 10 or fewer days may appeal the decision to the school's superintendent according to the district's policies.

Any out-of-school suspension of more than 10 days is considered an expulsion. Students who face being excluded from school for longer than 10 days have certain rights. For example, the school must provide a written notice of the intent to expel to the student's parents (or to the student, if 18 years of age). This initial notice must outline the infraction and set a date for a hearing. The hearing must be held no sooner than three but no more than five days after the student's removal from school, and must be conducted by the superintendent or a representative. The student must be allowed to hear evidence against him or her, present his or her own evidence and bring legal counsel. The hearing must be recorded to create a permanent, verbatim transcript of the proceeding.

If, at the hearing, it is decided that the student should be expelled, the district, within 24 hours, must send a second notice to the student outlining the length of the expulsion and his or her right to appeal to the board of education and state court. A student generally may be expelled for no more than 80 school days (which may extend into the next school year). For specific infractions, including drug or weapon offenses, a student over age 16 may be permanently expelled. A student, unless disabled, is not eligible to receive educational services from the expelling school; also, the student does not have a chance to make up missed work. Nevertheless, the student may apply to receive educational services from another public or private school in the state during the period of the expulsion. The other school *may*, but is not obligated to, accept the student into regular classes or provide educational services until the student fully serves the expulsion term. However, any grade or credit earned at the other school during the time of the expulsion will not be applied to the student's record in the expelling school.

Due to state and local school boards' zero tolerance policies, expulsions occur more frequently now than in the past. Under the zero tolerance policy, anyone bringing drugs, fire-arms, knives, or other weapons to school may be expelled. School districts may decide to include medicines or pocket knives in this list.

These general provisions are modified for students that have been identified as or suspected of having a disability. For such a student, educational services must be continued, according to the *Individualized Education Program* (IEP), during periods of discipline beyond 10 days' duration. If the student's conduct: 1) was caused by, or was directly and substantially related to, the disability; or 2) was the direct result of the school's failure to implement the IEP, then the behavior is considered a "manifestation" of the disability. Schools now may remove a student with disabilities who possesses drugs or weapons in school, or inflicts serious bodily injury on another person, even if the infraction is a manifestation of a disability, for

up to 45 days. If the disabled student is removed from school, the district must continue to educate the student in an interim alternative educational setting. (See sections later in this chapter for a more detailed explanation of discipline provisions as they apply to children with special needs.)

Student Right to Privacy

Increasingly, school districts are turning to traditional law enforcement techniques to secure their buildings and prevent drug or weapon use on school grounds. In Ohio, only law enforcement officials may carry guns onto school grounds. Also, no person may enter a school building with a concealed weapon, even if certified to carry a concealed weapon. Schools may use metal detectors to help ensure student safety.

Similarly, locker searches conducted by school officials are permitted in emergency situations. A district's board of education may authorize random locker searches, as long as notice is posted in a conspicuous location. School boards also may specifically grant school administrators the authority to search a locker when there is reasonable suspicion that the locker contains evidence of violations of law or school rules.

Searches of other personal property or persons are more strongly regulated, although they usually do not require a warrant. A school administrator may search a student or a student's belongings if it is reasonable to believe an inappropriate item will be found. School officials must be especially careful about justifying a search of a student's person, and about conducting the search so that it is limited in scope and not overly intrusive.

Harassment

Ohio's public schools are required to enact policies that prohibit student harassment, intimidation and bullying. *Harassment* refers to severe, pervasive or objectively offensive conduct based on a student's actual or perceived race, color, national origin, gender, disability, sexual orientation, religion or other identifying characteristic. Harassment includes physical, emotional or sexual conduct that causes harm to the targeted student,

often affecting a child's performance in educational or social activities.

Bullying also may affect a student's school performance, but is not necessarily related to the target's race or other identifying characteristic. Ohio law defines "bullying" as any intentional written, verbal, or physical act that a student exhibits toward another student more than once and the behavior both: a) causes mental or physical harm to the other student; and b) is sufficiently severe, persistent or pervasive that it creates an intimidating, threatening or abusive educational environment for the other student. By law, every school must include both physical and mental harm in its policy against bullying.

Federal laws prohibit particular types of harassment, but no comprehensive law addresses all forms of harassment in schools. The No Child Left Behind Act of 2001 requires school districts receiving federal money to provide a plan for making school environments conducive to learning, safe and drug free. All school districts must consult with employees, students, parents and community members to establish policies prohibiting harassment, intimidation and bullying.

The policies must include: a) a statement prohibiting bullying on school property or at school-sponsored events; b) a procedure to report bullying; c) a requirement that school employees and volunteers report bullying to the school principal; d) a procedure for documenting and responding to incidents of bullying; e) a requirement that parents of students involved in bullying be notified of any incidents and given copies of any written reports; f) a discipline procedure for a student guilty of bullying another; and g) a strategy for protecting a victim from additional bullying or retaliation for reporting it. Also, schools must report any bullying incidents to the Ohio Department of Education and on their websites at least two times a year.

Parents who suspect that their child has been a victim of bullying should review their school's bullying policy and contact the school's principal. If the school has not solved the problem, contact the school superintendent or a board member.

For bullying prevention resources, parents may contact the Ohio Department of Education's (ODE) Office for Safety, Health and Nutrition and explore the Safe and Supportive Learning Programs that are part of ODE's Office of Family and Community Support.

In Ohio, schools and teachers who are acting appropriately and seeking to help students develop their skills are protected from liability (civil or criminal responsibility) for ordinary school situations. Typically, schools and teachers are held liable for only the most severe cases of intentional misconduct. However, Ohio students must be supervised, and schools and their teachers may be held liable for foreseeable injuries if supervision is inadequate. Also, schools must respond in a timely manner to code of conduct violations and harassment complaints.

Child Abuse Reporting Obligations

Ohio has laws aimed at protecting children from abuse and neglect. *Child abuse* is actual, deliberate physical or mental injury or death or the threat of injury to a child's health or welfare. Abuse includes inappropriate sexual behavior. The definition of *child neglect* is broader and includes situations where parents refuse to provide proper or necessary subsistence, education, or either physical or mental health care.

Under Ohio law, *mandatory reporters* must immediately report child abuse or neglect to local law enforcement or human services agencies. Mandatory reporters include teachers and other authorized school employees, counselors, health care professionals, child care workers, attorneys, clergy and others who work closely with children or are charged with protecting children. Mandatory reporters must report any known or suspected abuse or neglect to local children's services agencies and cannot be sued for following through on this obligation. If they *fail* to report known abuse or neglect, they may face both criminal and civil liability.

Other community members are not required to report abuse or neglect, but they may choose

to contact law enforcement or human services agencies with good faith reports of possible abuse or neglect.

Special Education

General Provisions

In general, the federal *Individuals with Disabilities Education Act* (IDEA) was passed to ensure that: 1) all children with disabilities receive a free, appropriate public education that meets their unique needs and prepares them for employment and independent living; 2) the rights of children with disabilities, and parents of such children, are protected; and 3) states and localities receive support in educating disabled students. Also, IDEA provides for assistance to states in developing early intervention services and educational assessment tools.

Early Intervention Programs

IDEA provides for early intervention services for children from birth until age three if they: 1) are experiencing a developmental delay in one or more areas or 2) have a diagnosed physical or mental condition that is likely to result in developmental delay. *Developmental delay* is a delay in one or more areas of development (cognitive; physical, including vision, hearing and nutrition; communication; social or emotional; and/or adaptive behavior).

In Ohio, the Ohio Department of Health (ODH) provides early intervention services under the "Help Me Grow" system. The ODH makes IDEA funds available to county Family and Children First Councils, which administer Ohio's early intervention programs. These funds may be used to maintain a system of services for eligible infants and toddlers, provide direct services for eligible children if not already provided by other public agencies or private sources, and to expand services for eligible children.

The state of Ohio, through its local agencies, must identify and evaluate all eligible infants and

toddlers at no cost to the family. Children from birth to three years who are referred for services must receive a developmental screening within 45 days of referral, and eligibility must be determined within 45 days following the screening by a developmental evaluation team, which includes the parents and at least two qualified personnel from two different disciplines.

Eligible children must be provided many services at no cost. In certain circumstances based on need, specialized services such as counseling, nursing, health services, therapy, and transportation also may be paid for through IDEA funds. Within 45 days of eligibility determination, an Individualized Family Service Plan (IFSP) is prepared. The IFSP identifies the services to be provided to an eligible child and includes a summary of the child's development, the family's resources and concerns about the child, outcomes to be achieved and a list of resources. Specific services must be identified and provided, if possible, in the child's natural environment. Individualized Family Service Plans must be reviewed 120 days after services begin and at least once a year afterwards.

In addition, a licensed professional (in nursing, social work, early childhood education or a related discipline), with a minimum of two years' experience working with children from birth to age five must coordinate the delivery of services to the child with a variety of agencies. This service coordinator also helps the child to transition to preschool or to the local school district.

Early Intervention Procedural Safeguards

Parents whose child is receiving early intervention services must be notified regularly of certain procedural rights such as the right to receive written notice before any change of service and the right to administrative review of complaints. Parents must give written consent before their child can receive any evaluation or services. For more information on Ohio's Early Intervention Program (age 0-3), visit the Ohio

Department of Health's website at www.odh.ohio.gov (choose "Early Intervention" from alphabetical index).

Child Identification Requirements

Each state must have a program to identify, locate and evaluate children requiring special education and related services. The program must include highly mobile children with disabilities, such as migrant and homeless children, and those who continue to advance in school, but need special education.

Ohio's state rules make each school district responsible for identifying, locating and evaluating all children below age 22 living within the school district who need special education and related services.

Free Appropriate Public Education

The IDEA requires school districts to provide all eligible students with a *Free Appropriate Public Education* (FAPE). Free Appropriate Public Education is special education and related services that: 1) have been provided at public expense, under public supervision and direction and without charge; 2) meet the standards of the state's educational agency; 3) include an appropriate preschool, elementary or secondary school education in the state involved; and 4) meet the IEP requirements. Each school district must adopt and implement written procedures ensuring FAPE to all children with disabilities, aged three through 21 years.

Evaluations and Re-evaluations of Students with Special Needs

Under IDEA, school districts must conduct evaluations and re-evaluations to determine initial and ongoing eligibility for special education and related services. Before conducting such an evaluation, a district must get consent from parents or legal guardians, and must explain, in writing, the district's proposed evaluation procedures.

Following an initial evaluation to determine the educational needs of a child with a disability,

the district must re-evaluate the child at least once every three years, or at the request of a parent or teacher, or if conditions warrant a re-evaluation. However, re-evaluations may not require new assessments in all educational areas. The Individualized Education Program (IEP) team may waive additional testing of the student if it finds that existing evaluation data is sufficient. A re-evaluation is required before a district can determine that a student no longer qualifies as a student with a disability.

The district must test all suspected areas of disability and educational need and may not use only one procedure as the sole criterion for determining eligibility or an appropriate program for a student. When evaluating a student, the district also must consider information provided by the parents and professionals working with the child. Parents who disagree with the results of the district's evaluation can request an *Independent Educational Evaluation* (IEE) at public expense.

Role of the Individualized Education Program (IEP) and the IEP Team

The IEP is the written program of specific special education and related services designed to meet the unique educational needs of a child with a disability. Each child with a disability should have an IEP in effect on the first day of school each year and it must be implemented as written. The IEP is a working document that must be reviewed and revised at least once a year. It is put together by the IEP team, which must include the child's parents, at least one of the child's regular education teachers (if the child participates in the general curriculum), at least one of the child's special education teachers, a qualified district representative who can provide resources, someone who can interpret evaluation results and implications for instruction and the child, if appropriate.

At a minimum, according to Ohio law, an IEP should outline:

- the child's present levels of performance;
- short-term goals and instructional objectives;
- measurements, criteria and a schedule for evaluation;

- a statement outlining the specific special education services to be provided and the extent to which the child will participate in regular education programs;
- when services will start and how long they will last;
- how services will be delivered; and
- any modifications or additions to the proposed program to fit the particular needs of the child.

When putting together a program, the IEP team must review special factors and other considerations, including the need to address behavior, English proficiency, visual impairments, communication, assistive technology devices and services, physical education services, extended school-year or summer services, transition planning and services to students age 14 and older, and state- or district-wide assessment requirements.

Resolving Disagreements Concerning Special Needs Children

When parents and the school district disagree about a child's special education services, parents may bring an expert, advocate or attorney to an IEP meeting to discuss the issues. Parents also may discuss the matter with the school's special education coordinator. If these discussions are not helpful, the Ohio Department of Education (ODE) offers free mediation services to help resolve disagreements about services for the child. Parents also may file a written complaint with the ODE.

If resolution methods do not work, parents or districts may file a request for an impartial *due process hearing*. An impartial due process hearing is an administrative hearing overseen by a hearing officer who is charged with hearing all evidence and determining the appropriate educational services for a student with a disability. The hearings are typically held at an agreed-upon location within the boundaries of the school district.

Information about all aspects of special education is available through ODE's website at www.ode.state.oh.us.

Identification of Gifted and Talented Students

Ohio recognizes the specific challenges and benefits of instructing gifted and talented children. All Ohio school districts must have a plan or local board policy, approved by the ODE and distributed to all parents, to identify gifted and talented children in their schools.

This identification must be based on tests and checklists that appear on an approved list prepared by ODE and assessments must be available on a regular basis. When conducting screening assessments, districts must include children who are culturally and linguistically diverse, come from low socio-economic backgrounds and who have special needs.

In Ohio, children may be identified as gifted in four different categories: superior cognitive ability, specific academic ability in a field (including math, language arts, science, or social studies), creative thinking ability, and visual/performing arts ability. Each field has its own criteria, which must typically be met on a measurement within the preceding two years for the assessment to be valid.

During the identification process, parents must be notified about assessment results and about whether the child has been identified as gifted or talented. Parents also may submit assessments performed outside the district by trained personnel for consideration. A parent who disagrees with the district's determination may appeal according to school board policy.

While Ohio schools must have a plan for identifying gifted and talented students, they do not have to provide special services for these students. For complete information concerning Ohio's gifted and talented programming, visit the ODE website at www.ode.state.oh.us.

Federal Legislation and Education

A number of federal acts and amendments affect U.S. educational programs. Many of these acts or amendments apply to all schools in Ohio that receive federal funds, including all public schools and most private schools.

Title IX

Established to promote gender equality in schools, Title IX of the Educational Amendments of 1972 prohibits any federally funded educational program or activity from discriminating based on sex. Title IX extends to all areas of public schooling and protects all students and employees of educational institutions that receive federal funds.

Each school must have a Title IX Coordinator, who works with the Office of Civil Rights within the U.S. Department of Education to enforce Title IX policies. The Office of Civil Rights protects the anonymity of anyone who files a complaint, and the institution that is the subject of the complaint must not retaliate against someone who complains. Any school that does not comply with Title IX may have to pay money, including any attorney fees, to the person who brought the complaint. Also, violations of Title IX may jeopardize the school's federal funding.

Section 504 of the Rehabilitation Act of 1973

The Rehabilitation Act of 1973 made it unlawful to discriminate against individuals with disabilities in activities funded by federal subsidies or grants. Section 504 of the act covers all public or private programs or activities that

receive federal assistance and, therefore, includes all public elementary and secondary schools and most colleges and universities. According to Section 504, schools may not discriminate against students with disabilities and must provide such students with reasonable accommodations and, in some cases, services. Section 504 protects individuals with impairments that substantially limit a major life activity, such as concentrating or learning. Unlike IDEA, which covers students in public schools until age 22, Section 504 covers all individuals no matter the age. For example, college students are covered, as are employees if they work for a company that receives federal funds.

Section 504 requires that knowledgeable people from a variety of sources determine students' eligibility. Eligible students are entitled to a Section 504 plan to address their educational needs and may receive their services in the regular classroom or a special education room, based on individual needs. Schools must re-evaluate students periodically or before a significant placement change is made. Although a plan must be developed to outline services under Section 504, it is not as detailed as an IEP written under IDEA and it does not address implementation accountability. Students with disabilities who meet the criteria for eligibility under both Section 504 and IDEA are served with one plan, the IEP written under IDEA, and are not entitled to separate plans under Section 504. Also, parents of children under age 18 may help develop the plan, but do not have the procedural safeguards provided in IDEA to help them enforce the plan. There is a free appropriate education requirement under Section 504, but it is not as encompassing as the requirement under IDEA. All students who are classified under IDEA are also covered by nondiscrimination under Section 504. Because the eligibility definition under Section 504 is broader, however, not all students on 504 plans may be covered under IDEA.

Americans With Disabilities Act of 1990 (ADA)

In 1990, Congress enacted the Americans with Disabilities Act (ADA), a civil rights statute extending the concepts of Section 504 to: 1) employers with 15 or more employees; 2) all activities of state and local governments, including employment and education; and 3) all places that offer goods and services to the public. The act requires public places to make reasonable modifications to policies, practices, and buildings unless those modifications would fundamentally alter the nature of the services or be an undue burden.

The regulations of the ADA parallel Section 504 regulations. While most schools provide Section 504 plans rather than ADA plans, school districts still must have an ADA policy in place, must actively enforce it and *must* make it available upon request to parents.

No Child Left Behind

The aim of the federal No Child Left Behind Act of 2001 was to improve schools nationwide by addressing standards and accountability, providing more choices for parents, increasing local control and flexibility, and using teaching methods that scientific research supports.

No Child Left Behind requires schools to implement a statewide accountability system to ensure continual and substantial academic improvement for all students. This accountability system (*Adequate Yearly Progress*, or AYP), seeks to narrow the achievement gaps among students by requiring schools and districts to report achievement ratings of state-developed annual goals to the state. The achievement ratings, gathered through the use of a statewide assessment, determine how well schools are performing.

The statewide assessments are based on annual measurable goals for reading and mathe-

matics. The state determines what percentage of students must test as proficient on these assessments for a school or district to be “adequately progressing.” Also, in order for a school to meet AYP, 95 percent of all students must participate in the statewide assessment based on these annual objectives. Elementary and middle schools also must maintain a certain attendance level, and secondary schools must maintain a certain graduation rate.

A school district that does not have the necessary percentage of proficient students still may meet the AYP standard if it has reduced the number of non-proficient students by at least 10 percent from the previous year’s report.

If a school and/or district fails to meet the state’s AYP standard, the state will apply sanctions (such as requiring implementation of a school improvement plan) to bring about improvement. If a school fails to meet the AYP standard for two years in a row, the school will earn “School Improvement Status.” Students enrolled in such a school can choose to enroll in another of the district’s schools that is *not* under “improvement” status. This is known as *school choice*. Schools that continue to fail to make AYP will receive supplemental services from the state and other arrangements may be made for the school’s management. For example, such a school may be closed and reopened as a community school or the school’s staff may be replaced.

In response to the No Child Left Behind Act, Ohio has restructured its assessment methods to enhance student learning and instruction. Students in kindergarten through grade 9 take the Ohio Achievement Assessments in reading, writing, math, science and citizenship on a rotating basis. Students in grade 10 take the Ohio Graduation Test (OGT) in all five assessment areas. In order to receive a high school diploma, students are required to take and pass all five assessment areas of the OGT or pass four out of five assessments

and meet other criteria, as outlined on the Ohio Department of Education website (under Alternative Pathway for Eligibility for a Diploma). Students with disabilities who have taken the OGT, but whose assessment teams determine that they should be excused from passing all or part of the OGT, still may receive a high school diploma.

Family Educational Rights and Privacy Act / Student Records

The federal Family Educational Rights and Privacy Act (FERPA) protects the confidentiality of educational records maintained by any educational institution receiving federal funds (or by someone acting for the institution). FERPA provides parents and eligible students (those over age 18 or in a post-secondary program) certain rights regarding records, files, documents or other materials containing personal information about the student. Some information (such as name, address, phone, degree, etc., as might be found in a directory) can be disclosed without the student’s consent, but affected parents and students must be notified first.

There are some exceptions to the general rule that the school cannot disclose information without parental consent. For example, the school may release educational records to other school officials who have a legitimate educational interest in the information, or information may be shared in an emergency to protect the health or safety of the student or others. Each school must comply with FERPA and notify parents and eligible students annually of their rights. For more information about FERPA, visit the U.S. Department of Education’s website at: www.ed.gov and type in “FERPA.” School districts must be aware of the interaction between FERPA requirements and the Ohio Public Records Act.

For Journalists: Covering Education Law

Under Ohio open meetings and public records laws, journalists covering education issues generally have access to school district decisions and strategies for education in their districts. Journalists face greater challenges in the reporting of specific education stories about students. Educational records containing personally

identifiable information about students generally are not subject to disclosure. Journalists should be aware of concerns for student privacy rights (see media law section on privacy). Because the educational and legal systems often protect the release of information about minors in an effort to safeguard their development, journalists are advised to consult with their own counsel on their rights of access to student records that contain personally identifiable information, when reporting about specific children in schools.

Chapter Summary

- A child may attend a public school without tuition payment if a parent lives in that school district. There are also other circumstances in which a child can attend a public school without tuition, such as when a child lives with someone other than a parent or receives special education.
- Ohio mandates compulsory education for all children living in Ohio who are between six and 18 years of age. Attendance is required until the student meets the state's minimum standard and receives a diploma. However, this requirement may be waived or modified if a child has a valid excuse, the parents decide to educate the child at home or the child is eligible for an *age* or *schooling certificate*.
- According to Ohio law, parents are responsible for making sure their children are not truant from school.
- There are several state-approved alternatives to public education. In certain situations and through a "voucher" program, public funds may be available for students to attend private schools. Also, the Ohio legislature has established agencies to supervise *community schools* in Ohio; these schools generally have more autonomy than traditional public schools.
- Traditional public schools and community schools are funded on a per-pupil basis by the state according to certain formulas. Local school districts also receive funding through local property taxes. Private or parochial schools are funded through tuition costs, fundraising, donations and private grants, and (if they meet federal and state requirements) state grants.
- Students do not lose their First Amendment rights when they enter school, but public, private and parochial schools may limit students' rights to express opinions when the expressions are vulgar or offensive, or when they interfere with the educational instruction of other students.

Continued on page 215

Chapter Summary *continued*

- The No Child Left Behind Act of 2001 requires school districts receiving federal funds to provide a plan for making classroom environments conducive to learning and schools safe and drug free.
- Under Ohio law, *mandatory reporters* must immediately report child abuse or neglect to local law enforcement or human services agencies. Mandatory reporters include teachers and other authorized school employees.
- The Individuals with Disabilities Education Act (IDEA) provides for free and appropriate public education, including early intervention services, for children with special needs. The Ohio Department of Health also provides early intervention services through its “Help Me Grow” program.
- Each state must have a program to identify, locate and evaluate children requiring special education and related services.
- Under the IDEA, school districts must determine initial and ongoing eligibility for special education and related services by conducting evaluations.
- The Individualized Education Program (IEP) is the written plan of specific special education and related services designed to meet the educational needs of a child with a disability.
- All Ohio school districts must have a plan or local board policy to identify gifted and talented children in their schools, although they are not required to provide special services for these students.
- Title IX of the Educational Amendments of 1972 prohibits any federally funded educational program or activity from discriminating based on sex.
- Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 make it unlawful to discriminate against individuals with disabilities in activities of the federal government and in all places that offer goods and services to the public.
- The No Child Left Behind Act of 2001 requires public schools to implement, at the state level, an accountability system that will ensure continual and substantial academic improvement for all students.
- The federal Family Educational Rights and Privacy Act (FERPA) protects the confidentiality of educational records maintained by any educational institution that receives federal funds. With some exceptions, the general rule is that a school cannot disclose information about a student without parental consent.

Web Links:

From the OSBA’s “Law You Can Use” column:

www.ohioabar.org/lawyoucanuse (search by title or topic)

- “Are Schools Legally Responsible for Your Child’s Sports Injuries?”
- “Children with Special Needs Can Get Funds for Private School Placement”
- “Choosing the Right Student Loan”
- “Circumstances Say Whether Minors Are ‘Emancipated’”
- “Divorce, Separation Raise School-Related Concerns”
- “Extended School Year: Summer Options for Students with Disabilities”
- “Grandparents Can Get Authority To Make School Decisions for Grandchildren”
- “Ohio Law Prohibits Bullying in Public Schools”
- “Ohio Law Says Where Students Can Attend School Tuition-Free”
- “Parents Must Take Responsibility for Truant Students”
- “Positive Behavioral Support Plans for Students with Disabilities”
- “Public Schools Adapt to Student Violence Issues”
- “Public Schools Can Impose Dress Codes”
- “Public Schools May Test Students for Drugs under Certain Circumstances”
- “School Evaluations and Independent Evaluations: The Foundation of Special Education Eligibility”
- “Schools Have Authority To Search Lockers”
- “Schools Must Assist Students with Reading Difficulties”
- “Schools Must Follow Procedures To Suspend or Expel Students”
- “Service Dogs in the School Setting”
- “Student Loans: Advice for Parents and Children”
- “Tina’s Law’ Requires Public Schools To Address Dating Violence”
- “Transition Services Help Children with Disabilities Move to Post-School Activities”
- “What You Should Know about Getting Help for Your ADD Child”
- “What You Should Know about Home Instruction”
- “What You Should Know about Home Schooling”
- “What You Should Know before Making a Public School Donation”

U.S. Department of Education’s website:

www.ed.gov

Ohio Department of Education’s website:

www.ode.state.oh.us



“Laws too gentle are seldom obeyed; too severe, seldom executed.”

– Benjamin Franklin

The Internet—in its public, commercial form—has been around for a generation now. For young adults, life without broadband, instant search results, whole-earth mapping, online purchases, apps and social networking is difficult to imagine.

As the Internet becomes ever-more sophisticated and as online innovations increasingly affect every aspect of life, the legal issues that arise can be surprisingly complex and challenging. This brief overview of online law is divided into two parts: the law as it affects us as individuals and the law as it affects businesses.

Online Law As It Affects Individuals

Privacy

“You have zero privacy anyway. Get over it.”
– Scott McNealy, *Sun Microsystems (1999)*

For Americans, individual rights and freedoms are not bestowed by government, but rather are considered to be inherent rights that government must not infringe. As Supreme Court Justice Brandeis said in 1928, “The makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued . . .”

This “right to be let alone” is one of the most important aspects of privacy in the United States. And yet, the Internet and privacy seem to be mutually exclusive. No Bill of Rights, no comprehensive privacy law, protects us in our online dealings. No one forces us to go online, of course, but even if we stay offline and never sign up for Facebook, our friends are tagging their photos of us, Google is photographing our house from cars and satellites, and surveillance cams in stores are going “smart” to recognize our faces. Information

about our homes, cars, businesses and the schools we attended has become “hyper-public.”

Whether we like it or not, sooner or later information about even the most reclusive hermit will be available through the web, complete with biometric identification, and not only by the government, which has long maintained biometric photos from drivers’ licenses, but also by private companies. Real-time online facial recognition systems are becoming so accurate that it is only a matter of time before a person walking down the street will be able to identify everyone who passes by. It will be possible to find out where all passersby live and work, who their friends are, what their interests are, how much education they have, and whether they have criminal records.

Anonymity

There are many different ways in which the Internet has affected our notion of privacy, and one involves America’s long tradition of being able to express one’s views anonymously. In 1787-1788 James Madison, Alexander Hamilton and John Jay used a pseudonym to write the *Federalist Papers*, through which they anonymously recommended that the Constitution be adopted. In 1986, when Ohio tried to ban anonymous political literature so as to allow identification of persons making false statements, the U.S. Supreme Court struck down the law with this objection: “The right to remain anonymous may be abused when it shields fraudulent conduct. But . . . in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.”

Although well-established, the right to express one’s views anonymously does not apply online. The First Amendment prohibits *government* from infringing the rights of free speech and free press, but the government is not in the business of providing Internet service. In an online context, therefore, there is no “right” to privacy. Companies such as Facebook, Google,

iTunes (Apple) and Internet broadband providers can collect, compile, cross-index, disseminate and generally use for commercial purposes whatever personal information they can get their hands on, with no time limits, as long as their terms-of-use say they can do so. Mobile networks and companies providing online services via mobile devices can do the same with the information they gain about users' locations. Even so, most online forums, including many run by private companies, still permit users to log in and submit comments anonymously. The only means of identifying someone who makes a defamatory comment would be to ask the forum host to check the Internet Protocol (IP) address of that user, and then to contact the Internet Service Provider who provides online access to that IP address, and find out who the user is. In most cases, getting this information requires a court subpoena.

Because the degree of privacy one enjoys online depends on the applicable terms of service, privacy in an online context is not a right, but a matter of contract. This contractual relationship does afford a degree of privacy, but it has limits. On one hand, online companies that collect private data about their customers jealously guard such information because it represents the lifeblood of their business. On the other hand, all online companies, no matter how much contractual privacy protection they offer, must respond to subpoenas seeking to identify users who have abused their anonymity by, for example, defaming others, committing fraud, infringing intellectual property rights or revealing trade secrets. Many companies take customer privacy quite seriously, however, and will actively oppose any subpoena they consider to be overreaching.

Addressing Online Privacy Violations

Although online privacy is normally a matter of contract, some violations of online privacy do occur outside of any contractual relationship. These include spamming, hacking into someone else's computer, accessing someone else's email account without permission, logging into an employer's computer system after one has left

the company, stealing a laptop with confidential medical data and "phishing" (attempting identity theft by putting up a fake merchant website and hoping people will provide personal information). Numerous federal laws cover such issues. Examples include the federal CAN-SPAM Act (which does not ban unsolicited commercial email, but requires that every such email provides the choice to opt out) and the Electronic Communications Privacy Act (which prohibits unauthorized access to any computer). General criminal statutes also may apply. Most states, including Ohio, have data breach notification laws, which require companies that maintain individuals' private information to notify those individuals in the event of a privacy breach.

Because online privacy is contract-based, virtually every site you may visit and every online merchant you deal with will have its own privacy policy and its own terms and conditions. This fact raises questions: How important is it to read all that fine print under "privacy" and "terms and conditions"? Are there limits on what can be part of an online contract? Can you enter into a contract merely by visiting a website?

Online Contracts

Merely passively visiting a website does not contractually bind you to that website's terms of use. There are caveats, however. If those terms of use are accessible through an easy-to-find link, they put even a passive visitor on notice about how the website may interact with the user's browser, which may include reserving the right to monitor the user's interaction with the site, place persistent tracking cookies, display advertising or disclaim the accuracy of information.

Electronic Signatures

Anything more than a passive look at a website may well bind a user to the website's terms of use. If, for example, you upload or download information, post a comment or sign up for a newsletter, the website's terms of use likely will be binding and can be enforced even if no money

changes hands, as long as you had reasonable notice of them. If you must accept a website's terms of use in order to gain access to something (for example, by clicking a button labeled "GO" next to text that says "I accept the terms of use"), then you will be bound unless the terms and conditions are unconscionable or impossible to find. Clicking the button is the same as signing a hard-copy contract. Such technological changes have made it unnecessary for you to physically sign a contract.

Interestingly, this technology did not originate with the Internet, but with the telegraph. In fact, in 1869, a court ruled that a contract concluded by telegram was just as good as one that was personally signed. Today, federal and state electronic signature laws specify that a person may "sign" a contract by means of any expression of assent other than a recorded voice.

Online contracts differ from manual contracts in one significant respect: website operators now include clauses in their contracts stating that the contract may be changed or completely rewritten at any time, without notice to the user who "signed" it. Such clauses state that the user is responsible for checking for contract changes each time he or she uses the website in question. Further, if the user does not like the changes, the user must stop using the website. Courts have generally found that such clauses can be enforced.

Reading the Fine Print

The most important use for online contracting is, of course, shopping. Online merchants have made the Internet a shopping paradise that includes vast inventories, product review blogs, personalized recommendations, social networking tie-ins, online deals and coupons, and links to competitor sites for comparison. Most people who make online purchases never bother to read the fine print of the purchase agreement, which on some sites can run to more than 100 pages of standard-size text.

Is it safe to ignore this fine print? In most cases the answer is, surprisingly, "yes," for several reasons. First, the Federal Trade

Commission (FTC), which has jurisdiction over all online sales in the U.S., does *not* ignore the fine print. The FTC actively enforces laws against unfair competition, false advertising and unfair or deceptive trade practices. These laws demand that advertisements must be truthful, disclaimers must be prominently displayed and invasive privacy policies must be brought to the consumer's attention. Federal law prohibits the deceptive practice of planting fake product reviews from people who are paid to write them. Web search results that are sponsored links must be labeled as such. "Free" must really *mean* free.

Not only does the FTC have the enforcement power to levy substantial fines against noncompliant online merchants, but numerous state consumer protection laws also apply to online sales. State authorities will respond to complaints of unfair consumer practices. Also, the U.S. Department of Justice pursues online merchants that break the law, and the penalties can be substantial. Google, for example, agreed to pay half a billion dollars in penalties for allowing Canadian online pharmacies (which are not permitted to sell prescription drugs to U.S. residents) to advertise on its site. Finally, any online merchant that treats its customers unfairly will quickly be subject to withering criticism on blogs, social networks, merchant rating sites, and in the press, and will quickly lose business.

Since there are so many safeguards when it comes to online consumer protection, you can generally shop online with confidence. Nonetheless, from a legal standpoint, shopping online is different from traditional shopping in a few significant ways.

Some Unique Aspects of Online Shopping

Sales and use taxes

The Internet is a "sales tax haven" because, unless the online merchant has a physical facility in the same state where the customer is located, no sales tax is charged to the customer for an item

purchased online. Retail store owners, who must charge sales tax, have protested that online merchants have an unfair advantage. Although from a strictly legal standpoint, consumers who purchase items online from out-of-state merchants are supposed to keep track of such purchases and pay their state sales tax authority a “use tax” in an amount equivalent to what the sales tax on those purchases would have been, use tax laws are rarely enforced for online purchases, and compliance is almost non-existent. Many people are not even aware that there is such a thing as use taxes.

There is a concerted effort underway by state tax authorities and retail store merchants to reform the law to make online purchases subject to sales tax, but adapting thousands of state and local sales tax laws to an online environment is difficult, and online merchants likely will not give up their price advantage without a fight. Thus, the present sales tax situation will probably remain unchanged for at least the near future.

Pharmaceuticals

Due to the high cost of pharmaceuticals in the U.S., many consumers shop online for cheaper alternatives, and they often find them in other countries. While “controlled substances” (those few drugs with high potential for abuse) are always illegal to import (even in person), all other pharmaceuticals can be brought into the U.S. There are restrictions, however. Pharmaceuticals can only be brought into this country in person. Also, the person bringing them into the U.S. must have a valid prescription and can bring no more than a 90-day supply. Internet purchases of pharmaceuticals from foreign pharmacies are still technically illegal, and the U.S. Customs and Border Protection is authorized to seize any package containing prescription drugs. Nevertheless, tens of millions of Americans routinely have their prescriptions filled by foreign pharmacies, and several states have even set up programs to help their residents do so. Currently, enforcement efforts are aimed mainly at “rogue” offshore pharmacies that dispense prescription drugs with-

out requiring any prescription at all, as opposed to “responsible” offshore pharmacies that require a copy of a prescription. To be considered legal under U.S. law, an online pharmacy must be certified by the U.S. government and must display its certification information on the home page of its website.

Gambling

For years, federal and state governments have been trying to suppress online gambling sites, most of which are offshore. The Unlawful Internet Gambling Enforcement Act of 2006, the federal law that makes Internet gambling illegal, has been challenged by numerous offshore casinos. On several occasions the World Trade Organization (WTO), an organization to which the U.S. belongs, has ruled that U.S. restrictions on offshore gambling constitute an unfair trade barrier and a violation of several international treaties. The WTO has imposed millions of dollars in annual sanctions against the U.S. due to its non-compliance with its obligations under the WTO in this regard.

While online gambling is prohibited under U.S. law, the fact that this prohibition has been found to violate international treaties makes prosecution of online gambling in the United States difficult. In fact, as of this writing, no one has ever been prosecuted in the U.S. for gambling online. The federal government’s containment efforts have, instead, focused on banks and credit card companies, which by law are prohibited from processing payments for gambling debts. Such efforts have met with little success, however, in part because offshore casinos are quite creative in finding ways to get paid. Increasingly, there have been calls for legalizing online gambling so that the huge revenues generated by such sites can be earned by U.S. businesses and taxed in the U.S.

Penny auctions

Auction sites are common on the Internet, but an unusual type of Internet auction is called a “penny auction.” Consumers are drawn to such sites for the prospect of being able to purchase an

expensive item for far below its normal retail cost. At a penny auction site, the consumer purchases the non-refundable right to submit a specific number of bids on a consumer item. The auctions are timed and bids are increased by pennies at a time. When the time limit expires, the bids on a very expensive item may have reached only a fraction of its retail value, which theoretically provides the winning bidder with a windfall. In reality, however, several thousand people may have purchased the right to bid on a single item. This practice of selling bidding rights generally nets the auction site far more money than the item is worth. Furthermore, the timer can be re-set if there are a lot of last-moment bids, which usually happens. The result is that most people who participate in penny auctions spend money on bids, but are unable to actually purchase any of the items they have bid on.

Legal Aspects of Downloading and Uploading

Every time you upload or download a file, copyright law determines whether that file transfer is permissible or whether you are infringing someone's rights. Here are two simple rules of thumb:

- If you created the file content, you own the copyright to it (unless you created it in your role as an employee, in which case, your employer likely owns the copyright). Copyrightable content includes text and graphics files as well as photographs or videos you take from a public location, no matter who or what you are photographing. Copyright ownership does not require any sort of registration or even a copyright notice. Nonetheless, copyright ownership may not prevent others from copying material that is posted online. Let's say, for example, that you own the copyright to photos or videos. If you upload them to a public photo or video sharing service, chances are that the terms of service you agreed to grant the service or forum provider fairly broad rights to use, reproduce and allow copies to be made of your uploaded photos or videos. The same is true of any blog entries or

comments you may make to an online forum. If you did *not* create the file content, you may need permission (usually some sort of license) from the copyright owner to upload or download it. If your transfer and use of the file fits within one of the "fair use" categories, however, you do not need such permission. For example, uploading or downloading content for purposes of education or commentary may be considered "fair use." Also, if you are downloading an article from a publication for your personal use, this will almost certainly be permissible or will constitute fair use.

- If, however, you decide to reproduce the article and distribute it to your office, you are probably infringing the copyright. If you are downloading a music or video file and not paying for it, you are probably infringing. Chances are fairly low that you will be sued, but it could happen. On occasion, copyright holders will subpoena the records of Internet access companies to find out the identity of people who are downloading infringing copies, and then sue those people. The mother of a teenager discovered this the hard way when a federal court found her responsible for her daughter's infringement of copyright because she downloaded 24 songs without permission or payment. In this case, the copyright owners were awarded damages of \$80,000 per song, a total of \$1.9 million. Illegally uploading music or video files or making them available for download is a fairly open, visible infringement, which increases the likelihood that you will be sued. "Fair use" exceptions still may apply, but most people who upload or download songs or videos will not fit within any such exception.

Children and the Internet

The Children's Online Privacy Protection Act (COPPA) prohibits businesses from knowingly collecting any personally identifying information from any child under age 13, other than a single email address to be used in a single response to an email from the child. In practice, COPPA's

effectiveness is limited. If a child claims he or she is 13 or older, the business is allowed to collect and use personal information. No parental verification of the child's age is required.

The same is effectively true for online contracts entered into by children. Minors are engaged in online activities "in astronomical numbers" (as one study put it), engaging in electronic commerce, and entering into contracts by clicking the "agree" button. Where a credit card purchase is involved, the presumption is that the child has the parent's permission. Children with no permission to use a credit card have discovered that they can enter into contracts online and have the amounts billed to their cell phone numbers without needing any prior permission from the cell phone account holder. There has been surprisingly little litigation about such issues. In the few cases where courts have ruled on such matters, they have acknowledged that contracts entered into by minors can be voided, but have held that neither children nor parents can use the child's status as a minor to avoid responsibility for a contract after having accepted its benefits.

By far the most popular aspect of Internet use for children is social networking. Children may be more aware than their parents that they only have to declare that they are at least 13 years old to gain full access to social networks, interactive games, chat forums and online video conferences. While it may be amusing to see 11-year olds proclaiming on Facebook that they are "married to" someone else, or stating that their occupation is "astrophysicist," it is sobering to realize that children are less protective of their own privacy than any other demographic. Children seldom pay attention to privacy policies or adjust privacy settings, and even 16-or 17-year-olds give little thought to the idea that what they post now could remain online for a lifetime. Parents may find their children's attitudes in this regard unsettling, but one thing seems clear: The Internet is changing young people's attitudes toward privacy and even social interaction itself.

What is a parent to do? Technical measures such as filtering that can be imposed from home will have only limited effectiveness in a society that is increasingly online everywhere. From a legal standpoint, parents can contact their cell phone provider and arrange to block the capability of paying by cell phone for Internet purchases. If their child is under 13, parents can contact any online site or organization their child may have joined and inform them of his or her age; the organization will have to delete all personal information they may hold about the child. If the child has entered into some expensive contract, parents can contact both the credit card company and the contractor and inform them that the child is a minor and did not have permission to enter into the contract. Parents must do this without delay, however, so they will not be accused of accepting the benefits of the contract before trying to void it.

Online Law As It Affects Businesses

Domain Names and Trademarks

For many businesses, having a good domain name is more important than having a good phone number. Most established businesses long ago secured their domain names, and even though "dot-anything" names are in the works, "dot-com" names likely will be the mainstay choice for Internet domain names for some time to come.

For new businesses, finding an available domain name can be a challenge. Unlike phone numbers, where a difference of a single digit makes a completely different number, a trademark can be infringed by a domain name that is spelled completely differently, but is acoustically similar. Failure to do a trademark check can result in the loss of months or years of effort to market a particular domain name, as well as a potential lawsuit from the owner of a conflicting trademark. A number of businesses get into

trouble when they choose domain names that include the brand name of the manufacturer whose products they are selling while forgetting to first get permission from the manufacturer. Auto dealers, for example, have had to give up domain names that were the dot-com equivalent of their business names (“hondaofgainesville.com”) because they included the manufacturer’s trademark.

When a business, large or small, has a domain name that corresponds to its trademark, the law will protect both the domain name and the trademark. Aside from standard trademark law that applies both on- and offline, some special laws and regulations apply specifically to the Internet. A federal law against “cybersquatting” prohibits the bad-faith registration of a domain name that is the same as or similar to a registered trademark. Similarly, the Uniform Domain Name Resolution Process (UDRP) provides a quick and inexpensive means of depriving a bad-faith registrant of an infringing domain name. All domain name registrants agree to be subject to the UDRP by clicking a “yes” button during the domain name registration process. A “bad faith” registrant in this context is one who attempts to make money from a domain name by selling it to the trademark owner or by otherwise exploiting the value of the trademark. Bad faith does not, however, include registering a domain name that includes a trademark for purposes of criticizing the trademark owner’s business. Many trademark infringement lawsuits against such so-called “gripe sites” have been dismissed on the basis that comment and criticism does not constitute bad-faith use. Nonetheless, a business targeted by a gripe site still has other potential remedies such as a defamation lawsuit if the site is spreading false information.

Selling Online

Just as fast-food companies noticed that adding drive-through windows could result in sales far exceeding those from walk-in customers, retail stores now realize that online sales often far exceed walk-in sales. The success of the major

online-only retailers is well known, but many small businesses find surprising success online as well. It is not unusual for a tiny retail store to be “discovered” through its online presence and suddenly find its sales going off the charts.

Terms of sale

The rules that apply to online sellers also apply to online purchasers, but the burden is on the seller to use legal and fair terms and conditions. These terms and conditions include provisions regarding privacy and data protection, jurisdiction, guarantees and warranty disclaimers, limitations on liability and dispute resolution. Such policies must comply with consumer protection statutes (in some states, business customers are also considered “consumers”), and should create realistic expectations as well as a favorable impression for customers.

Advertising online

Most businesses know about the limitations on unsolicited email advertising such as those spelled out in the CAN-SPAM Act. Legal restrictions, together with ever-improving filters, have substantially reduced both the annoyance and the litigation resulting from spam, meaning that legitimate emails from businesses are more likely to reach customers than in years past. Likewise, most businesses, whether or not they know about the FTC rules, know that if they engage in any questionable practices, they will quickly lose reputation. The result is that the volume of consumer complaints regarding transactions with online merchants is relatively minor.

Currently, the legal issues that arise regarding Internet advertising most often involve trademark rights. Your business can imbed various keywords in its website to increase the likelihood that people who are searching for those terms will find your business. You can even “rent” a keyword from a search engine company so that, whenever an Internet user types that keyword into a browser, your business will appear as part of the sponsored search results. The issue of whether it is permissible to imbed in your website, or “rent,” your

competitor's trademark as a search keyword has not yet been resolved, either by legislation or the courts. Under court rulings to date, however, using another company's trademark as a rented search items does not appear to constitute use of that term as a trademark, but rather as a means to generate search results containing the *type* of goods and services identified by the mark. Also, it appears to be permissible to include another company's trademark (often its name) if it identifies factual information such as revealing an owner's prior position with another company or even making a statement such as, "We are a competitor of... ."

Employee Use of the Internet

In an environment where employees have flash drives, smartphones, tablets and laptops, employers must take careful measures to safeguard their company's internal information. For both security and productivity reasons, every company should establish privacy policies and policies regarding Internet access during working hours. Such policies should include the company's right to monitor and log all Internet use on company computers (including private communications), restrictions on or prohibition of certain types of Internet use (chatting, personal correspondence, file transfers, smartphones, texting, etc.), and rules regarding online access to company computers if online access is granted. Some courts have held, however, that employers may not monitor communications between an employee and his or her attorney, even if the employer has reserved the right to monitor all communications.

Employers may not prohibit employees from discussing their jobs and working conditions online, such as on social networking forums. Firing employees for engaging in such discussions is a violation of federal law. The right to discuss, however, is not the right to abuse. Employees' online comments still may be found to be

defamatory, or they may violate employment agreements, expose trade secrets or otherwise be unlawful.

Website Ownership

One brief note regarding your business website and copyright law is in order. If you hire someone other than an employee to design your business's website, then that company or person will own the copyright to your website. When setting up a domain name and designing a website for it, therefore, you should make specific legal arrangements to ensure that your business owns both.

Conclusion

Using the Internet involves abandoning the traditional concept of privacy in favor of a new reality: All public information is fair game to post online. Online privacy is contract-based and very limited. The Internet has made it easier for scam artists and extremists to come out of the woodwork. Sometimes the rapidly expanding ways in which the Internet is used outpaces the law's ability to keep up.

In spite of these realities, it is possible to contain and gain some control over these matters. Judging from the popularity of Internet use, it might be concluded that most people have accepted the Internet's limits in favor of its informational and communicative power, which enables us to research anything, zoom in on any building on earth, maintain a circle of close friends around the world with whom we can videoconference, buy and sell things knowledgeably and efficiently, and reduce our reliance on paper. For many people who live under restrictive dictatorships, the Internet is seen as a source of knowledge, power and hope. In less than a generation, it is safe to say that the world has been transformed.

Journalists and Online Law

The Internet has changed journalism to its core. The way information is gathered, analyzed, disseminated, consumed and paid for is now completely dependent on online technology. The type of people who are involved in journalism, where they are located and how they operate have seriously stretched the traditional concepts of “journalist” and “journalism.” Individuals who are not constrained by any journalistic ethics, who never studied journalism and who never worked for any news organization flood social networks, reader comment forums, blogs and do-it-yourself websites with their videos, photos, comments and descriptions of “fact.” Are such people “journalists”? What constitutes “journalism”? Do these terms have any legal significance these days? How do traditional legal doctrines such as defamation and copyright apply in an online context?

Perhaps surprisingly, the classic legal doctrines that apply to journalists and journalism have survived the transition to an online world relatively intact. A few new laws, as well as numerous court decisions, have adapted existing law to the unique issues raised by the Internet. The high points:

- Protection of sources: The First Amendment itself, while protecting freedom of the press, does not guarantee that journalists will never have to reveal their sources. Such privilege, if it is to exist at all, must be in the form of a statute. A large majority of states have some form of journalistic shield law that protects journalists from being required to reveal their sources. This is one area in which traditional journalists still have the advantage over self-professed online journalists. In order to take advantage of a shield law, most states, including Ohio, require the person claiming shield law protection to be a “real” journalist, and not just a blogger. In fact, Ohio requires that, not only must the person be a real journalist, but he or she must have been functioning as one at the time the source disclosed the confidential information.

- Defamation: The traditional laws of defamation apply online. Although some plaintiffs have tried to sue American defendants in Britain (where proving defamation is much easier), claiming that allegedly defamatory American publications available on the web were, therefore, also “published” in England, they have discovered that United States courts will not enforce British defamation awards. Even domestically, a section of the Communications Decency Act makes it clear that only the person who actually makes a defamatory statement can be sued for defamation: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” Courts have interpreted the phrase “another information content provider” to mean any third party. Journalists (and anyone else) who merely report what a third party said, or who simply provide a forum for others, are immune from online defamation liability.
- Copyright infringement: The “fair use” doctrine applies to its full extent on the Internet. In that regard, online journalists are free to use copyrighted content of others at least as extensively as offline journalists. Furthermore, the Digital Millennium Copyright Act (DMCA) shields all Internet providers, including online publications, blog sites, consumer comment areas of online merchant websites and many more, from copyright infringement liability for allowing third parties to post infringing content, as long as they register as a provider with the U.S. Copyright Office and adhere to the “notice-and-takedown” rules promulgated under the DMCA. The “notice and takedown” rules provide that, when someone notifies the provider and claims that certain specific content is infringing, the provider is immune as long as the content is removed and the issue resolved. The DMCA works well for Internet Service Providers as well as journalists.

See the section on media law, Part XV of The Law & You, for more information on journalism and online law.

Chapter Summary

- As Internet use and online innovations increase, the legal issues that arise can be complex and challenging, affecting individuals as well as business.
- The Internet has changed society's notion of privacy, including the right to express one's views anonymously. In an online context, there is no "right" to privacy. Nevertheless, numerous laws address online privacy issues, including the federal CAN-SPAM Act, which requires that every commercial email must provide the recipient the choice to opt-out, and the Electronic Communications Privacy Act, which prohibits unauthorized access to any computer.
- Online contracts differ from manual contracts in that website operators include contract clauses stating that the contract may be changed without the notice of the user who "signed" it. The user is responsible for monitoring contract changes each time he or she uses the website in question, and must stop using the website if the changes are not acceptable. Courts have enforced such clauses.
- Consumers who shop online are generally protected by the Federal Trade Commission (FTC), the U.S. Department of Justice, and by public opinion, which can serve to keep merchants honest.
- There are some unique aspects of online shopping. For example, no sales tax is charged for an online purchase, and although consumers are technically responsible for paying equivalent "use taxes" to their own state, use tax laws are rarely enforced for online purchases. In addition, online purchases of pharmaceuticals, gambling and participation in online penny auctions raise difficult legal issues.
- Copyright law determines whether you are infringing someone else's rights when you download or upload a file. "Fair use" laws allow you to transfer and use a file for certain limited purposes.
- The Children's Online Privacy Protection Act prohibits businesses from knowingly collecting any personally identifying information from any child under age 13, other than a single email address to be used in a single response to an email from the child.
- The law protects a business's Internet domain name as well as its trademark. In addition to trademark law that applies on- and offline, special laws and regulations apply specifically to the Internet. A federal law against "cybersquatting" prohibits the bad-faith registration of a domain name that is the same as or similar to a registered trademark. Similarly, the Uniform Domain Name Resolution Process provides a way to deprive a bad-faith registrant of an infringing domain name.

Continued on page 227

Chapter Summary *continued*

- The burden is on the online seller to use legal and fair terms and conditions of sale, which include provisions regarding privacy and data protection, jurisdiction, guarantees and warranty disclaimers, limitations on liability and dispute resolution. Such policies must comply with consumer protection statutes and should create realistic expectations as well as a favorable impression for customers.
- Legal restrictions and spam filters have decreased the amount of litigation resulting from unwanted advertisements. Internet advertising issues now generally involve trademark rights.
- For security and productivity reasons, every company should establish privacy policies and policies regarding Internet access during working hours. While employers may not prohibit employees from discussing their jobs and working conditions online, such as on social networking forums, employees' online comments still may be found to be defamatory, or they may violate employment agreements, expose trade secrets or otherwise be unlawful.
- Businesses should make specific legal arrangements to ensure that they own the copyright to their own website, regardless of who develops the site.

Web Links:

From the OSBA:

From the OSBA's Law Facts pamphlet series:

www.ohiobar.org/lawfacts (search by title)

“Online Law”

From the OSBA's “Law You Can Use” column:

www.ohiobar.org/lawyocanuse (search by title or topic)

“Are Potential Employers Getting Too Much Personal Information from Social Media Sites?”

“Be Careful When Blogging”

“CAN-SPAM Act Affects Email Marketing”

“Consumers Should Exercise Care When Purchasing Health Products Online”

“Data Security Breach Rights and Obligations”

Continued on page 228

Web Links *CONTINUED*

“Digital Assets Can Pass to Heirs”

“Electronic Information Changes the Face of Litigation”

“Electronic Signatures: Can Your Computer Sign a Contract without Your Knowledge?”

“Employee Blogs Can Create Workplace Problems”

“Fair Use Doctrine Permits Limited Copying of Copyrighted Material”

“FTC Enforces ‘Consumer Protection’ Laws”

“National Labor Relations Board Weighs in on Social Media”

“Reading the Fine Print: Who Owns What on Popular Websites”

“Social Networking and Your Divorce: What You Need to Know”

“What You Should Know about Online Shopping”

From other sources:

www.coppa.org

Children’s Online Privacy Protection Act

www.copyright.gov/legislation/dmca.pdf

Digital Millennium Copyright Act

www.educause.edu/resources

click on “Browse by Topic”

www.copyright.gov

U.S. Copyright Office

www.uspto.gov/trademarks

U.S. Patent and Trademark Office



Part XIV

the lawyer

“A lawyer’s time and advice are his stock in trade.”

– Abraham Lincoln

Lawyers are officers of the courts and their services are essential to the effective operation of the legal system. Lawyers work under solemn duties of trust and responsibility to their clients. The purpose of this section is to discuss the profession of law, to describe the requirements for becoming a lawyer and to outline the standards of conduct lawyers must follow. This section also provides information about legal fees, bar associations and other professional organizations, and information about finding a lawyer.

The Legal Profession

Lawyers are members of a learned profession. Admission to the profession (or the *bar*) requires an undergraduate degree and a law degree. In addition, most states, including Ohio, require candidates for admission to the profession to pass a bar examination.

What Is a Lawyer?

A lawyer, also known as an *attorney-at-law* or *attorney* or *counselor*, is someone licensed to manage the legal affairs of another person, to give legal advice, to help resolve disputes and, when necessary, to plead cases in court. The lawyer occupies a position of special trust in society. Clients regularly entrust their most important business and personal affairs and even their freedom to their lawyers. The lawyer has a confidential and individual relationship with each client. Within this relationship, the lawyer must always place the client’s interests above any of his or her own personal and professional interests.

A Lawyer’s Education

The Supreme Court of Ohio controls the practice of law in Ohio, including the develop-

ment and oversight of admission standards. Before being admitted to the practice of law in Ohio, an individual must, among other things, successfully complete both undergraduate studies and law school.

Ohio’s educational requirements are similar to those of most states. According to the Supreme Court of Ohio’s Rules for the Government of the Bar, a candidate for admission to the bar must earn a bachelor’s degree from a properly accredited college or university before being admitted to law school. The candidate must then earn a law degree from a law school approved by the American Bar Association (ABA).

There is no set curriculum for pre-law students; a bachelor’s degree in any field of study is acceptable. However, since words are the tools of the legal profession, expertise in their proper and effective use is a highly desirable attribute for a lawyer. A lawyer should be able to read quickly, write clearly and speak persuasively. An undergraduate major or minor in English is one way to prepare for the study of law. Other disciplines—philosophy, history, economics, journalism, political science or business administration—also provide excellent pre-law studies. A background in science or engineering is an asset for certain specific areas of practice, such as patent law, construction law, environmental law or computer law. Justice Felix Frankfurter (who served on the Supreme Court of the United States from 1939 to 1962) once advised a young candidate to prepare for the study of law by becoming well read and familiar with all the arts and sciences—in short, by becoming a cultured person. This advice is still sound.

The basic curriculum of an accredited law school complies with the requirements of various accrediting agencies. Approximately one-half of the courses taken by law students are required; the remaining courses are electives. The required courses cover the substance, theory and philos-

ophy of the law, as well as its practice and procedure. Emphasis is placed on critical thinking, research, writing and speaking. The work is demanding. The average course load is 14-15 hours per semester, and at least two or three hours of concentrated study is required to prepare for every hour spent in class. To earn a law degree, a candidate usually must spend three years as a full-time student or four years as a part-time student.

A legal education does not end when a lawyer receives a law degree; it is a life-long proposition. Some lawyers obtain additional degrees or certifications in legal specialties. All lawyers must read the voluminous literature of the profession, engage in private study and attend regular continuing legal education seminars to learn about changes in the law and to improve their legal skills. In fact, the Supreme Court of Ohio requires lawyers to attend 24 hours of continuing legal education (CLE) programs every two years, including specific courses in legal ethics, substance abuse and professionalism, in order to retain their licenses.

Admission to the Bar

Obtaining an undergraduate degree and a law degree are only two of the necessary steps an individual must take to become a licensed lawyer in Ohio. The prospective lawyer also must undergo a background investigation, successfully complete a comprehensive examination on the law (the bar exam) and, finally, take an oath of office.

A basic investigation of a candidate's character and fitness to practice law is completed while a candidate is in law school. Normally, this investigation is completed during the second year of law school and a report is forwarded to the Supreme Court of Ohio. When a candidate is ready to graduate from law school, an updated report is submitted to the Supreme Court of Ohio. The Court must approve a candidate's character and fitness to practice law before he or she can take the bar examination. A candidate's character and fitness are not taken lightly. The Supreme Court of Ohio, as part of its "sum-

mary of character and fitness" process, outlines a number of reasons a candidate may not be approved.

The bar examination is a comprehensive test of legal knowledge and judgment that a candidate must pass in order to practice law in Ohio. The bar exam lasts two and one-half days. One portion of the test, called the multi-state exam, consists of multiple-choice questions on general legal principles. Those questions are developed at the national level and used by many states as part of their bar examinations. In a second, Ohio-only portion of the exam, the Supreme Court of Ohio specifies the subject matter and number of questions posed on each area of law. Bar examiners (experienced lawyers appointed by the Supreme Court) prepare the questions and determine how the answers are to be scored. The questions are changed for each examination (two tests are held each year). On average, four out of five candidates pass the exam, although this statistic varies from year to year.

The Court notifies all candidates of their individual bar exam scores. Successful candidates must take an oath of office. This oath is normally administered to all successful candidates together by a member of the Supreme Court of Ohio at a formal swearing-in ceremony in Columbus. The oath of office is not a hollow formality; rather, it distills the essence of lawyers' duties concerning justice, the law and the courts, clients and the public. The oath reads:

I, (name), hereby (swear or affirm) that I will support the Constitution and the laws of the United States and the Constitution and the laws of Ohio, and I will abide by the *Ohio Rules of Professional Conduct*.

In my capacity as an attorney and officer of the Court, I will conduct myself with dignity and civility and show respect toward judges, court staff, clients, fellow professionals, and all other persons.

I will honestly, faithfully and competently discharge the duties of an attorney-at-law. (So help me God.)

When the candidate completes the oath, he or she is officially an attorney authorized to practice in all Ohio courts.

Admission to Other Jurisdictions

Admission to practice in Ohio does not authorize a lawyer to practice before the federal courts, although, generally, a lawyer must be admitted to practice in a state before he or she is eligible for admission to federal practice. Separate applications for admission to practice are required for each federal district court, each circuit court of appeals and the Supreme Court of the United States. Normally, admission to the federal system is by application and does not require an examination. Some federal courts do, however, have admission examinations. For example, the District Court for the Southern District of Ohio requires lawyers to pass an admission examination covering federal practice and procedure.

Similarly, admission to practice in Ohio does not automatically authorize a lawyer to practice in another state, nor does admission in another state authorize a lawyer to practice in Ohio. Different states have different requirements for lawyers who are already admitted to practice in another state. In many states, a lawyer who has been practicing for a specific length of time and who is in good standing in Ohio may be admitted to practice without taking that state's bar exam. Also, most states will admit an attorney from another state by courtesy, or *pro hac vice*, for the purpose of participating in a single case. For example, an Ohio attorney representing an Ohio resident who was injured in an accident in Michigan may represent the client in a Michigan court, providing that the attorney has sought and received admission by the Michigan court for that case.

The Rules of Professional Conduct permit lawyers in good standing in other U.S. jurisdictions to provide legal services on a temporary basis in Ohio under certain circumstances.

Legal Ethics and Discipline

All attorneys are bound by a strict code of ethics. In Ohio, the code of ethics is called the *Ohio Rules of Professional Conduct*. Judges are also bound by an additional set of rules called the *Ohio Code of Judicial Conduct*. The discipline (sanctions) for a lawyer's violation of the *Ohio Rules of Professional Conduct* may range from a public reprimand to permanent disbarment. Judges may be disciplined for violation of either the *Ohio Rules of Professional Conduct* or the *Ohio Code of Judicial Conduct*.

The Rules of Professional Conduct

All states have rules of conduct for lawyers that are similar in most important respects. The *Ohio Rules of Professional Conduct* are based on the *Model Rules of Professional Conduct* developed by the American Bar Association.

The *Ohio Rules of Professional Conduct* is a list of principles organized by topics. These rules provide the minimum standards of conduct that every lawyer must follow and are summarized below.

- A lawyer is to provide competent representation to his or her client.
- A lawyer is required to abide by the client's decision concerning the objective of the representation and shall consult with the client as to the means by which the objectives are to be pursued.
- A lawyer should act with reasonable diligence and promptness in representing a client.
- A lawyer shall: promptly inform the client of any decision or circumstances to which the client's informed consent is required; reasonably consult with the client about the means by which the client's objectives are to be accomplished; keep the client reasonably

informed about the status of the matter; comply as soon as practicable with reasonable requests for information from the client; and consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the *Ohio Rules of Professional Conduct* or other law.

- A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- A lawyer shall not make any agreement for, charge or collect any illegal or clearly excessive fee. The nature and scope of representation and the basis, or rate, of the fee and expenses for which the client will be responsible shall be communicated to the client. A fee may be contingent on the outcome of the matter for which the service is rendered, except in criminal cases and certain domestic relations matters.
- Generally, a lawyer may not reveal any information relating to the representation of a client, including information protected by the attorney-client privilege, unless the client gives informed consent. Under certain circumstances, a lawyer may reveal confidential information relating to the representation of his client, but these situations are limited.
- Generally, an attorney cannot represent a client when it creates a "conflict of interest." A conflict of interest is created when the representation of one client will be directly adverse to another current client, or there is a substantial risk that the lawyer's ability to consider and recommend an appropriate course of action to a client will be materially limited by the lawyer's responsibility to another client, former client, third person or by the lawyer's own personal interest.
- Generally, lawyers cannot represent a party against a former client in the same matter or a substantially related matter.
- A lawyer is generally prevented from entering into business transactions with a client unless certain requirements are met, such as the following: the terms of the transaction are fully disclosed and in writing; the client is advised and provided an opportunity to seek independent legal counsel; and a client gives informed consent concerning the transaction.
- Generally, a lawyer is required to take steps to safeguard a client's funds and property. Under certain situations, a lawyer is required to withdraw as counsel for a client. For example, the lawyer must withdraw if representation will result in a violation of the *Ohio Rules of Professional Conduct* or another law; if the lawyers' physical or mental condition materially impairs his or her ability to represent the client; or if the lawyer is discharged. A lawyer may withdraw under certain situations including the following: if the withdrawal can be accomplished without material adverse effect on the client; the client persists in a course of litigation involving the lawyer's services that the lawyer reasonably believes is illegal or fraudulent; the client has used a lawyer's services to perpetuate a crime of fraud; the client insists upon taking action that the lawyer considers repugnant or has a fundamental disagreement about; the client fails to substantially 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; the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; the client gives informed consent to terminate the representation; the lawyer sells his law practice; or other good cause for withdrawal exists.
- A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is considered a prospective client. Even if there is

no client-lawyer relationship, a lawyer who has had discussions with a prospective client is not permitted to use or reveal that information, and is not generally permitted to use that information against the prospective client.

- In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations, such as moral, economic, social and political factors that may be relevant to the client's situation.
 - A lawyer may agree to evaluate a matter affecting a client for the use of someone other than the client, as long as the lawyer reasonably believes that making the evaluation is compatible with the lawyer's relationship with his or her client.
 - A lawyer must not bring or defend a proceeding, or assert or controvert an issue in a proceeding, unless there is a basis in law and fact for doing so. Further, the proceeding must not be frivolous, but it may include a good-faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in an incarceration, may nevertheless defend the proceeding to the extent of requiring every element of the case to be established.
 - A lawyer must act with candor toward the court. A lawyer is not permitted to make a false statement of fact or law to a court or fail to correct a false statement of material fact or law previously made to the court by an attorney, or fail to disclose to the court legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the client's position and not disclosed by opposing counsel, or offer evidence that the lawyer knows to be false.
 - A lawyer must act with fairness to opposing parties and counsel.
 - A lawyer must act with impartiality and decorum toward the tribunal.
- Generally, a lawyer is not allowed to disseminate information concerning an investigation or litigation when the information will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
 - Generally, a lawyer is not permitted to act as an advocate at trial when that lawyer will also be called to testify as a witness.
 - In representing a client, a lawyer is not permitted to make false statements of material fact or law to a third person, or fail to disclose a material fact when disclosing that fact is necessary to avoid assisting in an illegal act or fraud by a client.
 - When representing a client, a lawyer is not permitted to speak with another person that the lawyer knows is represented by another lawyer in the same matter.
 - Generally, a lawyer is not permitted to use means that have no substantial purpose other than to embarrass, harass, delay or burden a third person.
 - A lawyer is not permitted to practice law in a jurisdiction when doing so would be a violation of the regulation of the legal profession in that jurisdiction.
 - A lawyer is permitted to advertise through written, recorded or electronic communication including public media. A lawyer is not permitted to do in-person, live, telephone or real-time electronic solicitation of clients.

The Ohio Code of Judicial Conduct

As lawyers, Ohio's judges are bound by both the *Ohio Rules of Professional Conduct* and the *Ohio Code of Judicial Conduct*. The *canons* (general rules or standards of behavior) of the *Ohio Code of Judicial Conduct* specifically apply to judges and magistrates. According to the canons, judges and magistrates must:

- uphold the integrity and independence of the judiciary;
- avoid even the appearance of impropriety in all activities (judicial, professional and personal);

- perform all judicial duties diligently and impartially;
- engage in outside activities only as long as they do not cast doubt on the judge’s impartiality and provided the judge regulates the activities to minimize any risk of conflict with judicial duties;
- file all financial disclosure statements required by law and report compensation received for any quasi-judicial or extra-judicial activities; and
- refrain from political activity inappropriate for a person holding judicial office.

Discipline for Professional Misconduct

Herbert Harley, founder of the American Judicature Society, once said that, in disciplinary matters, the legal profession could “afford to be drastic but not sentimental.” The *Ohio Rules of Professional Conduct* reflects this view. These rules are rigorously enforced. In no other profession is discipline for misconduct as certain or as severe as it is in the legal profession. A client, or any interested person, may complain about the conduct (actions or inactions) of an attorney or judge by filing a grievance with either the Supreme Court of Ohio’s Office of Disciplinary Counsel or a certified grievance committee of a local bar association or the Ohio State Bar Association.

The Office of Disciplinary Counsel is a permanent entity that has jurisdiction to investigate and prosecute professional misconduct by attorneys and judges. The Office of Disciplinary Counsel investigates allegations of misconduct and prosecutes formal complaints of misconduct before the Board of Commissioners on Grievances and Discipline and before the Supreme Court of Ohio.

A certified grievance committee is an organized committee of either a local bar association or the Ohio State Bar Association, that meets certain standards established by the Supreme Court of Ohio and has been certified (authorized) by the

Supreme Court to act in disciplinary matters. Generally, the certified grievance committee of a local bar association will consider grievances against lawyers who practice in that locale. The Ohio State Bar Association’s certified grievance committee accepts complaints from all areas of the state, but generally limits its activities to cases involving alleged judicial misconduct. In general, bar association certified grievance committees serve the same function and have the same investigative and prosecutorial powers as the Office of the Disciplinary Counsel.

The grievance process begins when the *complainant* (the person making the complaint) files a written grievance with a disciplinary agency providing specific information about the alleged misconduct. At this preliminary stage of the process, the fact that a grievance has been filed remains confidential. The disciplinary agency will, however, begin an investigation.

In a great many cases, preliminary investigation by a disciplinary agency finds that a grievance does not involve unethical conduct, but rather, for example, a dispute over the unfavorable outcome of a legal matter, the amount of an attorney’s fee or poor lawyer/client communications. Such problems are troublesome for all concerned, and many bar associations have special programs to help resolve these kinds of disputes. If, however, the conduct complained of does *not* involve an ethical issue, it cannot be addressed through the disciplinary process and will be dismissed for that reason.

When a grievance *does* involve a violation of one or more ethical rules, the disciplinary agency will go forward with its investigation in order to determine if there is probable cause to believe that a lawyer or judge has engaged in misconduct. At the conclusion of that investigation, the disciplinary agency will take one of the following two actions:

- If it finds probable cause to believe that a violation has occurred, it will file a formal complaint against the offending lawyer or judge with the Board of Commissioners on Grievances and Discipline.

- If it finds insufficient cause to believe a violation has occurred, it will notify both the complainant and the lawyer or judge involved that the grievance has been dismissed. (If a bar association grievance committee dismisses a grievance, the complainant has the right to appeal the committee’s decision to the Board of Commissioners on Grievances and Discipline.)

If probable cause is found and a formal complaint is filed, a three-member panel of the Board of Commissioners on Grievances and Discipline conducts its own “probable cause” review. If this panel does not agree that there is probable cause to proceed, it will dismiss the grievance. If the panel finds probable cause to proceed, it certifies the complaint, and a three-member panel is appointed to conduct a formal evidentiary hearing. When the complaint is certified, both the existence and the nature of the complaint become matters of public record.

A formal disciplinary hearing at which the accused lawyer or judge appears before a panel of the Board of Commissioners on Grievances and Discipline (basically the “trial” on the grievance) is then scheduled, and a report and recommendation is made to the full board. If the board finds that the accused lawyer or judge has committed professional misconduct, the board files a report with the Supreme Court of Ohio. The report states the basis of the board’s decision as well as the recommendation for discipline. The Court reviews the board’s findings and imposes the discipline it believes to be proper under the circumstances.

There are special procedures for dealing with grievances against attorneys and judges who suffer from mental illness.

In Ohio, there are four basic types of discipline, which are (in descending order of severity):

- **Disbarment** – a permanent revocation of the right to practice law without any possibility of reinstatement.

- **Indefinite suspension** – suspension of the right to practice law for an unstated period of time. Reinstatement is a possibility, but not a certainty. A reinstatement application cannot be filed for two years after the indefinite suspension begins.
- **Definite suspension** – suspension of the right to practice for a specified time, ranging from six months to two years.
- **Public reprimand** – a public censure for the conduct involved.

Probation for a definite time is often required if the discipline is a definite suspension. Further, many attorneys charged with misconduct choose to resign their right to practice law rather than to face discipline. Reinstatement is not possible after resignation, regardless of the reason for the resignation.

All disbarments, suspensions, reprimands, resignations and reinstatements are published in the official reports of the Supreme Court of Ohio that appear in the *Ohio State Bar Association Report* (a weekly magazine published by the Ohio State Bar Association), and in the publication of the appropriate local bar association. To learn about the status of a particular Ohio lawyer, visit the Supreme Court of Ohio’s website at www.supremecourt.ohio.gov, click on “Attorney Directory,” and type in the name of the lawyer in question.

While the disciplinary systems of other states and the federal courts are in many ways similar to the Ohio system, many other states have centralized procedures that do not permit bar associations, or committees of bar associations, to prosecute disciplinary actions. Further, the types of discipline imposed in other states may differ from the discipline imposed in Ohio. For example, in most states disbarment is not the permanent loss of the right to practice law. In most states, a lawyer who is disbarred has a possibility of reinstatement, generally after five years. In Ohio, a lawyer who is disbarred or has resigned has permanently lost the right to practice law in

Ohio without any opportunity for reinstatement. Some jurisdictions also levy fines for misconduct.

Lawyers in Ohio and in the United States are subject to active discipline, and have a duty to police the legal profession through the disciplinary system in order to protect the public.

Discipline for Judges

Discipline for judges is similar to discipline for lawyers. Any person may file a grievance with the Office of Disciplinary Counsel or with the Ohio State Bar Association's Certified Grievance Committee. The grievances are processed in basically the same way as grievances against lawyers, although there are special procedures for dealing with grievances against justices of the Supreme Court of Ohio.

Compensation for Clients' Losses

When an attorney is guilty of either malpractice or professional misconduct, that attorney's client may suffer legal damages (lose money, property, or a particular right, etc.). An attorney must use, at least, the degree of care that is exercised by other members of the legal profession in any given matter. If the attorney is negligent and a client suffers loss as a result, the attorney may be liable for monetary damages in an action for malpractice. (*See Part V, "Torts," at "Typical Negligence Cases."*) It should be noted that malpractice alone is usually not a violation of the *Ohio Rules of Professional Conduct*, although a violation of those rules may indicate malpractice in a particular case. Further, repeated neglect or incompetence may be grounds for discipline.

In addition, a client who has suffered a loss caused by the dishonest conduct of any attorney acting in his or her professional capacity may seek reimbursement from the Client Security Fund of Ohio, which was established in October 1985. Eligibility requirements and reimbursement limitations are stated in the Supreme Court of Ohio's *Rules for the Government of the Bar*. Application forms and general information are available from the Client Security Fund of Ohio, located in Columbus, or through the Supreme

Court of Ohio's website at www.supremecourt.ohio.gov/Boards/ClientSecurity/default.aspx. The Client Security Fund is financed solely by attorney registration fees from all lawyers licensed to practice in Ohio and not by any tax or other public money.

When and How to Locate an Attorney

Individuals who need legal advice are often faced with a series of questions, such as: Do I really need an attorney in this situation? How do I find an attorney who is familiar with this kind of problem? What do attorneys charge? The following sections address these questions.

When to See an Attorney

It is clear that you need an attorney if you are arrested or charged with a serious crime, or when you are served with a formal complaint naming you as a defendant in a lawsuit. At other times, the need for legal assistance may be just as important, but less obvious. The best time to consult a lawyer is before a problem occurs. You should consult a lawyer whenever you have reason to believe that an act, omission or course of conduct may have a significant impact (good or bad) on your (or your family's) property, finances, rights, freedom, obligations or liabilities.

There are many more opportunities to avoid legal difficulties than there are to solve actual legal difficulties. For example, a lawyer may be able to write an agreement defining rights and obligations or clarifying important issues between parties. A lawyer also may see obvious legal problems in a "wonderful deal," or may be able to negotiate a compromise in a matter that might otherwise result in litigation. Early consultation with a lawyer may avoid the necessity of filing or defending a lawsuit, or may maximize the effectiveness of a claim or defense.

While it is impossible to develop an all-inclusive list of situations in which you should consult

a lawyer, the following list provides some guidance. In general, you should consult a lawyer as soon as possible if you:

- receive notice of a lawsuit, or know a lawsuit is a distinct possibility;
- are arrested or cited for an offense where charges involve the possibility of jail time or a substantial fine;
- are involved in an accident where there is personal injury or property damage;
- seek to have another party perform according to the terms of a contract, or are being pressed by the other party to do something you do not believe is required;
- believe you have been treated unfairly in a business transaction and the other party shows reluctance to make the transaction “right”;
- are trying to collect a debt that another individual is reluctant to pay;
- are being dunned (persistently pursued or threatened) for a debt you question or do not believe you owe;
- wish to file for bankruptcy, trusteeship or a wage-earner plan, or make an arrangement with your creditors;
- need an opinion on title of real estate;
- are buying or selling real estate;
- are about to enter a written or verbal agreement that may have consequences—good or bad—with respect to your actual or prospective property, finances, rights or obligations;
- are involved in any problem concerning taxes;
- are about to begin any venture that may be significantly regulated by the government;
- are organizing, dissolving, buying or selling a business;
- are organizing or dissolving a partnership or corporation;
- do not have a will and are married, or even if unmarried, you own or may acquire a significant amount of any kind of property;
- want to plan your estate;
- are involved in settling an estate for someone who has died;
- want to adopt a child;

- are involved in a guardianship; or
- are involved or may become involved in a divorce or similar proceeding.

Choosing an Attorney

Traditionally, suitable lawyers have been found through word-of-mouth referrals. People talk with relatives, friends, neighbors or business acquaintances who have used attorneys and ask them about the possibility of using their attorneys for help in finding other attorneys.

Another way to find a lawyer is through the use of a lawyer-referral service. These services are generally operated by local bar associations. Attorneys taking part in referral programs represent a cross-section of types of practice. A person who contacts such a service is referred to a lawyer whose practice fits his or her needs. The referral program usually sets initial consultation costs. After a person’s first consultation, the employment and fee arrangements will be between the client and the attorney.

Other methods of finding an attorney include using telephone directories, published lists of lawyers (law lists) and information from advertisements. The “yellow pages” of telephone directories contain listings for many attorneys in a particular geographic area; the “white pages” usually list both an attorney’s office and home phone numbers. Some attorneys will advertise in the yellow pages, giving basic information about their practice. Similar information can be gleaned from advertisements in the newspaper, the radio or television. Not all attorneys advertise. The fact that one attorney advertises, while another does not, has no bearing on either’s competence or suitability.

A number of published “law lists,” including the *Martindale-Hubbell Law Directory*, may be available through the public library. The *Martindale-Hubbell Law Directory* lists attorneys in the United States by state and city, as well as some attorneys in foreign countries. It also provides law firm information.

Before hiring an attorney, you have the right to know that person's training and experience in dealing with cases similar to yours. You should ask the attorney questions about his or her education, experience and qualifications. You may also ask for references from other lawyers.

You can find out if an attorney is licensed to practice law in Ohio by contacting the Supreme Court of Ohio's Office of Attorney Services at the Ohio Judicial Center, 65 Front St., 5th Floor, Columbus, Ohio 43215-3431; phone: (614) 387-9320, or by visiting the Court's website at www.supremecourt.ohio.gov (select "Attorney Information" and then "Attorney Directory"). You can also find out if the attorney has been disciplined. To find out if there are any pending disciplinary cases against an attorney, you will need to contact the Board of Commissioners on Grievances and Discipline at (614) 387-9370. You cannot, however, find out if there are any *pending complaints* against the attorney *unless* there has been a "probable cause" finding by the Board of Commissioners on Grievances and Discipline. Only the Supreme Court of Ohio has the authority to restrict or end an attorney's right to practice law in Ohio.

If you have a legal problem but cannot afford to pay an attorney, you should contact a legal aid society or legal aid clinic. Legal aid societies, legal aid clinics, law school legal clinics and similar entities operate for the specific purpose of providing legal advice and assistance to individuals who cannot afford to pay for legal services. The Ohio State Legal Services Association was founded by members of the Ohio State Bar Association. (See "*The Ohio State Bar Association and Affiliated Organizations*" section on page 245.) Also, a court may contact a legal aid society (or an Ohio Public Defender's office, or an attorney in private practice) to handle a case for someone who is accused of a serious criminal offense. Such an individual has a right to an attorney, even if he or she cannot afford one.

How Lawyers Charge for Their Services

Lawyers earn a living by charging fees that are based chiefly on the amount of time they devote in service to their clients' causes. The hourly rate a lawyer charges is governed largely by the economics of the practice of law.

Determining the Amount of a Legal Fee

Abraham Lincoln summed up the economic realities of the practice of law when he said, "A lawyer's time and advice are his stock in trade."

Lawyers have only their time, learning, experience and skill to offer their clients, and their livelihood depends on the compensation they receive for the time, learning, experience and skill they use on behalf of their clients. The rate charged depends primarily on the lawyer's expenses, the nature of the problem, the demands on the lawyer's time and the lawyer's relative standing, experience and ability. In general, time is the basic unit for determining a legal fee. Lawyers keep careful records of the time they spend on any given matter, and fees are normally calculated by multiplying the number of hours spent by the lawyer's hourly rate. Some lawyers charge a flat fee for particular types of routine services—such as preparation of a will or deed—but even a flat fee is based on the time it takes the lawyer to complete the particular service in normal circumstances. In certain types of cases, lawyers may use contingent fees. (See "*Some Typical Fee Arrangements*" on page 239.)

When establishing an hourly rate, a lawyer factors in office operating expenses. A lawyer's office expenses and overhead, including such items as personnel costs, rent, office furniture, equipment and maintenance, may consume 40

percent or more of the income from client fees. Other expenses include dues for professional organizations, the cost of continuing legal education programs required to learn about changes in the law and insurance, including malpractice insurance.

The relative standing and ability of a lawyer and the demands on the lawyer's time also affect the lawyer's rate. A lawyer who has gained recognition for ability and experience is in demand and generally will charge a higher rate, although the greater the attorney's experience, the less time likely will be needed to complete the work.

The nature of the legal question at the core of a particular case also affects rates. Legal questions that are new or complex, or both, generally will increase the time that must be spent. Such legal questions may require an enormous expenditure of time for legal and non-legal investigation, research and analysis.

Normally, a lawyer will set an hourly rate for most matters. Under some circumstances, the lawyer may vary the rate. The impact that representing a particular client might have upon the lawyer's practice may be a reason to vary the rate. This is especially true if representing a particular client requires the lawyer to turn down other prospective clients. For example, a long trial would require the lawyer to decline representing other—perhaps many other—clients. On the other hand, a lawyer might reduce the rate if there is a continuing relationship with a particular client who might regularly give the lawyer similar legal questions that can be addressed in a standard fashion.

Rates are also affected by the responsibility a particular lawyer assumes in a legal practice (a partner charges more than an associate); the relative benefit of the lawyer's service to the client; and the certainty, or uncertainty, of actually being paid by the client.

Unlike people in other occupations, a lawyer cannot simply charge what the market will bear. The *Ohio Rules of Professional Conduct* require that fees be reasonable, and gives the factors lawyers must use to determine a reasonable fee.

Some of those factors are discussed above. An attorney who charges an unreasonably high fee, or charges for services that were not performed, is subject to discipline for professional misconduct. Further, a court must approve some attorney fees before they can be paid. For example, the probate court must approve attorney fees in estate administration cases, and the common pleas court must approve attorney fees in certain domestic relations matters.

Some Typical Fee Arrangements

The most common type of fee arrangement is the *time charge*. In this arrangement, the hourly rate is multiplied by the number of hours spent on the matter to arrive at a fee. Another common fee arrangement is the *flat fee*, where the total fee charged for a case is determined before work starts. Generally, a flat fee would be charged for a routine service such as preparing a standard will or handling a real estate closing.

A *contingent fee* is an arrangement that sets the attorney fee as a particular percentage of any money that is recovered in the case. The fee is contingent (dependent) upon a recovery being obtained; if there is no recovery, there is no attorney's fee, although the client still may be liable for expenses. Without contingent fees, persons of modest means could not seek redress for injuries, because they could not afford to pay a lawyer for the time that would have to be spent. Because of their general social value, contingent fees are allowed in certain cases, despite the general rule that lawyers cannot stir up litigation or buy an interest in an actual or prospective lawsuit.

Usually, contingent fee contracts set the attorney fee as a percentage of any recovery made in the case. Such contracts are risky for attorneys because they do not get paid if no recovery is made in the case. Because of this inherent risk, the percentage may range from 25 percent to 50 percent of the amount of the recovery, with 33 and one-third percent being the most common percentage. The percentage may vary depending on how far the case proceeds in the courts. For

example, a settlement before trial may call for a lower percentage fee, while a recovery after a completed trial may call for a higher percentage. When discussing a contingent fee arrangement with an attorney, the client should ask how the expenses of the litigation are to be handled. For example, are the expenses taken from the gross settlement or from the client's portion? These are negotiable items.

Clients who need regular legal services often make regular monthly or annual payments to ensure that the lawyer's services will be available as needed. Such payments are called *retainers* because they maintain the lawyer's services on a continuing or standby basis. This fee is considered earned upon receipt because it buys only the lawyer's availability. Also, in some matters a client may be asked to make an advance payment toward the lawyer's fee, and this advance payment is also called a *retainer*. The fee for services subsequently rendered by the lawyer to a client who has made such an advance payment is credited against the retainer. As fees are paid against this retainer, the client may be asked to make additional payments to be added to the retainer.

Lawyers sometimes offer *pro bono* legal services, that is, volunteer their time and expertise to individuals or organizations who could not otherwise afford a lawyer and who would otherwise be denied equal access to the law. According to the Ohio Legal Assistance Foundation (www.olaf.org), about 75 percent of the civil legal problems of Ohio's poor receive no attention. Consequently, attorneys throughout Ohio provide many hours of civil legal services to assist low-income citizens in matters such as landlord/tenant disputes, wills, consumer problems and foreclosure. Lawyers also provide *pro bono* services to individuals or organizations involved in disputes concerning social justice issues that have wide implications beyond their individual situations.

Discussing Fees with Your Lawyer

The best time to discuss fees is during the first meeting with a lawyer. If your lawyer does not mention fees, you should ask your lawyer to explain his or her fee policy and contract.

Specifically, ask your lawyer whether he or she charges a flat fee, an hourly rate, or works on a contingent fee basis. Ask the lawyer to state the amount of the flat fee or hourly rate or, where applicable, the specific terms of the contingent fee contract. Further, ask the lawyer to estimate how much time your particular legal issue is likely to require. (Sometimes it is not possible for a lawyer to make such estimates. However, a lawyer should be able to outline the steps that he or she intends to take.) Finally, ask your lawyer about how fees and expenses are to be paid. Many lawyers accept credit cards or will make arrangements for deferred or installment payments.

Ask your lawyer for a representation agreement or letter that outlines the scope of the representation. Ask any questions you may have about the agreement, the services provided, or the fee arrangement. The agreement (contract) should clearly state the lawyer's obligations and your obligations. The lawyer's invoice should itemize each service performed on your behalf and the time it took to complete it. Remember that much of what lawyers do for their clients is done when the clients are not present. For instance, the proper preparation of a four-page contract may take many hours of careful deliberation, writing and rewriting. Similarly, advice that takes only minutes to give may have required days of concentrated research and analysis by the lawyer.

If you are not sure a charge is justified, talk with your lawyer. From both a business and a professional point of view, it is to your lawyer's advantage for you to be content that the fee (the amount of the invoice) is fair and that the services provided were satisfactory. In Ohio, a lawyer is *not* allowed to tell a client that any fee to be

charged will be “non-refundable” *unless* the lawyer also advises the client *in writing* that the client may be entitled to a full or partial refund if, for any reason, the representation is not completed.

The Attorney-Client Relationship

Generally, persons may consult with and be represented by an attorney whenever they choose. The client is usually responsible for the fees associated with the service. When you hire or retain a particular attorney, and the attorney agrees to represent you, an attorney/client relationship is created.

Initial Consultation

Your first meeting with an attorney is frequently called a “consultation.” The attorney uses this meeting to evaluate your case, to assess whether the attorney is qualified to handle the particular case, and to determine whether the attorney can represent you or whether some factor exists (such as a conflict of interest) that would prevent the attorney from taking your case. You should use the initial consultation as an opportunity to get acquainted with the attorney, to discuss the attorney’s background and training, how the attorney is to be paid, what expenses may be involved in the case, how and when you can communicate with the attorney (*e.g.*, personally in the office, by phone, by email or in writing), and to find out the names of all those persons who will be working on the case (*e.g.*, paralegals, associates, etc.).

Attorney Responsibilities in an Attorney-Client Relationship

The attorney’s primary task is to protect your legal rights. Attorneys must use their best efforts on behalf of their clients, but they cannot guarantee particular results in cases. Attorneys also

must observe the ethical standards set forth in the *Ohio Rules of Professional Conduct*.

The attorney should keep you informed of the status of your legal problem, and should provide copies of all correspondence and documents prepared on your behalf or received from another party. An attorney may not settle your case without your prior approval.

Client Responsibilities in an Attorney-Client Relationship

For the attorney/client relationship to work effectively, you must be truthful in all discussions with your attorney. You must give the attorney both the favorable and unfavorable facts pertaining to the legal matter, and must provide copies of all relevant information and documents to the attorney. You must inform your attorney of any changes in your situation. You must pay in a timely manner all legal fees earned by the attorney, and any other expenses or items agreed to in the retainer or fee agreement.

Confidentiality and Attorney-Client Privilege

Lawyers are generally required to keep secret the information learned during the attorney-client relationship. The primary reason that lawyers are required to keep secret information relating to their clients’ representation is to make sure clients provide their lawyers with all possible pertinent information—including possibly embarrassing or damaging information—that may be relevant to their legal problem. Full communication allows lawyers to determine what is or is not relevant to a client’s case. The confidentiality rule protects clients from being penalized for consulting with lawyers and telling their lawyers as much as possible about their legal matter. The rules requiring lawyers to maintain confidentiality of their clients’ information apply to both natural persons and to entity clients such as corporations, partnerships and unincorporated associations. The attorney-client privilege also survives the death of the client.

Three separate, but overlapping, rules protect information that clients give to their lawyers within the lawyer-client relationship.

- 1) “Confidentiality” – Under the rules of legal ethics, lawyers generally cannot *voluntarily* reveal information relating to the representation of their clients without their clients’ express or implied consent.
- 2) “Attorney-Client Privilege” – Under the rules governing the introduction of evidence in court, lawyers generally cannot be *compelled* to reveal communications with their clients. However, the attorney-client privilege applies *only* when clients communicate confidentially with their lawyers in order to obtain legal service.
- 3) “Work Product” – Under the rules of civil and criminal procedure, lawyers generally cannot be *compelled* to reveal written material that was created while working on their clients’ behalf to prepare a case for trial. When lawyers do legal research, take notes of witness interviews or meet with other lawyers to develop strategies, the written material is called “work-product” and it is protected from disclosure by rules of both criminal and civil procedure.

The rules of legal ethics prevent lawyers from volunteering what they know. Also, the rules on introducing evidence in court prevent lawyers from being compelled to tell what was discussed with their clients, and the rules of court procedure prevent lawyers from being compelled to reveal written information created for litigation.

Information transmitted by electronic means is protected by these secrecy rules. Lawyers and clients may exchange confidential information by email, fax transmissions, cellular phones, cordless phones, text messaging, video conferencing and other electronic means. Generally, lawyers may communicate with clients by email without encryption or other safety measures, but enhanced security measures may be required for any form of electronic communication transmitting exceptionally sensitive information.

It is important to remember that the attorney-client privilege protects only *communications*, and not facts. Clients cannot hide facts by telling them to their lawyers. What is privileged is the *content* of the actual communications between the clients and their lawyers. What clients say or write to their lawyers is privileged, but the facts about what clients knew, did or failed to do are *not* privileged.

Exceptions to “Secrecy” Rules

Exceptions to the general rule that lawyers must keep their clients’ communication secret are detailed and complex. Some of the most important exceptions are provided below.

Confidentiality

Ohio lawyers **may** *volunteer* information relating to the representation of their clients when the clients give “informed” consent or when it is implied that the disclosure was authorized in order to carry out the representation. In addition, lawyers **may** *volunteer* information relating to the representation of their clients if lawyers reasonably believe it necessary to: 1) prevent reasonably certain death or substantial bodily harm; 2) prevent their clients or others from committing a crime; 3) mitigate substantial injury to financial or property interests resulting from their clients’ commission of illegal or fraudulent acts for which their clients have used their lawyers’ services; 4) obtain legal advice about their own compliance with the lawyer disciplinary rules; 5) claim or defend in controversies between lawyers and their clients, defend against criminal or civil claims based on conduct in which their clients were involved or respond to allegations in proceedings concerning the lawyers’ representation of their clients; and 6) comply with other law or court orders.

Attorney-Client Privilege

In Ohio, there are three basic *exceptions* to the attorney-client privilege that *permit* lawyers to disclose information when it is compelled by

judicial process. 1) The *crime-fraud exception* applies when clients have used their lawyers' services to commit a crime or fraud. 2) The *testamentary exception* applies in Ohio when competing claimants are asserting claims through a deceased client and the dispute addresses their deceased client's competency, or has to do with whether their deceased client was the victim of fraud, undue influence or duress. 3) In Ohio, lawyers may testify by the *express consent* of their clients, or, if the client is deceased, by the expressed consent of the surviving spouse or the executor or administrator of the deceased client's estate. There is no requirement that the surviving spouse, executor, or administrator must make the same decision about a waiver that the decedent would have made.

Under the common law there are four major ways in which clients may be deemed to *waive* the attorney-client privilege:

- 1) waiver by disclosure (which occurs when the client reveals privileged documents or privileged communications);
- 2) waiver by failure to object (which occurs when a lawyer fails to object to a question that calls for privileged information);
- 3) waiver by attacking their lawyer's work (which occurs when a client sues a lawyer or former lawyer for malpractice; the client waives the attorney-client privilege for communications relevant to the malpractice action); and
- 4) waiver by putting the advice of counsel at issue (which occurs when a client's defense against criminal charges is that he or she relied on the lawyer's advice that the conduct was lawful).

Work Product

Sometimes the opposing party may obtain parts of a lawyer's work-product if that party has "substantial need" of the materials and is unable to obtain the information in any other way.

When Lawyers *Must* Disclose Client Information

In Ohio there are three rules that *require* lawyers to disclose information relating to the representation of their clients. The first two of these are general rules and the third specifically addresses lawyers' representation of business organizations.

- 1) Lawyers have a duty to be honest to the courts. If the lawyer, the client, or a witness for the client has offered false evidence and the lawyer later learns of its falsity, the lawyer must take "reasonable measures" to remedy the situation, including, if necessary, disclosure to the court. Lawyers in adjudicative proceedings also must take "reasonable measures" to remedy the situation (including, if necessary, disclosure to the court) when they know that their clients or other persons intend to engage, are engaging or have engaged in criminal or fraudulent conduct relating to the proceeding.
- 2) Lawyers must be truthful in statements to others. When representing clients, lawyers must disclose material facts when disclosure is necessary for lawyers to avoid assisting their client's illegal or fraudulent acts.
- 3) A recent Ohio rule (Rule 1.13) provides that lawyers for organizations must proceed as is necessary in the best interests of their client organizations when the lawyer knows or reasonably should know that an owner, officer, director, trustee or employee of the organization is acting, intends to act or refuses to act in a manner that constitutes 1) a violation of a legal obligation to the organization or 2) a violation of law that reasonably might be imputed to the organization and is likely to result in substantial injury to the organization. More

specifically, if it is necessary to enable organizational clients to address the matter in a timely and appropriate manner, lawyers *must* refer the matter to higher authority within the organization, including the highest authority that can act on behalf of the organization. This rule only requires lawyers to report within the organization, *i.e.*, report “up the ladder.” It does not require or permit lawyers to report outside the organization, *i.e.*, report out. Nevertheless, one of the two general rules requiring disclosure of information may still require lawyers to disclose information outside the organization.

Terminating the Attorney-Client Relationship

In most cases, the attorney-client relationship is ended when the legal matter is concluded. However, with certain limitations, either you or your attorney may terminate the attorney-client relationship at any time. This should be done in writing, and in accordance with any provisions contained in the retainer or fee agreement and, for the attorney, with the *Ohio Rules of Professional Conduct*. The attorney is entitled to be paid for the work completed before termination. You are entitled to a refund of any unused or unearned fees paid in advance. You are also entitled to your file.

Law Practice Closing or Termination of Representation

Lawyers generally have ongoing legal matters being handled for their clients that are pending in or out of court. They may have files containing important information, clients’ funds held in a trust account, or other client property or documents such as wills. When a lawyer can plan a departure, as in a retirement, there is time to handle these matters, but when departure is abrupt, there may not be.

When your lawyer stops representing you for any reason, you are entitled to your files and to

any property the lawyer may be holding for you. When lawyers withdraw from matters in which they are representing clients, they must ensure their clients are not damaged by the withdrawal and must return unearned fees.

Because client matters are confidential, your client information and files cannot be given to other lawyers outside a firm without your permission. Lawyers who are retiring or who can anticipate suspension of their right to practice generally will have time to notify you and return your files and property or obtain permission to provide them to another lawyer approved by you.

The *Rules for the Government of the Bar of Ohio* contain a provision permitting the Supreme Court of Ohio’s Disciplinary Counsel and certain bar association committees to appoint attorneys to inventory the files of deceased lawyers, certain suspended lawyers, and lawyers who have abandoned their practices, if there is no other capable party to conduct the lawyer’s affairs, and to take necessary action short of representing the clients. This procedure is, however, likely to be slow for clients who need immediate attention or access to information or property.

If a lawyer is deceased, his or her executor usually will have responsibility for the lawyer’s legal affairs. Disabled lawyers may have guardians. It may be necessary to contact a guardian or other personal representative, or, if a lawyer has intentionally abandoned a practice, a disciplinary agency. Lawyers who are suspended or disbarred must immediately notify clients and courts, tell clients to seek other representation, return client papers and property, and refund unearned fees. Because suspension orders take effect immediately and timing and results can be unpredictable, this may create, especially in pending trials, inconvenience for clients, lawyers and courts.

If you have ongoing legal problems that need immediate attention, it will generally be best to contact another lawyer. You are entitled to discharge one lawyer and hire another at any time, and another lawyer probably will be in the best position to determine how to obtain necessary information and take appropriate action.

Bar Associations and Related Organizations

The bar association movement began in the 1870s as a concentrated effort by lawyers to improve the image and standing of the legal profession. Today, approximately 25,000 Ohio lawyers are members of the Ohio State Bar Association, which is one of the largest voluntary bar associations in the United States.

Historical Perspective

Before the Revolutionary War, most lawyers were well educated, competent and esteemed by the public. With the Revolution, the bar in the United States began a long period of professional decline, and by the end of the Civil War the system of professional legal education had broken down and standards for admission to practice were nearly non-existent.

By the 1870s, the situation had become critical. The honest and competent members of the profession realized that there were many unscrupulous and incompetent practitioners, and that little was being done to control or discipline these individuals. It was clear that some standards of competence and honesty had to be established for the profession. These concerns spurred the formation of voluntary bar associations across the United States.

Leading the way was the Association of the Bar of the City of New York. It was formed in 1870, primarily to rid the city of the notorious Tweed ring, many of whose key members were lawyers (including William Marcy “Boss” Tweed himself). The New York City Bar’s long-term purpose was to reverse the process of professional erosion by upgrading standards for legal education, admission and conduct, and by providing an effective system for disciplining lawyers.

New York City was not unique in its problems with the bench, the bar and political corruption; these problems existed everywhere in the 1870s. The example provided by the New York City bar

in attacking these problems motivated responsible lawyers in other states to organize to accomplish the same purposes.

Local, and then state bar associations sprang into existence across the country. Ohio helped lead this charge with the formation of the Cincinnati Bar Association in 1872 and the Cuyahoga County Bar Association in 1873. The American Bar Association was formed in 1878, partly to encourage the organization of state bar associations. Twenty-five state bar associations were formed from 1878 to 1888. Again, Ohio remained on the cutting edge with the formation of the Ohio State Bar Association in 1880.

Despite the movement’s success, professional progress was neither quick nor easy. Nevertheless, the bar associations never lost sight of their mission. Today, the legal profession holds its members to exceptionally high standards of legal education, professional competence, conduct and discipline. Moreover, the organized bar scrupulously maintains those high standards and is constantly seeking to improve them.

The Ohio State Bar Association and Affiliated Organizations

Bar associations are not maintained for lawyers alone, but also for the benefit of the public. For its members, the Ohio State Bar Association has committees and sections working to improve justice and the administration of justice in most major areas of the law. For example, committees and sections regularly review the developments in their areas of the law and recommend specific actions to improve the law and the public’s understanding of the law. The Ohio State Bar Association also conducts its own regional and statewide meetings. While these meetings concern some association business, much of the time at the meetings is spent on presentations designed to keep lawyers informed about developments in the law.

The Ohio State Bar Association is also one of the leading providers of approved continuing legal education (CLE) programs in the state, and continues to offer a wide variety of CLE programs in

a variety of formats, including live and online seminars, video replays and live satellite broadcasts. Programs cover a broad range of topics in almost every area of legal practice.

The Association also sponsors or directly administers a number of important programs that benefit the public either directly or indirectly. These programs currently include: evaluation of judicial candidates for the Supreme Court of Ohio; an active legislative program designed to improve justice and its administration; specialization programs that allow lawyers and paralegals to become certified in certain areas of the law; and public information services through a pamphlet series, a weekly legal information column, publications such as this book and legal resources for journalists and small business owners and a website that contains a wide variety of materials for members of the general public.

The organizations affiliated with the Association also provide services to the public and the profession. For example, a partner in the publication of *The Law & You* is the Ohio State Bar Foundation (OSBF), an independent, 501(c)(3) organization dedicated to promoting public understanding of the law and improvements in the justice system throughout Ohio. Since 1951, the OSBF has fulfilled its charitable mission through:

- Investing more than \$6 million over the past 20 years in law-related nonprofit organization, bar association and governmental agency programs and initiatives;
- Serving its donors and helping them support the law-related causes they care about;
- Leveraging the expertise and volunteer service of OSBF fellows, attorneys and judges to create educational programs and tools that support family discussions on advance directives, educate children about the judicial system, help youth who are leaving foster care, support communities and citizens following incarceration, guide new and struggling nonprofit organizations, and help communicate the legal consequences of

sexting and cyberbullying to young adults and teens.

- Honoring outstanding attorneys and law-related organizations across Ohio for their service to their communities and to the legal profession.

Other organizations affiliated with the Ohio State Bar Association

The Ohio Bar Liability Insurance Company (OBLIC) is an independent, for-profit corporation affiliated with the Ohio State Bar Association. Established by members of the Ohio State Bar Association, it ensures that lawyers have access to professional liability insurance at reasonable rates.

The Ohio State Bar Association Insurance Agency is an independent, for-profit corporation affiliated with the Ohio State Bar Association. It offers all types of group and individual insurance coverage to Association members.

The Ohio State Legal Services Association (OSLSA) is an independent, nonprofit corporation affiliated with the Ohio State Bar Association. It was established by the Ohio State Bar Association to provide civil legal services to people who could not afford such services. Currently the OSLSA offers two basic services. First, it provides free legal representation to indigent persons in civil matters in 30 counties in southeastern and central Ohio. Those services are delivered through nine offices spread throughout the region. Second, OSLSA provides assistance to the other legal services programs in Ohio through a state support center located in Columbus. For more information, visit the OSLSA website at www.oslsa.org.

The Ohio Center for Law-Related Education (OCLRE) is an independent, nonprofit, non-partisan organization affiliated with the Ohio State

Bar Association. It was established by the Ohio State Bar Association, the Attorney General of the State of Ohio and the American Civil Liberties Union of Ohio Foundation to develop an active law-related education program through the partnership of educators, the legal community, government officials and civic leaders. Among other activities, OCLRE conducts the statewide Ohio Mock Trial Program, We the People... The Citizen and the Constitution, Middle School Mock Trial, Project Citizen, Youth for Justice, the Ohio Government in Action program, and an annual Law and Citizenship Conference for teachers. The OCLRE is now jointly sponsored by the Ohio State Bar Association, the Supreme Court of Ohio, the Attorney General of the State of Ohio and the American Civil Liberties Union of Ohio Foundation.

The Law & Leadership Institute, LLC (LLI), was developed and promoted in partnership with the OSBA, Ohio's metropolitan bar associations, the law schools in Ohio, the Supreme Court of Ohio, the League of Women Voters and others. The Ohio State Bar Foundation established funding for this effort in 2009. The goal of the Law & Leadership Institute is to create and sustain a "pipeline" into the legal profession for disadvantaged students from underserved schools.

The Ohio Lawyers Assistance Program, Inc. (OLAP) is an independent, nonprofit corporation affiliated with and initially established by the Ohio State Bar Association. It is a voluntary program available to help lawyers, judges and law students who suffer from alcohol and drug abuse/dependency, and/or mental health issues, by providing assessments, referring them to treatment and providing continuing support. The person seeking assistance does so confidentially.

Other Bar Associations

In addition to the Ohio State Bar Association, local bar associations are active in each of Ohio's 88 counties. Some of Ohio's metropolitan bar associations are among the largest in the nation.

The American Bar Association operates at the national level in many of the same areas of activity as the Ohio State Bar Association and local associations.

Journalists and Lawyers

Most lawyers, and the journalists who cover them and their clients, likely would agree: The relationship between lawyers and journalists is of the "love/hate" variety. Journalists rely on lawyers as sources of legal expertise and information on law as well as specific cases. Lawyers rely on journalists to explain the law and their cases to the public. That both sides need each other in explaining the law to the public is undeniable but there is an inherent tension in the goals of both professionals. Journalists are seeking the truth as well as a good story for their readers and viewers, and occasionally theatrics and the cast of characters in a case may overshadow the substance of the truth in the reporting of the matter. This may irritate some lawyers. Similarly, the extent to which lawyers perform zealously to protect their clients on the public stage may aggravate journalists who are interested in getting to the bottom of a legal matter for their readers or viewers.

Nonetheless, the relationship is an important one, and journalists and lawyers are advised to nurture it, despite the inherent tensions. There are some key components to maintaining a successful partnership. Journalists are encouraged to spend time understanding, and researching and learning about the law, and consulting with the local and state bar associations with substantive questions when working on a story. When questioning a lawyer for a story, a journalist should voice any confusion about the law or its application so that the lawyer can clarify. And finally, journalists are reminded that, in the end, lawyers are obligated to represent their clients. Contacting all sides in a legal dispute is key to presenting the full story of the dispute. Journalists who are preparing for a story about a legal issue are urged to contact the Ohio State Bar Association's Public & Media Relations Department for assistance.

Chapter Summary

- Lawyers are officers of the courts and their services are vital to the effective operation of the legal system. They work under solemn duties of trust and responsibility to their clients.
- A lawyer, also known as an attorney-at-law or attorney or counselor, is someone licensed to manage the legal affairs of another person, to give legal advice and to plead cases in court.
- Before being admitted to the practice of law in Ohio, an individual must, among other things, successfully complete approximately seven years of higher education.
- A lawyer's education does not end with the receipt of a law degree; it's a lifelong proposition.
- An undergraduate degree, admission to law school and a law degree are only some of the necessary steps an individual must take to become a licensed lawyer in Ohio. A prospective lawyer also must undergo a background investigation, successful completion of a comprehensive examination on the law, and must take an oath of office.
- All attorneys are bound by a strict code of ethics. In Ohio, the code of ethics is called the *Ohio Rules of Professional Conduct*. Judges are also bound by another set of rules called the *Ohio Code of Judicial Conduct*. A disciplinary process ensures that practicing attorneys and judges abide by these codes.
- An attorney is needed, usually without question, when an individual is arrested and charged with a serious crime, or when someone is named as a defendant in a lawsuit. At other times, the need for legal assistance is often just as important but less obvious. The best time to consult a lawyer is before an actual problem occurs.
- A lawyer's livelihood depends on the compensation received for the time, learning, experience, and skill used on clients' behalf. The rate charged depends primarily on the lawyer's expenses, the nature of the problem involved, the demands on the lawyer's time and the lawyer's relative standing, experience and ability.
- The most common type of fee arrangement is a *time charge*, where an hourly rate is multiplied by the hours spent on particular legal matter. *Flat fees* and *contingent fees* are also commonly used.
- Lawyers sometimes offer *pro bono* legal services, that is, volunteer their time and expertise to individuals or organizations who could not otherwise afford a lawyer and who would otherwise be denied equal access to the law.
- The bar association movement began in the 1870s as a concentrated effort by lawyers to improve the image and standing of the legal profession. Today, approximately 25,000 Ohio lawyers and nearly 4,000 law students and legal assistants are members of the Ohio State Bar Association, one of the largest voluntary bar associations in the United States.
- Local bar associations are active in each of Ohio's 88 counties.

Web Links:

From the OSBA's "Law You Can Use" column:

www.ohiobar.org/lawyoucanuse (search by title or topic)

- "Can the Clients' Security Fund Help You?"
- "Consumers Should Seek Legal Advice before Establishing Trusts"
- "Criminal Defense Lawyers Help Protect Clients' Rights"
- "How to Get the Most from an Attorney-Client Relationship"
- "Lawyers Keep Clients' Confidences"
- "Ohio's Civil Legal Aid System Offers Hope to Low-Income Individuals"
- "Ohio Supreme Court Regulates Lawyer Advertising"
- "Paralegals Aid Attorneys and Clients"
- "What Happens When a Lawyer's Practice Closes?"
- "What You Should Know about Attorney Ethics"
- "What You Should Know about Attorney Fees"
- "What You Should Know about the Value of 'Free' Legal Information"
- "Why Hire a Lawyer?"

From the OSBA's Law Facts pamphlet series:

www.ohiobar.org/lawfacts (search by title)

- "Attorneys"
- "Becoming a Lawyer"
- "Certified Attorney Specialists"
- "Lawyer Ethics and Discipline"

Other resources from the OSBA:

www.ohiobar.org/ForPublic/AboutLawyers/Pages/StaticPage-72.aspx

Find a lawyer; attorney specialization program

From the Supreme Court of Ohio:

www.supremecourtofohio.gov

Rules for the Government of the Bar of Ohio; *Ohio Rules of Professional Conduct*; attorney directory; attorney registration; filing a complaint; Clients' Security Fund; pro bono services

www.supremecourtofohio.gov/Publications/consumersguide.pdf

Guide for managing attorney-client relations

From the American Bar Association:

www.americanbar.org/portals/public_resources.html

Legal information on a variety of topics



Part XV

media law and legal resources for working journalists

“Information is the currency of democracy.”

– Thomas Jefferson

Introduction

The material in this chapter is designed to help working reporters and news executives avoid legal problems in the everyday practice of their profession; assist them in gaining access to public meetings and documents they are entitled to cover; and help them provide the public with full, accurate and reliable information about the justice system and legal issues in the news. It is divided into four sections.

Section I explains the Ohio laws and legal procedures regarding:

- libel;
- invasion of privacy; and
- journalists’ privilege (shield law).

Section II discusses:

- Ohio’s state laws regarding media access to public meetings and public records; and
- the Supreme Court of Ohio’s rules governing media access to state courts.

Section III discusses:

- how new and existing laws apply to Internet journalism;
- how the Internet has affected the definition of a “journalist”;
- Internet journalists and blogging;
- the application of foreign laws to Internet journalism; and
- the Digital Millennium Copyright Act of 1998.

Section IV lists:

- legal contact information; and
- resources for reporters.

Keep in mind that this material is intended to provide basic legal information of value to the general public and, in particular, to journalists. It DOES NOT provide an exhaustive, all-encompassing discussion of the laws or legal topics addressed. The legal information and the text of state laws provided in the following pages were current as of January 2012, but laws change and legal interpretations are constantly evolving as a result of court decisions, legislative action and administrative rulemaking. In any real-world legal situation, readers are strongly advised to independently verify the currency and accuracy of information in this publication and to seek competent legal counsel.

Section I: Libel, Privacy & Journalist’s Privilege

The material in Section I of this chapter, including statements of opinion and commentary on legal issues, was prepared by Prof. Timothy D. Smith of Kent State University and includes excerpts from Handbook for Reporters, a publication originally developed for the Associated Press Society of Ohio. Smith is an attorney and a former daily newspaper editor. Opinions expressed are his and do not necessarily reflect the policies or opinions of the Ohio State Bar Association. This material was modified and updated for this edition of The Law & You by Richard M. Goehler and Kevin T. Shook of Frost Brown Todd, LLC, and Jeffrey T. Cox, Robert P. Bartlett and Andrew J. Reitz of Faruki Ireland & Cox PLL.

Libel

Libel is defined as injury to reputation. Unfortunately, that definition leaves volumes unsaid.

In the law, libel is a *tort*. That means it is a type of injury where the remedy is a civil suit for damages. To win such a civil suit, the injured party, or *plaintiff*, must prove that the *defendant* published or broadcast damaging information and did so either negligently or deliberately, knowing it was false.

The terms *published*, *damaging*, *negligently* and *false* are among the “elements” of the tort of libel. The plaintiff must prove each one to win a suit.

Libel is a complex subject and there is danger in attempting to reduce it to terms that make it appear otherwise. Despite that, there are basic rules that, if understood, will substantially reduce the risk of a libel suit.

The first rule is to avoid being sued. The next logical piece of advice would be to accomplish this by always publishing the truth. Unfortunately, even though truth is always a defense to a libel suit, truth itself is an elusive subject. There is the truth believed by the reporter’s sources and the truth believed by the plaintiff. Those “truths” may be at odds without either side being wrong. “Truth” in reporting is rarely as concrete as the direction of the sunrise.

To avoid being sued, in those cases where the truth doesn’t rise in the east (and even when it does), be *fair*. Fairness, or lack of it, is not a formal element in a libel suit, but it often looms large in a jury’s assessment of how the case should come out. One major study into why people sue for libel found that most plaintiffs were angry at being treated “unfairly.” While they disputed the charges contained in a story, they said they sued because they had been treated in a cavalier fashion. Long-time investigative reporter Bruce Locklin of the Bergen County, N.J., *Record* has written many stories that devastated the reputations of his subjects. Suits are rare, though, because he has always treated his subjects

decently. He doesn’t take cheap shots in the stories and he takes special care to see that the story is balanced. People and issues that are controversial and newsworthy are rarely one-dimensional. Giving both sides fair treatment means more than just saying the subject or a critical report “declined to comment.”

Being fair is no guarantee against a suit, but it will reduce the risk and, equally important, enhance your chances if there is a trial. Jurors have a keen sense of fairness. They know a hatchet job when they see one. They know it even when the defendant’s printed or broadcast accusations are accurate—but are displayed unfairly.

Elements of libel

There are two critical components that must be present for a story to be libelous. The story must be *false* and *defamatory*. A plaintiff must prove *both* elements to win a libel suit. Not all false statements are defamatory nor are all defamatory statements false.

For example, to report that a man has blond hair when his hair is really black is clearly false. The false report is not defamatory, however, because it causes no damage to the man’s reputation. To be defamatory, a story must hold a person up to public ridicule, loathing or scorn. The accusation must be of the sort that would cause others to avoid the subject’s company because he or she is perceived to be of suspect character or, in some sense, unclean or dishonest.

Application of the “defamatory” definition changes over time as our culture changes. Forty years ago, to write falsely that someone had cancer was probably defamatory as well as clearly damaging to a reputation. The disease was not well understood and viewed with fear and shame. Today, having cancer carries no more stigma than having bronchitis. However, a person labeled as having AIDS would be in a different situation. The disease is still poorly understood and often is associated with lifestyles that are themselves the subject of public scorn. To report

that a person has AIDS probably would be defamatory and damaging to a reputation today.

Note: Whether an accusation is defamatory has nothing to do with whether it is false.

The two are totally separate concepts. To write that someone has AIDS would likely be held to be defamatory. If false, it could also be libelous.

The law puts the burden of proof on the plaintiff. The person suing must prove that the accusation is false. While that often involves many kinds of evidence, it can be as simple as the plaintiff taking the stand and saying under oath that the accusation is false. The law puts no such burden on the defendant, who is presumed “innocent,” in a manner of speaking, of the charges made in the libel suit. However, that presumption probably would not mean much once the plaintiff denies the charge.

Publication

This is a technical element in libel. It means the damaging information was communicated in writing to a third party—someone other than the person who is the subject. It can be as simple as dictating a damaging letter to a secretary, who types the letter and sends it to the subject. The secretary is the “third” party. (The author is the “first” party and the subject is the “second” party.) Typically, publication is proved by showing that the damaging information appeared in a published or broadcast news story.

Identification

The person complaining of damage must be identifiable in the story. This does not mean that the person must be named. A description that is specific enough to narrow the possible identities to just a few people is enough. For example, a story that states, “Korean merchants in the neighborhood have been accused of gouging the residents with inflated prices,” would be enough identification if there were only three such Korean merchants. Any one or all three could claim that the story was aimed at them. (Note: Accusing

someone in business of an unfair or improper business practice is damaging.) Using an address may be sufficient identification, since the occupant of that address may be “identified” and his or her reputation damaged by an apparent connection to wrongdoing.

Fault

It is important to understand that there are two very different standards of fault in libel cases, depending on the status of the person claiming to be a victim of libel.

Private person

Ohio law requires that a private person—someone who is not a public official or public figure as defined by the law—must prove that a false and damaging statement was made with a level of fault known as *negligence*. Negligence is defined as lack of reasonable care or the care that a reasonably prudent person would use in conducting his or her affairs, including writing or broadcasting a news story. The standard in Ohio is whether a reasonably prudent “person” would have made the mistake that is alleged in the story, *not* a reasonably prudent “reporter.” The import of the difference is that the jury is told to judge the reporter’s conduct by its own standards of care, not those of other “prudent” reporters. The problem is that jurors typically view these situations in hindsight. Libel trials usually involve a debate as to the “truth” of a harmful statement. Jurors are more likely to think that they would not have published the statement unless its truth was absolutely certain, even though that might not be a reasonable practice for a prudent reporter. The bottom line is that, if the plaintiff is able to cast some doubt on the truth of a harmful statement, showing it was published with negligence is not difficult.

Public officials/public figures

Public officials and public figures in Ohio must meet a fault standard set by the U.S. Supreme Court. The nation’s high court, in a series of cases in the 60s and 70s, ruled that

people who are voluntarily in the public eye must prove a level of fault called *actual malice*. The phrase itself is a poor choice of words because it does not involve the usual meaning of malice. *Actual malice* is defined as “knowledge of falsity or reckless disregard for the truth.” The definition appears to be straightforward, but, in practice, it is more complex. Few, if any, reporters would ever deliberately publish information that they knew was false. Pure fabrication is rare in mainstream journalism. Usually, libel cases involving public figures or officials revolve around whether the reporter exhibited “reckless disregard for the truth.”

The U.S. Supreme Court and the Supreme Court of Ohio have ruled in many cases where the issue was whether the evidence presented by the plaintiff could be considered as proof of “reckless disregard.” The examples are too numerous to list here and are often tied to the specific facts of the cases. In general, however, there are guidelines.

The evidence must focus on the reporter’s attitude toward the truth and not toward the plaintiff. Evidence that the reporter, or others at the newspaper or broadcast outlet, did not like the plaintiff is not considered evidence for a claim that any of these people would recklessly disregard the truth.

Mere failure to check all possible sources is not, by itself, evidence of reckless disregard for the truth, but that rule is contingent on the sources used. The more credible those sources are, the less need there is to check all other possible sources. If the sources used are such that a prudent reporter might, or should, have doubts about their authenticity, more checking is in order. Evidence of serious doubt on the part of the publisher of the story—and that includes all the major players involved in the story including the reporter, editor(s) and executives who decide how it will be used—will be viewed as evidence of reckless disregard, unless those doubts have been clearly resolved.

Notes

One thing should be apparent in this section on actual malice: the evidence comes chiefly from the defendant. Typically, the plaintiff, through the discovery process, questions the defendant and collects any physical evidence the defendant might have that would relate to the story. Physical evidence can include notes, tapes, documents, drafts of the story, letters and anything else a creative plaintiff’s lawyer can think to request.

The law obligates a defendant to turn over all such material. Disposing of such material once a suit has started, or even after it seems likely that a suit will be filed, is extremely dangerous. It could be viewed as an attempt to obstruct justice. At best, if such a move is discovered, it could be presented to the jury as evidence of a cover-up.

However, there is no rule requiring that such material be saved. Libel defense lawyers differ on just what practice to follow concerning notes, documents, etc. As a media lawyer and former newspaper editor, I prefer a simple rule: do not keep what you do not need. Public records and similar documents that support a story are valuable and worth saving. Notes and transcripts of interviews may be worth saving if they are clear and do not contradict any information in the story. The plaintiff’s lawyer(s) will pounce upon contradictions, seeking to discredit the reporter for not following what was written in the notes or for not using all of the material in the notes. This latter point can be especially telling if the reporter had favorable material in the notes and didn’t use it, regardless of the reason.

One school of thought holds that, if a reporter has no notes to support a challenged story, it makes the reporter look careless. Indeed, a plaintiff’s lawyer can inflict some pain if the reporter has no notes to refer to when testifying about published or broadcast material. The competing school of thought is that the damage is limited because the lawyer will not be allowed to dwell for long on the issue of why the reporter routinely

disposes of notes after a story is completed. It is difficult to attack testimony that goes:

“I know what the plaintiff and others said because that’s what I put in the story. Everything significant that everyone said is in the story.”

If there are notes, the plaintiff’s lawyer can spend considerable time going over every line, every phrase, every doodle or extraneous mark, extracting an explanation from the reporter. If the notes are old—as they certainly will be because the time between the filing and the trying of a libel suit is usually measured in years—the reporter may have a very hard time remembering everything written there. Another alternative is to type the notes, preserving only the significant details and purging extraneous matter.

Regardless of approach, experience dictates that the reporter be consistent in the handling of notes, documents, tape recordings, etc. It looks bad if the reporter has file cabinets full of notebooks for every story written in the last 10 years, *except* for the story that is the subject of the libel suit.

Defenses to libel

- ***Truth***

Truth is always a defense to libel. As noted above, it is a defense that is open to considerable interpretation. A reporter’s firm conviction that what he or she wrote or broadcast *is* the truth will not be as comforting to the company libel lawyer as sworn statements or other forms of tangible evidence that will not erode over time. That goes for sources, too. They move away. They forget. They even get fearful of being embroiled in a court case. Important: The news media is responsible for the truth of what it publishes, except in the circumstances outlined below. That means a reporter must be certain of the truth of statements made by others and cannot use the defense that a story *accurately recounts* what was said by someone else. The defense of “truth” refers to the substance of damaging statements and not merely

to the accuracy of the report. Note: For material published online, federal law has created an exception to this basic rule. Comments posted on a website by a third party (someone *other* than the website operator) do not create a risk for the website operator. Thus, someone who writes a letter to the editor and posts it on a newspaper’s web page is responsible for the content, but the newspaper is *not* responsible for that content. In that same circumstance, if the letter were printed in the newspaper, both the writer AND the newspaper would be responsible. The U.S. Supreme Court has not yet ruled on this interpretation of Section 230 of the Communications Decency Act (CDA) of 1996. Even so, Section 230 of the CDA has been widely used by websites as a defense from libel where the libelous material was posted by a third party other than the website itself or its Internet Service Provider. Also, several federal appeals courts have ruled that, while news organizations are responsible for third-party opinions that are printed, they are *not* responsible for third-party opinions that are posted on websites.

- ***Privilege***

This defense is based on the privilege accorded public officials and public documents. The theory is that people charged with the responsibility of carrying out the public’s business should not be held liable for any damage they might cause to someone’s reputation if the damage occurs while the officials are acting within their governmental capacity. When performing their official duties, public officials are granted an “absolute” privilege from libel suits. Those who report what the officials say have a “qualified” privilege; the qualification is that the reporter must *accurately* recount what the official said. The same rules apply to government documents. The reporter will not be held accountable in court for revealing the contents of those documents, no matter how false and damaging they might be, as long as the account accurately reflects the contents. The key is that knowledge of truth or falsity on the reporter’s part is irrelevant. What counts is

whether the story accurately portrays what the official said or what the document contained. Privilege applies in a number of governmental settings. For example, members of Congress and members of the state legislature are immune from suit for remarks made on the floor during sessions of congressional or legislative bodies. Publication of those remarks also carries a qualified privilege. In Ohio, this privilege also extends to reports of judicial proceedings, hearings, official government meetings (city council, school board) and a vast array of public records.

- ***Fair comment/opinion***

The defense of “opinion” seemed to be maturing for several years after its initial appearance as dictum (that’s legalese for “oh, by the way”) in the U.S. Supreme Court decision in *Gertz v. Welch* in 1974. Lower courts, with lots of help from news media lawyers, seized on the language in that decision that there was no such thing as a “false idea.” The comment had nothing to do with the case, but it had appeared in a Supreme Court ruling and that was enough. Gradually, a body of law built up that defined “opinion” in news media stories and made it exempt from libel. The key was the holding that something decreed by the trial judge to be opinion, by definition, could be neither true nor false. If it could not be false, then no matter how nasty, hurtful or defamatory, it could not be libelous.

In any case where there was even a remote chance that a damaging statement could be considered “opinion,” defense lawyers would file a motion (a request to the trial judge to take some action) to rule that the offending statement was “opinion” and dismiss the case. In the spring of 1990, the U.S. Supreme Court revisited the opinion defense in *Milkovich v. Lorain Journal Co.* The case grew out of a sports column written in 1974 (the same year *Gertz* was decided) about the aftermath of a fight at a high school wrestling match. At issue was a line in the column that said a wrestling coach and a school superintendent “lied” at a subsequent court hearing. The coach and the school official sued and the case spent the

next 16 years in the court system. In 1986, the Supreme Court of Ohio ruled that the offending statement was an expression of “opinion.” But, in 1990, the nation’s top court held that the *Gertz* case was not intended to fashion a separate, constitutionally based defense of opinion. The decision reversed earlier dismissals of the coach’s suit and seemed to damage, if not eliminate, the defense of opinion.

The Supreme Court of Ohio cleared up that issue for state law cases in the spring of 1995 with its decision in *Vail v. The Plain Dealer*. There, the court upheld the dismissal of a suit against *Plain Dealer* columnist Joe Dirck on the grounds that statements in his column were opinion and protected under the Ohio Constitution’s free press guarantees. The court went on to hold that, in determining whether a statement was a fact or an opinion, a court should consider:

- 1) the specific language used;
- 2) whether the statement was verifiable;
- 3) the general context of the statement; and
- 4) the broader context of where the statement appeared.

Recently, the Supreme Court of Ohio emphasized that its ruling in *Vail* has “expressly declined to follow *Milkovich*” by relying on the Ohio Constitution’s independent protection of opinion. This independent Ohio constitutional privilege to express opinion applies to both media and non-media defendants.

Also, the defense of *fair comment* remains, although its application is limited. It is useful in cases where the news media has reviewed some public performance, on the stage, on the screen (large and small) or in a restaurant. It would probably also apply to a sportswriter’s commentary on the play of some college or professional athlete. To write that the actor exhibited a range of emotion from A to B or that the featured dessert at Benny’s Ptomaine Palace could launch a wave of dieting is protected fair comment. It must, however, be based on facts and there must be an absence of spite or ill will.

- ***Neutral reportage***

This is another “don’t-kill-the-messenger-just-because-you-don’t-like-the-message” defense, similar to qualified privilege. Knowledge of the truth is irrelevant in this defense, as in qualified privilege. What *is* important is the parties involved. The nub of this defense is that the news media is serving as a neutral observer (and reporter) of a dispute between others over a matter of public concern. Further, those involved in the dispute must be public figures or public officials. The idea behind this defense is that the public has a right and need to know when such people are having a fight since the outcome could affect a much wider audience. Therefore, if such a dispute erupts that is not generated by the news media, and the news media accurately recounts the charges made by one side against the other, the media *will not* be held responsible if those charges are libelous. It is an excellent defense when one of the participants in a public debate turns on the news media because he or she is miffed by the coverage of a fight. Caution is urged, however. Not every jurisdiction has accepted this defense and some states and federal circuit courts have rejected it outright. The Supreme Court of Ohio, in a 1996 decision, refused to recognize this defense in a case that focused on a qualified privilege issue.

In *Young v. The Morning Journal*, the newspaper defendant reported that a contempt charge had been filed against a local lawyer. The paper omitted the lawyer’s middle initial contained in the official record and added his hometown, which had not been part of the record. There were two lawyers with the same first and last names, but different middle initials. By adding the hometown and leaving out the middle initial, the paper identified the wrong lawyer. The Supreme Court found that the qualified privilege was lost because of the errors. The Court added that it would not recognize the neutral reportage defense in this case, either, because it had not done so in the past. The ruling did not foreclose this defense in future cases, but the prospects do not appear favorable.

- ***Retraction***

Retracting a libelous statement will not prevent a suit, but it may lessen the damages. However, printing a retraction *does* eliminate the defense of truth. If a newspaper admits an error, it will not be able to later claim the statement was true. Despite that limitation, it makes good sense, legally and ethically, to print a retraction promptly when a mistake is made. If a suit is filed, the retraction is evidence of the newspaper’s willingness to correct the harm it caused, to the extent a retraction can do so. A retraction may be an admission of negligence, the level of fault required for a private person to prove to win a libel suit. It would not necessarily be an admission of actual malice, *e.g.*, that the newspaper knew the information was false prior to publication. A retraction is simply admission that an error was discovered *after* publication.

Statute of limitations on libel suits

This statute sets limits on the time within which a plaintiff may sue. The limit for libel suits in Ohio is one year from date of publication. The limitations period begins to run from the time the alleged defamatory words are spoken, regardless of whether the plaintiff had knowledge. The statute acts as an absolute bar to a suit, regardless of the merits of the case.

Libel jurisdiction

The Supreme Court of Ohio recently held that Ohio’s long-arm statute confers jurisdiction on a non-resident who posted statements on the Internet from outside the state because the statements were technically published in Ohio when read by five Ohio residents. The Court’s 2010 decision in *Kauffman Racing Equipment LLC v. Roberts* was the first decision in Ohio to recognize personal jurisdiction over a non-resident based on Internet postings.

How to handle a libel suit

There is evidence to suggest that a substantial number of libel suits are generated by the way

people are treated after a story has been printed or broadcast. Three professors at the University of Iowa surveyed libel plaintiffs and found that half of them contacted the newspaper before contacting a lawyer about suing. That suggests that there is the possibility of avoiding a suit, even though the story itself may be very damaging.

One way to almost guarantee a libel suit is for the potential defendant to ignore a complaint or treat a caller rudely. The Iowa study found this to be the most common treatment—and clearly ineffective. Typically, the study found, the average libel plaintiff was a public official (most were male in this study, which spanned the decade from 1974 to 1984) who felt his reputation was at stake and wanted a retraction or apology for what he believed to be a false story.

In handling a libel complaint, it is wise policy to keep a reporter who is the target of a complaint from dealing directly with the person complaining. The reporter is likely to be defensive. The reporter also may try to prevent superiors from finding out about the complaint until it is too late. It is not unusual for a person who feels wronged to call the reporter involved. The policy should require the reporter in question to forward the complaint immediately to an editor (assuming the nature of the error is potentially libelous; misspelled names don't require such treatment).

The editor should respond to the complaint by taking it seriously and determining exactly what the caller wants. Sometimes a "clarification" is sufficient to satisfy the target of an unflattering story without requiring the publisher to admit error. There is little to be gained by trying to negotiate over the telephone. Unless there is a quick and obvious solution satisfying to all concerned, the editor should agree to investigate and promptly respond. If the investigation reveals lapses in the story, then it would be worthwhile to invite the complainant to the paper or station, or offer to visit the offended party's office to discuss the matter further. Again, the idea is conciliation, not confrontation. If it is not possible to reach an accord on what to do next, at least the effort has been made, which is worthwhile. It can also have

the effect of calming an irate potential plaintiff. This is not the time for either defensiveness or arrogance, two traits the researchers found in abundance when examining 10 years' worth of libel suits. The object is to avoid a suit that is time-consuming, expensive and rarely a worthwhile experience.

If it is the lawyer for the aggrieved party who makes that initial call, then the editor should politely refer all questions to the company's lawyer. The editor should not attempt to answer anything, no matter how innocent it may appear.

Invasion of Privacy

Simply put, invasion of privacy is a violation of a person's right to be left alone. Unfortunately, the very essence of newsgathering is minding everyone else's business. When privacy and newsgathering interests collide, there is the potential for an invasion of privacy. Generally, the issue is one of *expectation* of privacy. A person who decides to streak across campus nude should not later complain if his or her photo appears in the college yearbook. A couple amorously engaged in a public park have the same problem. But move that scene to a hotel bedroom and try to capture the action with a keyhole camera and the outcome could be different. Where the legitimate expectation of privacy is high, the rights of the newsgatherer are often correspondingly low.

Although there is just one tort known as invasion of privacy, it actually comes in four different forms: intrusion, publication of embarrassing private facts, false light and appropriation. Ohio allows suits for all four invasion-of-privacy claims, which is not the case for all states.

Intrusion

Intrusion is simply being someplace where you have no right to be and acting in a fashion that the average person would find highly offensive or outrageous. The validity of a claim of intrusion usually rests on whether the journalist has obtained unauthorized access to an area where another person would have a reasonable expect-

tation of privacy. For example, there is generally no liability for intrusion when a journalist is gathering news in a public place, such as a sidewalk or a public street. However, with each step the journalist takes from a public space into more private spaces, the risk of liability for intrusion increases. For example, unauthorized entry into a private home or bathroom leads to a high risk of an intrusion claim.

The intrusion branch of the invasion of privacy tort is similar to the criminal charge of trespass, although it takes more than a technical violation to result in a successful lawsuit. Taking a shortcut across someone's lawn is trespassing, but not intrusion unless you were in a four-wheel vehicle and tore up the grass. Intrusion can be physical. For example, being on someone's property without permission or straying from an area where you are allowed to one where you are not would be physical intrusion. Intrusion can also be electronic or photographic. Electronic eavesdropping could result in an intrusion suit, as could taking pictures while the subject is in a private area and the photographer is trespassing. Generally, taking pictures from a public area is not intrusion, even if the subject matter is obviously private. The key is whether the activity could be seen from a public street or other public area.

The best defense against an intrusion suit is consent. To be effective, however, consent must be both competent and knowing. That means young children cannot give consent, nor can the feeble-minded. Also, the person giving the consent must be aware of the significant facts. (In the *Life* magazine case described below, for example, the quack would never have consented to the presence of the *Life* reporter and photographer had he known who they were.) Consent can also be withdrawn. A reporter invited into a home is not guilty of intrusion. Refusing to leave after being asked could be considered a violation.

Courts also often consider the newsworthiness of a report. For example, a court may be more willing to allow certain intrusions where the report relates to a public official engaged in serious misconduct at work as opposed to an

investigation of the private affairs of a private individual. Courts often consider the depth of the intrusion against the perceived social value of the report or the extent to which the complaining party thrust him or herself into public light.

Note: The privilege that law enforcement or other public officials have to tread upon private property does not extend to the news media. An invitation from the sheriff to tag along during a drug raid does not confer any special privilege on the reporter or photographer who accepts. The sheriff may have a search warrant, which legitimizes his presence, but that right does *not* extend to the private citizen, reporter or photographer. The private citizen, reporter or photographer who troops into someone's house behind a deputy or treks across private property with the FBI may be guilty of intrusion. The risk of suit may not be high, particularly if the miscreant sought is the property owner, but being convicted of a crime does not rob a person of privacy rights. In 1971, there was a successful suit against an undercover reporter-photographer team for *Life* magazine who helped unveil a bogus healer (*Dietemann v. Time*). The man was convicted of practicing medicine without a license, but later won a suit against the magazine because the reporter misrepresented herself to gain access to his home for a treatment that later formed the basis of the charge against him.

Embarrassing private facts

This type of case involves the actual publication of private facts, as opposed to intruding upon private spaces during the newsgathering process. The essence of the complaint is that the information is true, but is not of public concern. Further, the information must be private. Information gleaned from public records, regardless of the age of the document, is not private and may be published no matter how embarrassing it might be. There is, however, a wealth of information available about people from quasi-public sources like hotel records, credit reports and private letters

that may not be covered under public records laws. Using such sources could subject a reporter to a lawsuit if the information is of the highly offensive sort. This tort does not recognize any formal distinction between public figure and private citizen. The latter may have a greater expectation of privacy, but even public officials have a right to privacy. The best defense in this case is the argument that the information is of legitimate public concern. But reporters should be careful when dealing in private, personal kinds of information. The invasion of privacy tort does not have the legal history that libel does with all its formal rules. In many cases, because of those rules, a libel case may be dismissed without ever getting to the merits of the issue—that is, whether the story was false and defamatory. Privacy suits are much more likely to go to trial where arguments about legitimate public concern must be made to a jury that may well believe the news media is too intrusive most of the time. Note: In a 2002 decision involving a suit against the *Akron Beacon Journal* by a former Akron police chief and his wife, the Ninth District Court of Appeals ruled that publication of the contents of medical records of the ex-chief's wife was not a violation of the couple's privacy. The medical records had been turned over to the newspaper as part of discovery in a previous suit over a story that alleged the ex-chief had abused his wife. Neither the chief nor his wife had requested that the records be sealed. The appeals court ruled that the use of these documents, along with information gleaned from an interview with a hospital nurse who had treated the wife, was of sufficient public interest to overcome the invasion of privacy claim.

Misappropriation/rights of publicity

This is a specialized form of invasion of privacy that applies more often in a commercial setting than in a news setting. The law recognizes that a person has the right to make money from his or her name or likeness and to prevent others from doing the same without permission. Some years ago, an entertainer (guess who) sued a portable outhouse company for using the name,

“Here’s Johnny.” The same rights apply to the private person who does not want to be used to make money for someone else. Thus, it would *not* be appropriate to take a woman’s picture and use it in a perfume ad without her permission. The law recognizes a “news exception” to this rule. Under that exception, the same woman’s picture, if taken in some public place, may be used in a newscast or on the front page of a newspaper, even though the picture may help the owners of the TV station or newspaper make money by making their product more attractive to readers or viewers on the day of the news event. Re-using that picture later on a company calendar that is sold or even given away for promotional purposes is another matter. Then, it would be best to have a release signed by the subject to avoid the risk of litigation.

False light

Ohio now recognizes a “false light” claim of privacy. A claim of false light is similar to a claim of defamation. A false light claim requires proof that a reporter gave “publicity” to a matter that shows the defendant in a false light. The false light must be “highly offensive to a reasonable person,” but it need not be defamatory. Also, all plaintiffs must prove “actual malice,” that the publishing party knew the information was false or acted with reckless disregard as to the probable falsity of the information.

False light claims were first recognized by the Supreme Court of Ohio in 2007 in the case of *Welling v. Weinfeld*, based upon a dispute between two neighbors. One of the neighbors believed that the other neighbor was responsible for damaging their property and published handbills offering a reward to anyone who could provide information leading to a conviction. Though the handbill did not mention the suspected neighbor by name, the material was posted where the suspected neighbor worked and where his children went to school. The plaintiffs’ theory was that the handbills at targeted locations spread wrongful publicity about them that unreasonably placed them in a false light before the public.

In the journalism context, false light lawsuits often arise from inadvertent details captured on camera or found at the margins of a story. For example, one might use a file photo of a particular street to illustrate a story on drug trafficking and mistakenly create the impression that a person caught at random in the photo was purchasing drugs. Also, be careful to check all your facts, even those that seem completely innocuous. An inaccurate statement could offend or embarrass a reader enough to bring a false light claim. Finally, when editing newspaper headlines and formatting your website, be careful of the juxtaposition of photographs and their captions or headlines. Sometimes joining the words together with the photographs can result in unintended results that lead to false light claims.

Journalist's Privilege

Overview

The concept of a journalist's privilege is rooted in the belief that the First Amendment will not function as intended if journalists are not permitted to protect their sources. The U.S. Supreme Court has *not* agreed, though numerous lower courts have afforded journalists most of the constitutional protection they have sought. The U.S. Constitution is not the only source of protection, however. There are state constitutions with news media freedom clauses as well as shield statutes. All of these afford varying degrees of protection for sources. This portion of Section I deals with that protection and the related problems of subpoenas and search warrants.

First Amendment rights

The U.S. Supreme Court held in *Branzburg v. Hayes* in 1972 that reporters *do not* have a constitutional right to refuse to testify in a criminal proceeding. The decision was softened somewhat by a dissent written by Associate Justice Potter Stewart, who proposed a three-part test for prosecutors to meet before they could compel a reporter to testify. Although Stewart's "test" had no force

of law, it has received wide acceptance by lower courts at the state and federal level.

The test (used to determine whether a reporter should have to provide information sought through a subpoena) has the following components:

- Is there a reason to believe that the reporter actually possesses the information sought? (Import: No fishing expeditions to see what a reporter might know is allowed; the request for information must be specific.)
- Have all other possible sources of the information been checked first? (Import: Go to the reporter last, after all other attempts to find the information have failed.)
- Even if the reporter has the information and is the only available source, is there a critical need for the information, *i.e.*, will a miscarriage of justice occur if the reporter does not testify? (Import: Save subpoenas for serious issues; don't use them to harass reporters.)

Courts have granted motions to quash subpoenas that have failed to meet one or more parts of this test, including several Ohio cases. Note: An attempt to have the U.S. Supreme Court revisit and revise *Branzburg* in 2006 failed in a case involving *New York Times* reporter Judith Miller. She refused a demand from a special prosecutor to reveal her source(s) concerning leaks about a covert CIA agent and ended up serving nearly three months in jail for contempt of court. A federal appeals court upheld the prosecutor's right to demand her testimony and the Supreme Court refused to hear the appeal. (The reporter later testified in court after her source released her from her promise of confidentiality.)

IMPORTANT: Subpoenas should never be ignored, despite a valid belief that they can be quashed if challenged in court. Receipt of a subpoena in person or by mail should result in a call to the company lawyer immediately. Failure to respond could result in a contempt of court charge.

Service

Subpoenas may be mailed, either by certified or regular mail, or delivered in person. In order to compel a reporter's appearance, a prosecutor (or any lawyer involved in a court case) must first have "good" service—evidence that the reporter actually received the subpoena. For that reason, regular mail is risky. A reporter who signs a receipt for a mailed subpoena has supplied evidence of receipt.

Frequently, service of a subpoena is attempted at a reporter's workplace. There is no provision in Ohio law that requires a news media company to permit such service on company premises. It is permissible to tell a process server (often a deputy sheriff or a police officer, but it can be anyone assigned by the lawyer issuing the subpoena) that the subpoena may be left at the front desk or information counter, but that does not mean it will be delivered to the reporter. A subpoena is not like a search warrant; the server does not have the right to enter the premises without permission. If the process server leaves the subpoena, then someone other than the reporter should check to see who issued it (it will say on the subpoena where it came from) and then call the company lawyer. If the process server won't leave it, try to find out from him or her who issued the subpoena and then call the company lawyer.

Shield statute

Ohio has two shield law provisions—one for broadcasters and one for print journalists—which protect them from having to reveal the source of any information gathered in the course of their work. The statute makes no distinction between confidential and other sources, so all sources are covered. The statute does not mention notes or other documents. They are not automatically protected and may be subpoenaed, even if the reporter is able to avoid testifying personally. The statute offers protection against having to testify in all the usual places: grand jury, petit jury, board, commission, committee, etc. Because it is a statute, however, it may not stand up to a

demand for testimony from someone asserting a constitutional right, such as a criminal defendant with a Sixth Amendment right to a fair trial. In such situations, the better argument would be to use Justice Stewart's three-part test, which raises a First Amendment constitutional argument.

A 2004 decision by the Sixth District Court of Appeals interpreting the shield statute offered a very narrow definition of the law's protection. The case arose when a reporter for the *Toledo Blade* sued a Toledo radio station for reporting that she was having an affair with the paper's publisher. The station's news director refused to reveal her source despite an order from the trial court. The appeals court ruled, 2-1, that the news director was not acting in a newsgathering capacity when she got the information from her source. Further, the court held that, because her source was just passing along information from yet another source, it was not "information" protected by the statute, but mere gossip. The Supreme Court of Ohio refused to hear the station's appeal.

Subpoena Response

Far too often, the news media reacts to a subpoena in a predictable fashion: no way will a reporter be allowed to testify or will a photographer be compelled to turn over pictures. Calling the company lawyer is expensive and doesn't always help. A more practical approach is to find out what the lawyer issuing the subpoena wants. If the lawyer is a county prosecutor or defense counsel involved in a criminal trial, there may not be much room for negotiation. If, however, the lawyer represents a private client and is seeking clips, pictures or videotape, the company should consider simply offering to provide the material for a price. A subpoena for personal testimony may still be resisted, but there is no need for a reporter to testify that he or she wrote a story or taped one that was broadcast. The clip or tape will speak for itself and may be admissible as evidence with an affidavit stating that it was written or taped by the author and appeared on such-and-

such a date. If pictures or videotape is sought, it is permissible to charge for it at whatever price the market will bear. Lawyers with private clients expect to pay for material they want (but prosecutors do not; they can demand the material as evidence for the state). A lawyer who asks for all accident photos, published and unpublished, may quickly back off if told the pictures will cost \$100 apiece and that there are 30 of them. A newspaper may also charge for search time and copying expense (say, \$50 per hour plus \$5 per copy) for someone who wants back clips. Such a fee has a way of turning a very broad subpoena into a much more reasonable request that produces revenue for the paper rather than costing legal fees.

Section II: Media Access to Courts, Meetings and Public Records

The material in Section II of this chapter, including statements of opinion and commentary on legal issues, was originally prepared and updated by Prof. Thomas S. Hodson, Esq., former director of the E.W. Scripps School of Journalism at Ohio University and currently the director and general manager of WOUB Public Media at Ohio University, and Prof. Timothy D. Smith, Esq., of Kent State University's School of Journalism and Mass Communication. Opinions expressed do not necessarily reflect the policies or opinions of the Ohio State Bar Association.

Access to Courts

The Ohio Constitution requires that all courts shall be open. With few exceptions, Ohio judges follow this edict. There are times, though, when judges are allowed to hedge on this requirement to protect the rights of litigants or criminal defendants.

“Gag” orders

The Supreme Court of Ohio has ruled that trial court judges have several options available to insure that a defendant receives a fair trial. These options include changing the venue, delaying the trial (if the defendant agrees), closely questioning prospective jurors, sequestering jurors and controlling comments by court personnel, lawyers and law enforcement officials involved in the case. An order limiting, or even forbidding, comment by those involved in the case is usually referred to as a “gag” order by the news media.

It is not unusual in a trial that has drawn intense media attention for the trial judge to issue orders governing the conduct of the trial. Often this includes a “gag” on participants, including witnesses. While information regarding jurors is normally a matter of public record, as concerns over privacy have continued to escalate, it is not uncommon now for courts to select jurors without using their names. The selection process is open, but the jurors remain anonymous. In 2002, the Supreme Court of Ohio found that juror names, addresses and questionnaire responses are not public record, but the blank questionnaires to be used to solicit information from potential jurors in a case are public. Also, if the defendant failed to object to the use of an anonymous jury at trial, the Supreme Court of Ohio found that there was no unqualified constitutional right to know the identity of jurors.

Occasionally, judges have extended their orders to the news media, barring coverage in some form. The Supreme Court of Ohio has ruled such a move should be taken only after all other attempts at insuring a fair trial have failed (*State ex rel. Toledo Blade co. v. Henry County Court of Common Pleas*, No. 2010–0106, 125 Ohio St.3d 149). The U.S. Supreme Court requires a trial judge to hold a hearing before taking such action, to determine whether it is the only avenue left and whether it will be effective. Consequently, such orders limiting what can be reported are extremely rare.

Nevertheless, the Supreme Court of Ohio accords trial judges wide latitude in governing trials. Orders that limit attendance, including entering and leaving while court is in session, and orders that limit seating for the news media and otherwise set rules for conduct are likely to be upheld unless obviously unreasonable.

Closed courtrooms

Rarely is a courtroom closed in Ohio. The U.S. Supreme Court has made it clear that such an action is likely to violate the First Amendment, Sixth Amendment and Fourteenth Amendment, except in the most extreme circumstances. Either party in a case may ask that the court be closed, but the nation's highest court has held that third parties, like the news media, have the right to be heard before the order is granted. In practical terms, this means that a reporter who is present when such a request is made should promptly, and politely, stand up and object. The objection will be noted in the record even though the reporter is not a participant. If the judge will allow it, then the reporter should request a delay in granting a request to close the proceedings until the reporter can get the company lawyer to court. Even if the delay isn't granted, getting the request on record is important. It will help preserve an appeal of a court closing. However, in the last decade—other than in juvenile court cases—closed hearings have been rare.

Pre-trial hearings

The right to attend a pre-trial hearing is the same as attending a trial. While it is not absolute, the prevailing court rulings make it very difficult to exclude anyone. Note: Conferences between a defense lawyer and a prosecutor to discuss plea bargains are not open, even though they are sometimes referred to as "pre-trial hearings." They are not "hearings" in the legal sense. Any bargain struck in such a conference, however, must be revealed in open court to be effective. Civil "pre-trial" hearings, usually held in the judge's chambers, are also closed. Often these sessions give the judge a chance to see if the two sides can agree to

settle the case. The amount of pressure applied by the judge to encourage settlement varies, but some jurists have been known to be somewhat heavy-handed in urging parties to reach an agreement and avoid trial. Judges win awards for keeping their dockets current and without a backlog of cases, and the best way to do that is to have cases settled rather than tried.

Cameras

Supreme Court of Ohio rules mandate that judges must allow still and video cameras in courtrooms during hearings and trials that are open to the public, as provided by Ohio law. The rules limit who may be photographed (no jurors at all and no witnesses who object). The defendant may be photographed while in the courtroom. There is, however, a divided opinion over whether the defendant may assert an objection to being photographed if he or she takes the witness stand. The more logical position seems to be that the defendant does not have the right to object, but the issue has not been ruled on by a court.

Rules for the use of cameras vary from county to county and, sometimes, from judge to judge. However, because cameras in courtrooms are generally permitted, with limitations, under the *Ohio Rules of Superintendence*, local rules providing for the use of cameras have become more stable. Still, the *Rules of Superintendence* provide that victims and witnesses have the right to object to broadcasting and photographing, and a judge retains the right to revoke permission to broadcast if rules are not followed. Advance permission must be sought and often the court has a standard form that it uses in such cases. The clerk of courts should have copies if the individual judge does not. If there are multiple requests, the judge may require pooling and the burden is on the news media to work out the pool. The judge may appoint one member of the news media to act as coordinator. Pooling applies to both still and video cameras. [See Rule 12 of the *Rules of Superintendence for the Courts of Ohio* at www.

supremecourt.ohio.gov/LegalResources/Rules/superintendence/Superintendence.pdf.]

Juvenile court

Typically, hearings involving abused or neglected children are closed to the public. But cases where juveniles are charged with serious offenses (crimes that would be considered felonies if the defendant were an adult), juvenile judges have been more willing to open their courtrooms, spurred by some U.S. Supreme Court and Supreme Court of Ohio decisions allowing public access. This move coincides with legislative changes that have made ever-younger juveniles eligible for trial as adults.

The person seeking closure of a juvenile court proceeding bears the burden of establishing through evidence that there exists a reasonable and substantial basis for believing that public access could harm a child or endanger the fairness of the hearing; that the potential for harm outweighs the benefit of public access; and that there is no reasonable alternative to closure. Although law enforcement and juvenile court personnel are often reluctant to release names of juveniles charged with crimes, there is no law prohibiting the publication of such names once they have been obtained. While some juvenile court records are exempt from the Public Records Act, police reports involving juvenile arrests are not.

Thanks largely to aggressive actions by the news media in recent years, more access is available to juvenile court proceedings than in the past. For example, hearings to decide whether a juvenile should be tried as an adult are often accessible. As is usually the case with any change in procedure, it is helpful, if possible, to discuss the court's policies in advance. Ground rules are much easier to work out when there is no controversial case pending.

Grand juries

As mentioned earlier, grand juries require special handling. They meet in secret to decide whether the evidence against someone warrants having a trial. Testimony is secret and so are

grand jury transcripts. The grand jurors themselves take an oath of secrecy. The purpose is to protect those whose cases are being heard by the grand jury, regardless of the outcome. An indictment is not evidence of guilt. There is no prohibition, however, against talking to witnesses who have testified before the grand jury.

Witnesses are not bound by secrecy rules and oaths, but there is a risk in speaking to the jurors themselves. Jurors are not supposed to talk about the case. While they risk criminal charges if they violate that oath, there is also the chance that criminal charges could be brought against a reporter for inducing someone to violate the oath of secrecy.

Appeals

Appeals courts are typically open to the public, though little activity is visible to the public eye. Most of the work of the appeals court is done in judicial offices where legal arguments are read, weighed and then voted on. Only the oral argument portion of an appeal is open to coverage. The bailiff of the court, or the clerk, will have a schedule of all cases to be argued. Filings in each case are in the public record and open to inspection. While judges may, and frequently do, interrupt the lawyers' presentations, the questions they ask do not necessarily indicate how they will vote. It is extremely risky to report that a judge favors one side based solely on questions or comments made during oral argument. Sometimes, a judge on the winning side will write a concurring opinion in order to distinguish his or her views from that of the majority opinion. To the extent that a concurring opinion varies from the majority, it weakens the force of the majority opinion as a precedent for future cases. A similar process is followed at the Supreme Court of Ohio level. Not all cases are scheduled for oral argument. The clerk's office has a schedule of cases for several weeks in advance.

The Supreme Court of Ohio usually hears cases on Tuesdays and Wednesdays. At the conclusion of each case, the justices retire to vote in secret. Reporters covering the Supreme Court of

Ohio should know that the entire record from the trial court is sent to the Supreme Court while the case is pending there. Although the case file is kept secure and handled with care, it remains a public record and should be available for inspection.

Access to Records

Ohio, like every other state, has a law guaranteeing public access to records kept by the government. Like every other state, Ohio's Public Records Act contains exceptions. Further, a staggering body of case law has been developed over the years as individuals and governments have wrangled over the meaning of the terms used in the statute. There isn't enough space in this document to review all those cases or cover every possible contingency. What follows is an overview of the statute and its exceptions, along with some advice on how to gain access without having to resort to a lawsuit. The Ohio General Assembly passed some sweeping changes in the Ohio's public records statutes effective in September 2007. A cautious reporter should always double-check the current statute and, when in doubt about a provision, consult with an attorney for an interpretation.

The statute

Ohio Revised Code Section 149.011 provides definitions for terms used throughout the different sections of the public records laws. Although Section 149.43 is commonly thought of as the Public Records Law, it actually is just the section that concerns *access* to public records. Other sections of law govern the creation, maintenance and destruction of public records—all worth knowing for a public affairs reporter. Ohio law creates three categories of public records:

- 1) *those that are public and must be released upon request;*
- 2) *those whose release is discretionary with the record-keeper; and*
- 3) *those that are confidential and may not be released.*

Provisions

The accessibility statute is mercifully short and fairly easy to read and interpret, as statutes go. The complete text can be found at <http://codes.ohio.gov/orc/149.43>. Caution: Despite the apparently clear language, it always is best to find a lawyer if an authoritative interpretation is needed, such as someone to quote in a story. For example, the statute appears to call for an award of attorney fees for the person who successfully sues to obtain a record that has been withheld. The language appears clear-cut, but the Supreme Court of Ohio somehow found an exception that permits the denial of attorney fees to the successful plaintiff if the record was withheld in “good faith.” A reporter, unaware of that decision, might read the statute and report that attorney fees are mandatory if a government office loses a suit over access to records.

On the other side of the issue, the Supreme Court of Ohio has ruled that the statute is to be interpreted “broadly” by public officials and that lower courts are to make public access easy and public records readily available. The court also repeatedly has held that exceptions to the statute should be given very narrow readings. Throughout this section, advice on access problems is predicated on whether it will be necessary to sue and how likely that suit is to succeed. Problems with access come in two sizes: delay and denial. With denial, the resolution is generally clear. Either the record is subject to an exception or it isn't, and the news organization must decide which way a court is going to lean on that issue alone. Delay is more troublesome. Courts generally are unwilling to substitute their judgment for that of another public official on matters of discretion, especially in the running of an office. If the delay appears reasonable—as judged from the perspective of another public official, not the news media—then the officeholder is likely to win. The potential plaintiff also needs to decide if suing is worth the risk of having the delaying tactics of one officeholder spread to other offices if the suit is lost.

Key provisions of *Ohio Revised Code* Section 149.43 require that public agencies must:

- *Maintain their records to make access possible within a reasonable amount of time.* What is “reasonable” is going to be defined by non-news people, which means 15 minutes’ notice because of deadline pressures probably won’t be acceptable. Generally, records that are on hand should be available for inspection on request and kept in a manner that easily allows for that inspection. If a search is required—the records sought are not current and are not maintained in the immediate vicinity of the record-keeper—some delay can be expected and probably would be permitted by a court.
- *Promptly prepare records (such as minutes of a meeting or copies of a police report) and make them available for inspection during regular business hours.* “Regular” business hours may vary depending on the nature of the office. Most government offices are open from 8 a.m. to 5 p.m., and their records must be available during that time. But some part-time governments (villages and townships, for example) might not operate on 40-hour weeks. In those cases, the records should be available during the times when the office is open normally. If there is no evidence of a deliberate attempt to conceal records, then a part-time government office probably would not be ordered by a court to open just in order to provide access to records. However, if a township police department is open seven days a week, then its records should be available at least during daytime hours when clerical staff is present, even if the rest of the township offices are only open every other Thursday morning. For agencies of government that are open 24 hours per day, access to public records must only be provided during times when clerical staff is present. An agency, however, may establish procedures to make records available during non-clerical staff hours. The new statute also mandates that the public office must make available its current

records retentions schedule. If the public records requester makes an ambiguous or overly broad request, then the public office may deny the request, but must provide the requester with the opportunity to revise the request by informing the requester about how records are maintained by that particular public office.

- *Follow requirements regarding redaction and denial.* The statute indicates that, if a public record contains information that is exempted from disclosure by law, the remainder of the record that is not exempt must be shown or copied. The requester must be notified by the public officer or person responsible for the record of any redaction (removal of information that was included in the original record), or the redaction must be plainly visible (meaning that it must be obvious that information was removed). The statute states that a redaction shall be considered a denial of the public record request unless the redaction is required by federal or state law. The new statute mandates that, if a request is denied, in whole or in part, the public office or person responsible for the record must provide the requester with an explanation, including legal authority, stating why the request was denied. If the initial request was in writing, then the denial explanation must also be in writing.
- *On request, make copies of public records at cost and within a reasonable amount of time.* This requirement has two potential stumbling blocks: “at cost” and “reasonable amount of time.” The “at cost” has been determined by the attorney general’s office (in an official opinion) to be the cost of the copy, which does not include the time it takes to search for the record or the cost of labor to copy the documents. Ohio law, unlike the federal Freedom of Information Act, makes no provision for a search fee. Arguments that the cost of a copy includes the time it takes to find the record have no support in the law because the law states that the records should be readily available. Given that commercial

establishments can make a profit charging less than a dime per page, it is difficult to imagine a public office that needs to charge more than 25 cents per page, unless the charge is set by statute. Reporters should be aware, however, that statutory charges often are for “certified” copies. If certification isn’t requested, then the charge should be the same as for any other document: at cost. The amount charged for public records has become an increasingly contentious one. The Supreme Court of Ohio has not dealt directly with the issue of what constitutes “at cost.” For example, it would seem unreasonable to suggest that the entire cost of a copying machine should be borne by those members of the public who want copies of public records. The machine was not leased or purchased solely for that purpose. Copying machines that can be found everywhere from gas stations to grocery stores rarely charge as much as 25 cents per page and apparently are profitable for the owner. It can be argued that some charges have been established by officeholders expressly to discourage copying of public records. Where such policies are encountered, the only choices are to pay the exorbitant bill or to sue.

The “reasonable amount of time” problem seems to be most prevalent among small town police departments, perhaps resulting from a greater sense of kinship between these departments and the communities they serve and an accompanying reluctance to share embarrassing information with outsiders. Such reluctance often takes the form of delayed access, documents with names deleted and excessive costs for copies. Typically, officials in these departments simply ignore the mandates of the Public Records Act. They are unlikely to be persuaded by anything short of lawsuit. For other public offices, “reasonable amount of time” probably means overnight at the outside. Ordinarily, a request for a copy should be filled within the day it is made. If the office has a standard procedure for responding to copy requests and handles a

high volume of such requests, then the news media probably cannot expect expedited treatment. If the normal turnaround time is 24 hours, that probably would be held to be reasonable. The most recent version of the statute states that the public office or person responsible for the public record may require a person to pay in advance for the cost involved in providing the copy or copies requested. A public office may establish policies and procedures about mailing copies of public records or delivering them by other means. Likewise, a public office may limit the number of records requested by a person who wants them delivered by mail. The limit may be 10 per month unless the requester certifies that he or she is not requiring the records for commercial purposes. “Commercial purposes” must be narrowly construed and specifically does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government or nonprofit educational research.

Note: State law permits public offices to store records in a wide variety of media such as film, microfilm, magnetic tape, perforated tape and computer. The law also requires that any agency that stores data in such a form must make machines available for the public to read and reproduce that data. The Supreme Court of Ohio also has ruled that a record seeker is entitled to a copy of an entire government database if that is the only practical way to provide a large amount of information. Further, that copy must be in computer-readable form; it cannot simply be provided as a towering stack of printouts. Also, the agency may not introduce a software copyright defense as an excuse for refusing to provide the information. Software companies that sell database management programs to government agencies typically include an agreement that the agency will not divulge the program to those not licensed to use it. However, that same

agency is obligated, under the law, to provide information in a usable form and that includes providing whatever program is needed to decipher the data.

The only proper recourse for the agency is to inform the software supplier that its program has just been made available to some third party and let the software company enforce its own copyright with the third party. In 2005, the Supreme Court of Ohio determined that tapes of 9-1-1 calls are public record and copies of tapes should be given to a person making a public records request. The cost is just the cost of reproducing the tape. The Court in 2004 also held, however, that if a requesting party asks for a transcript of a taped court hearing, the requestor must pay at the commercial rate for transcripts.

A 1998 Supreme Court of Ohio opinion, *State ex. rel. Wadd v. Cleveland*, addressed the timeliness issue, requiring the Cleveland police department to supply copies of accident reports to the plaintiff, who ran an accident-reporting service for lawyers and doctors, within eight days of the request. In the opinion, the Court noted that there was evidence that many departments could produce records overnight, but, because the plaintiff asked for the reports within an eight-day limit, that is what was granted. It is the first time the court has defined the terms “promptly” and “within a reasonable time.”

Unless there is a specific state or federal law requiring it, no public office or person who is responsible for a public document may limit or condition the availability of public records by requiring the requester to disclose either his or her identity or the intended use of the requested material. The statute states that “any requirement that the requester disclose the requestor’s identity or the intended use of the requested public record constitutes a denial of the request.”

Ohio Revised Code Section 149.43(B)(5) indicates that the public office or person responsible for the public document may 1) ask a

requester to make the request in writing, 2) ask the identity of the requester and 3) inquire about the intended use of the material. However, the person responsible for the public document may make these requests *only* after disclosing to the requester that a written request is *not* mandatory and that the requester may decline to reveal his or her identity as well as the intended use of the material.

Penalties

For failure to permit inspection or to provide copies of public records, the law allows a person to sue for access and/or copies and to be awarded attorney fees and court costs if successful. This is called a request for a *writ of mandamus*—a request for a court order mandating compliance with the law.

Note: The award of attorney fees, while suggested by the statute, has, in the past, been treated by the Supreme Court of Ohio as discretionary, though in recent years, such awards have been more frequent. In deciding if attorney fees should be awarded, the Court has considered whether the person responsible for the records failed to respond affirmatively or negatively, or the person failed to fulfill a promise to inspect the records within a reasonable time. The fees are remedial and not punitive. If the recordkeeper makes requested records available after a suit is filed, then attorney fees still may be awarded.

Additionally, the requestor under the law may be entitled to statutory damages for failure to provide public records of \$100 a day up to an amount of \$1,000. The court, however, may reduce this amount depending on the reasons for the failure to comply.

Training

All public offices and designated officials must attend training sessions approved by the attorney general. Also, all public offices must adopt a public records policy, make sure employees read the policy and have the policy

posted in the office. It should also appear on an office's website if the office has one, and in policy and procedure handbooks if they are available.

Definitions

- A *record* is any document or item generated by or kept in a public office, or received by a public office, or coming under the jurisdiction of a public office (as in the case of records kept by an agency working under contract with a public office), regardless of form. While the statutory definition is broad, the Supreme Court of Ohio has added some limiting language, requiring that records must "document a public purpose" to qualify as a "public record." The limitation has been used to deny access to letters written to a judge recommending a tough sentence for a man convicted of rape and to deny access to children's names and addresses kept by a city recreation department. This "documentation" issue may arise even more often when it comes to accessing electronic communications.

Email routed through a server operated by the government technically fits the definition of a public record. Some email, however, may be construed to be personal and not related to government operations. One such case involved email of an allegedly derogatory nature about a sheriff's deputy (exchanged by her co-workers). The email was held *not* to be public because its content did not concern governmental functions. A person who generates this personal email on government-owned computers and through government-owned servers may be subject to discipline for wrongful use. That discipline does not, however, change the public/private nature of the underlying information. Also, it should be noted that in 2005, the Supreme Court of Ohio, in *Dispatch Printing Company v. Johnson*, 106 Ohio St.3d 160, found that state-employee home addresses are not public records as defined in ORC 149.011 (G).

The biggest case to be decided since the public records law was changed in 2007 was

Rhodes v. City of New Philadelphia (129 Ohio St. 3d 304), in which the Supreme Court of Ohio found a new exception to the public records law for people who are "aggrieved" by a denial of access. The Court determined that those who are not really interested in public records are not being harmed if they are denied access to them. According to the Court, a party is not aggrieved by the destruction of a record when the party's objective in requesting the record is not to obtain the record, but to seek a forfeiture for the wrongful destruction of the record. The import of this decision was watered down by a legislative change that reduced the penalty for destroying public records to a maximum of \$10,000. (See also *Toledo Blade v. Seneca County Commissioners*, 120 Ohio St.3d 372, where the Supreme Court of Ohio gave the *Blade* access to emails illegally deleted by the county and required the county to retrieve them (or try) at county expense, since they had been deleted contrary to the county's records retention policy.)

- *Draft or preliminary* information is treated differently from information that has been completed or finalized, depending on how it is viewed. If a work product is considered to be in preliminary form that is not yet complete, then it may fall outside the "public record" definition. Information in a report or document that is complete, but has not been presented to a final approving body, still is a public record. For example, information compiled by the county auditor was held to be a public record even before it was presented to the county board of revision that was to act on it. A contract between a city and its police union was held to be a public record even though city council had not yet ratified it. Some statutes specifically exempt preliminary work products, such as state audits, prior to final approval.
- *Public office* covers all governmental agencies at the state, county, municipal and township level. It also includes schools and courts. State-supported colleges and universities

meet the definition, as do the foundations authorized to receive donations for a state-supported higher education entity. Mere receipt of public funds is not enough to turn a private agency into a public one. However, agencies created through tax dollars, such as a community hospital, that are later run by a private association have been considered to be public offices. The Supreme Court of Ohio has not allowed public agencies to remove records from public reach by transferring the records, or the record-making function, to a private company. For example, a private accounting firm hired to perform a public audit had to permit inspection of the records it created to fulfill its contract with the state auditor. The law since has been changed to exempt such private company records, but the principle still applies in other cases. In 1997, the Supreme Court of Ohio held that the Cuyahoga County ombudsman's office was a "public office," even though its legal status was that of a private, nonprofit agency. The Court noted that the agency received public funds (in addition to funds from private sources) and performed a public function, acting as a mediator between the citizenry and county government. Two decisions by the Supreme Court of Ohio in 2006 add clarity to this issue. The court found, in the case of *Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, that a private entity is not subject to the Public Records Act unless there it can be shown, by clear and convincing evidence, that the private entity is the functional equivalent of a public office. The court must analyze pertinent facts including:

- 1) whether the entity performs a governmental function;
- 2) the level of governmental funding;
- 3) the extent of government involvement or regulation; and
- 4) whether the entity was created by the government or to avoid the requirements of the Public Records Act.

In *Repository v. Nova Behavioral Health, Inc.*, 112 Ohio St.3d 338, the Court, in a tight 4-3 decision, also applied these tests and the functional equivalency analysis to deny a public records request of a community mental health agency contracting with a county mental health board.

- *Any person* who requests public records need not be a resident of Ohio, an adult or even an American citizen.
- The *request* for records may be oral or written. Following a Supreme Court of Ohio decision that a person may require the material to be supplied on computer media if that is the most reasonable way to provide it, the legislature amended the statute to require that a copy may be requested on any medium that the office is able to provide. Governmental units may not "require" public record requests to be made in writing.

Exceptions to the statute whereby records are removed from public examination

Note: This list of public records exceptions has grown substantially in recent years. In addition, separate exception provisions are contained in other statutes. A database search of the *Ohio Revised Code* looking for "public records" and "closed" or "exempt" is likely to produce scores of hits. Those seeking to remove records from public examination rarely take the frontal approach of seeking an exception in this statute. It is much easier to simply tack an exemption directly onto the affected statute. So, while this list has grown, it is by no means exhaustive. A reporter should always check the most recent statutory language or seek legal counsel.

List of public records statute exceptions:

- *Medical records* - Information about a person's medical history, condition, diagnosis or prognosis is exempt, provided the informa-

tion was generated and maintained as part of the person's treatment. Generally, this kind of information is released at the discretion of the recordkeeper. However, medical information contained in a personnel file, for example, are *not* exempt, regardless of the file's location, because the file is *not* being maintained for medical treatment purposes. This exception does not include birth or death records or admission and discharge records of a public hospital.

- *Adoption records* - cannot be released, no matter who holds these records. A statute specifically forbids it.
- *Probation and parole records* are exempt, no matter who holds these records, although release is discretionary and not forbidden.
- *Juvenile records related to requests for an abortion* cannot be released. However, the Supreme Court of Ohio has ruled that statistical data about such cases is public record. The Supreme Court of Ohio must protect the identity of minors seeking permission for an abortion, but also must release information about the number of such requests and their disposition. This information might be released by whatever public office maintains such statistical records.
- *Trial preparation records* - These also fall into the discretionary release category. The Supreme Court of Ohio has construed this exception narrowly. For example, it rejected an attempt by one police department to treat all of its arrest records as trial preparation records because the arrests, at least initially, could result in a trial. Also, the Court has held that this exception does not cover routine factual reports, such as police offense and incident reports. In 2002, the Supreme Court of Ohio even found that certain correspondence and documentation concerning a potential court settlement of a matter involving the state were not exempt from the public records laws as trial preparation documents.
- *Intellectual property records* - This exception was inserted into the public records statute at

the request of the state universities and the spin-off companies that work in university labs, etc., to protect research projects that produce revenue for the universities. It does not include, however, matters that are "administrative" in nature; nor does it include matters that have been publicly disclosed or published.

- *Donor profile records* - This exception resulted from a newspaper's successful lawsuit to open the records of Toledo State University's foundation. All state universities use charitable foundations to raise funds and create discretionary accounts for expenses that the university itself does not wish—or cannot legally—spend tax dollars to cover. Included in the foundation records are reports from fundraising personnel about their contacts with donors, including some frank discussions of their personal situations. Once the Supreme Court of Ohio opened access to foundation records, the universities moved to exempt this portion of the files on the grounds of protecting donor privacy. It should be noted, however, that this exemption does not protect the names or addresses of actual donors; neither does it keep the "date, amount, and conditions of the actual donation" from being revealed.
- *Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information* - *Ohio Revised Code* 143.43(A)(1)(p). This legislation followed decisions by a federal appeals court and the Supreme Court of Ohio limiting access to personal information about law enforcement officers working under cover. The courts balanced their rights of privacy against the need for the information being sought by defense counsel and sided with the police. While the decisions were limited to officers working under cover, the legislature followed with this much broader exemption. In 2005, the Supreme Court of Ohio in the case of

Plain Dealer v. City of Cleveland, and Vindicator Printing Company v. City of Youngstown, 106 Ohio St. 70, found that photographs of police officers are not subject to disclosure under this exception.

- *Confidential law enforcement records* - These are records related to a criminal or civil law enforcement matter where the release would:
 - create a high probability of identifying a suspect who has not been charged with a crime;
 - create a high probability of identifying a confidential informant;
 - likely endanger law enforcement personnel, crime victims, witnesses or informants;
 - reveal confidential investigatory techniques; or
 - reveal specific investigatory work product.

Note: These exceptions for confidential law enforcement records generally mean that police reports of ongoing cases, beyond routine factual matters, may be withheld. Courts are likely to defer to police judgment if there is a dispute. More success in obtaining records is probable after a case has been concluded and there appear to be other reasons for keeping records locked up, such as avoiding embarrassment. However, the Supreme Court of Ohio has ruled that records in this category may be withheld as long as there is the possibility of litigation. The decision has been interpreted very liberally by many police departments, despite language in several subsequent decisions narrowing the original opinion. This section can be subject to abuse by overzealous protectors of records. If in doubt, then contact legal counsel for an up-to-date interpretation of this exemption.

- *Information pertaining to the recreational activities of a person under the age of 18* - This is information that is kept by a public office and would disclose the address or telephone number of the child or the child's

parent, custodian or guardian. It also protects Social Security numbers, birth dates and photographic images of the children, as well as children's medical information that might be held in the file.

- *Records whose release is prohibited by state or federal law* - This exception is much broader than it might appear to be because it incorporates all the other sections of Ohio and federal law that except records from public view. Most of the exceptions to disclosure are not contained in O.R.C. 149.43. There are dozens of exceptions scattered throughout the statutes. Examples: educational information on students in public schools and at any college or university receiving public funds; taxpayer records maintained by cities, villages and the state; records sealed by court order; records involving juvenile arrests if fingerprints or photographs have been taken; Social Security numbers; and federal and state income tax returns.

Other provisions of Ohio's "Open Records" Law

The burden is on the record-keeper to show why a public record should not be released. There are no "privacy" considerations to be balanced against the release of public records (unlike the Federal Freedom of Information Act, which *does* provide for such a requirement). One possible exception to this general statement is a 1994 decision by the Supreme Court of Ohio recognizing a federal constitutional right of privacy that had the effect of exempting the release of Social Security numbers of public employees found in their personnel files. A federal appeals court in Cincinnati ruled in 1997 that undercover police officers had the right to be notified in advance of any request for access to their personnel files. The three-judge panel found a federal right of privacy to be balanced against Ohio's open records laws. The implication seemed to be that police—at least those working undercover—might be able to get an injunction when confronted with a demand for access.

Personnel files of public employees are public record in Ohio with the limitations noted above. Some personal data such as Social Security numbers and home addresses and photographs may be redacted, but the files are otherwise subject to review.

If confidential information is mixed with public information, then the burden is on the public agency to remove the confidential material before releasing the public portion. Release may not be denied because of the mixed nature of the record.

There is no provision in Ohio law for requiring that any forms be filled out before records will be released. An agency may request that such a form be filled out but cannot insist on it before releasing a record.

Where one party to a lawsuit is a public agency, that agency cannot be bound by an agreement to keep the terms of a settlement secret.

A public agency cannot enforce an agreement to protect the copyright of software purchased or leased by the agency to operate its computerized records systems where access to the software is integral to a records request. For example, if a newspaper requests all the information in a public records database, and the only way that information is readable is through copying the software information management system, then the agency may not refuse to release such information, even if it means violating the purchase or lease agreement. It is the software company's obligation to protect its own copyright.

There is nothing in the Personal Information Systems Act, *Ohio Revised Code* Chapter 1347, that supersedes the Public Records Act. Nor is it a "privacy" act. The act was designed to protect individuals from excessive government record-keeping. (See <http://codes.ohio.gov/orc/1347>.)

Note: Despite the length of the preceding discussion, it is not an exhaustive explanation of the provisions of this statute.

Reporters should consult the text of the statute at <http://codes.ohio.gov/orc/149.43>.

Also check on the website maintained by

the Ohio Attorney General's Office (www.ohioattorneygeneral.gov) for changes in the law and recent court opinions.

Access to Meetings

The Open Meetings Act, also known as the Sunshine Law, was adopted in Ohio in the mid-70s in the wake of the Watergate disclosures as part of a national movement to make government more accessible and accountable. Journalists have encountered two problems associated with the current Act: 1) charter cities may alter the provisions through a charter amendment; and 2) the penalty provisions for violations are cumbersome and thus rarely used.

The law created confusion among public officials at first because it seemed to cover every gathering of a majority of the members of the public body, even if they happened to be in a restroom at the same time. It was an overly broad reading of the statute, which defines a "meeting" as any "prearranged discussion of the public business of the public body by a majority of its members." Casual, social or chance gatherings are not covered by the statute. However, that characterization might change if public business is discussed.

Definitions

- *Meeting* - As noted above, a meeting is a specific event. However, the law does not require a specific topic to be discussed for the session to be considered a meeting. A retreat where members of several public bodies gathered to talk about a range of public issues was ruled a "meeting." If a majority of a public body attends an event where those present engage in discussions of public business, then it is a "meeting," even if those engaging in the discussions did not call the session. The statute requires the meeting to be "prearranged," so that a casual gathering of officials not called to discuss public business probably would not qualify. However, it is

not permissible to hold a series of gatherings with less than a majority of the public body to discuss the same topic. Such “round-robin” sessions violate the law. Conference telephone calls with a majority of members also are prohibited. (Note: Only members who are physically present at a meeting may vote.)

- *Discussion/deliberation* - These terms rarely are cause for much concern, but there have been a few court cases on the subject. A discussion is an exchange of comments by members of the public body and deliberations means consideration, through discussion, of an issue. Presentations to a public body, or conversations by employees of a public body, may not reach the level of discussion/deliberation.
- *Public body* - The law defines this term broadly. It has been held to include committees of a public body and even subcommittees. The statute exempts certain bodies. Often, search committees for public employees also constitute a public body and are subject to Ohio’s open meetings laws. [See *Ohio’s open meeting laws, Ohio Revised Code Sec.121.22 (D) and (E)*, at [http://codes.ohio.gov/orc/121.22.](http://codes.ohio.gov/orc/121.22)]

Provisions

- *Notice* - Anyone may request notice of all regular meetings, special meetings and emergency meetings, including time and place and, in some cases, the purpose of the meeting. For a “reasonable fee,” a person also may request that agendas be mailed in advance of the meeting.
- *Regular meetings* - The law requires that the public body establish a method that would allow anyone to determine when regular meetings are held. Courts have said, for example, that county commissioners cannot designate their meeting times as 9 a.m. to 5 p.m. during one or more days of the week and then actually gather whenever they please. The “regular” meeting requirement means

that meetings must be scheduled with a reasonable degree of precision.

- *Special meetings* - The same rule about establishing a method for the public to find out when and where such meetings occur applies, as well as a requirement that the purpose be revealed. Further, the body must give 24 hours’ advance notice to all news media that have requested it.
- *Emergency meetings* - No advance notice is required where immediate action is necessary, but the body must provide immediate notice to news media members who have previously requested that they be notified.
- *Minutes* - These must be prepared promptly for all public meetings, including those held in executive session. The executive session meetings do not have to detail matters that legally may be discussed in private, but must reflect the general subject matter. The Supreme Court of Ohio *has* ruled that meetings of public bodies must reflect the substance of the discussion and *not* merely record any votes taken. The Court leans to having minutes be more inclusive instead of less inclusive. The Court has indicated that the more detail in minutes the better.
- *Votes* - All votes must be taken in open meetings. Evidence of a vote taken in executive session may be used to invalidate the public action.
- *Executive sessions* - The law sets out six specific exceptions that permit sessions to be held in private, with only the members of the public body and those they invited allowed to be present. (The exceptions are discussed below.) Such sessions may only be held after an open meeting is held first. Typically, where a body intends to hold an executive session, it will call a regular meeting and then adjourn to executive session. The specific purpose of the session must be announced, and a roll call vote taken to adjourn to the private session. After the executive session, the public body must return to open session

before an adjournment. Sometimes, a body will return to open session to vote on what was discussed in executive session.

Exceptions

- *Personnel* - Hiring, firing, promoting, demoting or compensating public employees may be discussed in private. Also, considering charges against a public official/employee may be held in private unless the person requests a public hearing. This exception applies only to specific personnel matters, not just any matter that might affect personnel. One court overturned a school board's attempt to discuss the budget in private, rejecting the argument that budgetary issues affected personnel. This is the most commonly used exception to an open meeting and probably the most commonly abused. The exceptions are narrowly construed by courts and the open meetings laws are liberally construed in favor of openness.
- *Property* - Discussions about buying property (real and personal) or discussions about selling property by competitive bid may be held in private, if public discussion would give someone an unfair advantage.
- *Legal* - Private conferences with a public body's attorney concerning *pending or imminent litigation* are permitted. Conferences with an attorney for a potential litigant are not covered by this exception. Also, it is not appropriate, in this form of executive session, to ask general questions of the body's attorney.
- *Bargaining* - Getting ready for union negotiations, reviewing current talks or actually negotiating may be carried on in private.
- *Miscellaneous* - Topics that other state or federal laws require to be kept confidential may be discussed in private.
- *Security* - Details of security arrangements may be discussed in private if public disclosure might result in a violation of the law.

Remedies

- *Injunction* - The law provides that a public body can be ordered to stop violating Sunshine Law provisions. This applies even if the public body only threatens (for example) to hold a private meeting in violation of the law. The law further provides that if the injunction is granted, the court also may order payment of attorney fees, court costs and a \$500 fine. (Note: If the court finds that the suit was frivolous, then it may award court costs and attorney fees to the public body.)
- *Civil suit* - The law holds that any action, resolution or rule adopted in violation of the statute is invalid. Practically speaking, however, this provision can be enforced only by filing a lawsuit and proving that the public body voted on an issue contrary to the notice, meeting or openness requirements of the statute. Often, requests for injunctive relief and for voiding previous "illegal" actions are combined in one lawsuit. If the court issues an injunction, the public body must pay a civil forfeiture of \$500 to the party seeking the injunction, and may also have to pay court costs and attorney fees.
- *Removal* - Any member of a public body who knowingly violates an injunction may be removed from office through a lawsuit brought by the county prosecutor or the attorney general.

Practical suggestions:

If a public body fails to follow the steps outlined above before going into a private session, publicly object and ask that your objection be made part of the minutes.

Advise the public officials that an executive session held illegally could result in any subsequent decision being ruled invalid retroactively to the illegal activity date, along with the payment of attorney fees, court costs and a civil fine if the case goes to court and the public body loses.

If you believe an executive session has been called improperly, then don't leave until you are asked. Leaving voluntarily might be viewed by a court as waiving your objection.

After the private meeting, request a copy of the minutes. Although the request may be oral, it is a better idea to put it in writing. Always wait for the body to come back into regular session before leaving; otherwise you might miss some action items.

Section III: Internet and Journalism

“The Internet had not been invented when the Constitution of the United States was ratified. Yet no rational jurist would suggest that the right to free speech does not apply to articles, blogs, or mere musings posted on the Internet.” – *State ex rel. Russo v. McDonnell*, 110 Ohio St.3d 144, 2006-Ohio-3459 at 66.

The material in Section III of this chapter, including statements of opinion and commentary on legal issues, was originally prepared by Neal Patel, counsel in the Intellectual Property Department and the First Amendment, Media and Advertising groups of the Cincinnati law firm of Frost Brown Todd LLC. He was assisted by Joanna Saul, a Frost Brown Todd summer associate and law student at Georgetown University Law Center. It was updated by attorney and former journalist Daniel F. Trevas of Nationwide, and reviewed by attorneys Jeffrey T. Cox, Robert P. Bartlett and Andrew J. Reitz of Faruki Ireland & Cox PLL. Opinions expressed do not necessarily reflect the policies or opinions of the Ohio State Bar Association.

The impact of the Internet on the practice of journalism has been and continues to be dramatic and far reaching. Where television, radio, and print publications suffer from limitations on subscribers, broadcast times or printable space, the Internet operates with no such boundaries on

membership, time and space. Where a journalist's ability to quickly research and report were often dependent on physically traveling to and sifting through reams of information, the Internet offers near instantaneous access to volumes of searchable information. More so than any other technological invention, the rise of the Internet has torn down the lines between traditional journalists (employed by newspaper, radio, or television outlets) and online (from individuals with a penchant for writing to entrepreneurs who have only sought to distribute their news online). Today, anyone with computer access can write and publish articles about current events.

As we consider the many benefits and drawbacks of the Internet, it is important to understand what has and has not changed from a journalist's perspective. This section of the chapter aims to provide journalists employed by traditional media outlets, online journalists, and individuals who blog or use social media an overview of the issues and nuances associated with using the Internet to research, obtain and distribute information. This section also provides some tips to avoid legal problems as well as resources for obtaining additional information.

Before continuing, it is important to note that these materials are intended to provide only basic legal information on major issues. It is not intended to and does not provide an exhaustive, complete discussion of all the laws referenced. Nor does it discuss all of the relevant laws and issues. In this area, the laws change and interpretations of existing laws evolve. So, readers should not rely on this information for anything other than an overview of certain legal issues. Readers should independently verify this information before acting on it in any important way.

The effect of the Internet on the law

The Internet is often described as a cultural and technological revolution, but in terms of the law, it is just another medium of communication to which many of the old laws still apply. If a defamatory statement is found in an online publication rather than a newspaper, it's still a defam-

atory statement. Traditional copyright laws apply to anything that is published on the Internet, as does the “fair use” exception. Privacy issues also abound on the Internet; thus, posting intensely personal information online is as likely to prompt legal action as printing it in the morning paper.

The Internet and social media sites like Facebook and Twitter are transforming the way information is developed and distributed. As of this chapter’s publication, Americans were spending a quarter of their time sharing information and comments online through social networks and blogs, a 43 percent increase since June 2009, according to the Nielsen Company. These forums can quickly turn any individual into an overnight worldwide celebrity as online readers and viewers can share comments and even engage the content creators with just a few simple strokes of the keypad. This immediacy has the effect of swaying the application of existing law.

One example of how the Internet is bringing news issues to media law came to light in Virginia. Outraged that Virginia clerks of courts were placing land records online without redacting Social Security numbers, Betty Ostergren, a well-known national advocate for information privacy, set up a website and started posting documents in a single Internet location, listing information from the land records, including the Social Security numbers as well as the names of those referenced in the document. The state attorney general charged Ostergren with violating a Virginia law prohibiting a member of the general public from revealing another person’s Social Security number. Ostergren challenged the law and noted that Virginia had underfunded attempts to redact Social Security numbers from documents before they were posted online. The Fourth District Court of Appeals ruled that Ostergren could not be punished under the Virginia law. This, in turn, opened up concerns about how states may be unintentionally aiding in identity theft and other privacy violations by trying to support efforts to make public documents accessible. (See *Ostergren v. Cuccinelli*, 615 F.3d 263, 2010.)

The rapid dissemination of information through the Internet also has been argued as a basis for limiting the documents that are filed with a court. Before the advent of the Internet, such documents were generally inaccessible to anyone other than those involved in the case or closely following the proceedings. Now, because such information is in the court record, often-sensitive material may be posted online and made public. A prime example of this is the case of I. Lewis “Scooter” Libby Jr., who became the only White House official convicted in the highly controversial case of the release to the media of the name of a confidential CIA agent. This case highlights the concerns associated with online access to documents filed in a case. In the Libby case, the issue was whether to release the more than 150 letters, some from former high-ranking government officials like Donald Rumsfeld, John Bolton and Paul Wolfowitz, which were written to the judge presiding over Libby’s sentencing hearing. Libby’s attorneys argued that, if the letters were released, they likely would be published on the Internet and expose their authors to discussion and even ridicule, and that such ridicule would make it harder, in the future, for the court to get information that would assist in the sentencing process. The court rejected the arguments and released the letters. Not surprisingly, the letters were immediately circulated on the Internet and used by some bloggers as a basis to mock some of the authors.

Another emerging legal question is whether hyperlinks to libelous statements on a website can be considered “republication” of the statement. This issue was considered under California law. In *Sundance Image Technology, Inc. v. Cone Editions Press, Ltd.*, Sundance filed suit over libelous statements Cone had apparently posted on the Internet about Sundance’s products. In California, as in many states, an action for libel must be brought within one year of the date that the statement is first published. Under the single publication rule, any single edition of a newspaper or book gives rise to only one cause of legal

action, regardless of how many copies are distributed. In this case, Sundance missed the initial filing deadline and attempted to argue that subsequently created links to the statements should be considered as a “republishing” by Cone. Sundance argued that the hyperlinks referencing the statement provided an entirely new cause of action with a new filing deadline. The court rejected Sundance’s argument, finding that “linking is more reasonably akin to the publication of additional copies of the same edition of a book, which is a situation that does not trigger the re-publication rule.” It should be noted that similar arguments have been made in other cases around the nation, with and without success. In addition, as discussed below, Section 230 of the Communications Decency Act of 1996 (CDA) provides certain protections for interactive computer service providers when publishing the statements of another person.

Section 230: A powerful new law

Though many of the same old laws apply to the Internet, there are new laws that have been developed to protect (and restrict) certain activities typically taking place over the Internet. For example, Section 230 of the CDA states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” In *Carafino v. Metroplash.com, Inc.*, the Ninth Circuit Court of Appeals stated that, in enacting this law, “Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party.” This law overrides all laws that are inconsistent with this provision, except for criminal and intellectual property laws or the electronic communications privacy law. The CDA has been used to protect website operators, online publishers, and other providers of content over the Internet against defamation, negligent misrepresentation, breach of contract, intentional nuisance, violations of

federal civil rights and other claims. As a result, journalists using the Internet are provided a level of protection previously not afforded in traditional print, television and radio outlets.

In addition, federal law affords journalists using the Internet some additional protections. However, in the end, the general rule for a journalist is as follows: Nearly every substantive law previously followed when practicing journalism still should be followed in the context of the Internet.

Who is a “journalist” and why does it matter?

In the past, one could recognize the journalist as a reporter on the evening news or the person carrying a press card and notepad. Thanks in part to the Internet, it isn’t that easy to identify journalists anymore. The Internet has renewed long-standing debates over whether a journalist is a journalist only if he or she is working for or connected to a traditional media outlet (such as a newspaper, television/radio station, press association, etc.). Over the years, many people not employed by traditional news institutions (including such people as book authors, documentary filmmakers, academics, freelance reporters, newsletter editors and talk-show hosts) have tried, with mixed success, to qualify as journalists for legal purposes. Given the proliferation and independence of online publications, and the relative ease with which a person can publish “news” on the Internet, efforts to better define the term “journalist” are underway like never before.

Why does it matter? Across the country, journalists are, to varying degrees, afforded a very important privilege over ordinary citizens: the right to choose not to disclose certain information during government proceedings. Each individual state has the right to define who should be granted that “privilege” right for purposes of state law. States providing this privilege have justified doing so by using the rationale that journalists would otherwise be unable to obtain relevant information unless they agreed to withhold sources or agreed

to publish only parts of the information their sources provide.

Forcing journalists to testify about or reveal their sources, or provide other confidential information would have a chilling impact on the free flow of information that is protected under the First Amendment. Therefore, definition of “practicing journalist” determines who is covered under the state’s journalists’ privilege statute (commonly called the “shield” law). Determining who qualifies as a journalist can have far-reaching impact.

Ohio’s shield laws, set forth in Chapter 2739 of the *Ohio Revised Code* (<http://codes.ohio.gov/orc/2739>), generally apply to persons “engaged in the work of, or connected with, or employed by” a newspaper, press association, radio broadcasting station or television broadcasting station. The law says that:

“...for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall [not] be required to disclose the source of any information . . . obtained . . . in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof.”

As with many shield laws around the country, Ohio’s law is somewhat dated and the text does not reflect the changing nature of journalism or current technology. This presents ambiguity and uncertainty when one attempts to apply the law in the context of the Internet. Indeed, it is unclear whether Ohio’s shield law covers all Internet journalists and electronic news outlets, or if it affords any protection for those who post print blogs, video blogs or podcasts, or utilize other digital means to disseminate “news” through the Internet.

Ohio law has not addressed whether to extend “shield” protection to a journalist writing for an exclusively online news site like CNET News.com or Slate.com. As these types of online publications increasingly move away from looking like an electronic version of a print newspaper or magazine, the application of Ohio’s shield laws becomes much less predictable. For instance, it is unclear how Ohio law would treat someone like Josh Wolf, a blogger who was jailed for more than 200 days for refusing to testify about and provide the federal government with video footage taken during an anarchist demonstration in California. Some would argue that Wolf does not qualify as a journalist under the technical definition of Ohio’s law because he is not employed or in any way connected with a traditional media outlet, but advocates of shield law protection would argue that he falls within the intent and meaning of the law because he was *practicing* journalism.

To bring more uniformity to the issue, there have been efforts in recent years to enact a federal shield law that would, with some exceptions, generally protect those persons engaged in journalism from testifying, providing documents or disclosing sources. These shield law proposals have generally defined “journalism” as “gathering, preparing, collecting, photographing, recording, writing, editing, reporting or publishing news or information that concerns local, national or international events or matters of public interest.

It is important to note that a proposed federal shield law would not override Ohio’s shield laws. The proposed law would only afford an Ohio journalist protection in proceedings under federal law, but leave in place the application of Ohio’s shield law in state proceedings. Such a proposed federal shield law would do what many have advocated for some time: define a journalist as any person engaging in journalism. So, in contrast to many state shield laws (such as Ohio’s), which tend to focus on the medium of communication or the employer (*e.g.*, print journalism or a particular newspaper), the federal law would focus on the

actions of the individual (*e.g.*, the journalist reporting news).

The debate over who should be covered by shield laws started long before the Internet became a viable medium for delivering news. While the development of the Internet has served to revive these discussions, it has not yet led to either legislation or case law that conclusively resolves the issue of who should be covered as journalists in Ohio—nor is it likely to in the near future. In the absence of a consistent state and federal law on the subject, there simply are no legal guarantees for Ohio’s journalists—whether traditional or non-traditional—when it comes to protecting confidential information and sources. For this and other reasons, journalists should be extremely careful when granting confidentiality to sources.

What state’s law applies?

As discussed above, using the Internet while doing something questionable will not protect a journalist from any existing relevant laws. However, the ability to widely disseminate information without regard for territorial boundaries raises some level of uncertainty as to whose law applies to the questioned conduct. For instance, what happens when a journalist writes an article in Ohio that is read in California and defames a California resident? Is the journalist subject to California’s laws, which may be drastically different from Ohio’s? Must a journalist be expected to conform to every state’s laws? Such questions do not have definite answers.

When litigious material travels from one state to another, it can be very difficult to determine which state has jurisdiction (meaning where you can be sued). Determining jurisdiction can be a thorny issue that stumps many a seasoned lawyer, let alone the average Internet journalist or blogger. Under traditional libel laws, a party can be sued in whatever location the libelous material is circulated (see *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 [1984]). Tests for invoking jurisdiction in the Internet context continue to shift. However, under the *personal jurisdiction doctrine*, a party

can only be sued in a court where he or she has “purposefully availed” himself of that jurisdiction (for example, in the location where a magazine has been actively marketed and sold). When applying this doctrine to the Internet, courts have tried to draw a distinction between “active” websites that actively engage users and “passive” websites or publication mediums that do not. To paraphrase the Franklin County Appellate Court in *Blue Flame Energy Corp. v. Ohio Department of Commerce*:

A passive website is one that does little more than display information and does not serve by itself to subject a party to a court’s jurisdiction. But an interactive website—one through which the party engages in knowing and repeated contacts with users—may be sufficient to show “purposeful availment” to the courts and laws in that user’s area. Websites that fall in between will be judged by the level of interactivity and the commercial nature of the exchange.

Internet news articles that do not allow for any reader interaction would seem to fall into the “passive” website category. But even in the context of passive websites, journalists can potentially be subject to another state’s laws if the website or content is clearly directed at the residents of that state.

With the proliferation of interactive tools, the line between passive and active websites may well be eroding. It is likely that something more than allowing readers to post comments would be needed for another state’s court to claim jurisdiction. At this point, there is no consensus on the subject because these questions are highly fact-dependent and determined on a case-by-case basis. Recent cases have started to develop case law around jurisdiction and the Internet, however. The Seventh District Court of Appeals recently ruled that Arizona-based GoDaddy, one of the nation’s largest providers of domain names, can be sued by a Chicago company in Illinois court because its extensive national advertising reaches Illinois residents on a regular basis and therefore is sufficiently directed at residents of that state.

(See *uBID, Inc. v. The GoDaddy Group, Inc.*, No. 09-3927 [7th Cir. Sept. 29, 2010].)

What about other countries? With the Internet has come the rise of “libel tourism.” For example, some authors and online publications have been sued in British courts where the thresholds for successfully arguing defamation are far lower even if only a few of their books were sold in the United Kingdom and only a few readers visited the website. Following the lead of states that adopted their own protections, Congress in 2010 passed the SPEECH Act (HR 2765). The SPEECH Act prohibits a domestic court from recognizing or enforcing a foreign defamation judgment from a court that does not provide at least the same level of freedom of speech and press as do the U.S. Constitution and the state constitution. The SPEECH Act provides an additional protection that arose from a growing concern regarding libel tourism. However, journalists who are practicing journalism without the benefits of a traditional media outlet double-checking for potential libel might have to defend a legitimate libel claim in a foreign nation and would be held to United States legal standards.

Anonymous posting

The interactive nature of online communications has increased the opportunity for anonymous authors to reach large audiences. This is commonly seen in two areas: online blogs and “comments” sections that frequently accompany articles appearing in (for example) the online version of a newspaper. Comments following such an article are written by anonymous individuals other than the article’s author. Courts have recognized that the right to speak anonymously or by using a pseudonym (such as a username) is protected by the First Amendment right to free speech. While not all speech is protected by the First Amendment, courts frequently adopt standards before deciding to unmask an anonymous Internet speaker. Those who are harmed by unlawful anonymous speech have a right to seek compensation for their injury in much the same way individuals can seek com-

penation for injury caused by the unlawful actions of traditional journalists. For example, an anonymous speaker who makes a defamatory statement, infringes a copyright or invades someone’s privacy is not immune from the law. Therefore, Internet Service Providers (ISPs), online publications and sites allowing the posting of anonymous speech may receive subpoenas or other discovery request seeking to unmask an anonymous speaker.

At the time of this handbook’s publication, Ohio had not had a significant case that resulted in the development of standards for determining when a website must reveal the identity of an anonymous speaker. However, courts in various jurisdictions have been adopting tests that, generally, strike a balance between the right to free speech and the right of injured parties to seek damages for harm caused by anonymous posters.

Several courts are following some variation of a “test” developed through a 2005 Delaware Supreme Court case, *Cahill v. Doe*. The test requires that, in order to unmask the identity of an anonymous poster, a party must: 1) produce for a court sufficient evidence to establish the legal elements of the party’s claim of defamation, invasion of privacy, etc. and 2) to demonstrate that the party made other attempts to ascertain the identity of the speaker. If the court determines that there is likely enough evidence to prove the claim, then the court will issue a subpoena or a discovery request requiring the web host to unmask the anonymous poster.

Things to keep in mind

1) *The Internet is a large slush pile of information.* For all its benefits, the relative ease with which anyone can post information on the Internet should cause every reader to question, and then question some more. Journalists have long been expected to follow a stringent code of journalistic conduct requiring them, for example, to use original sources and documents whenever possible, attribute information gathered to published sources, use multiple original sources

of information, and to check every fact reported. When considering information derived from the Internet, however, upholding these standards can be daunting (for example, how do you verify a posting from an individual who lists only a first name?). However, within the context of Internet constraints, upholding these standards is more important than ever and will go a long way toward helping journalists avoid legal entanglements.

2) *Journalists must consider the consequences of anonymous posting and blogging.* The debate over whether bloggers are journalists continues, but what must journalists consider when deciding to create a blog?

First, journalists who blog anonymously, or under pseudonyms, may well have a right to remain anonymous in most instances, but this right is not absolute. The U. S. Supreme Court, in *Talley v. California*, recognized that anonymous speech deserves First Amendment protection. While the First Amendment will not shield an anonymous blogger from liability in posting defamatory statements, the issue is the ability of the law to protect a person's First Amendment right to anonymous speech while preserving the rights of the defamed to seek redress. Though this issue has not been addressed in Ohio, several courts are following standards similar to the *Cahill v. Doe* test described earlier. This raises another important caution: The ability to remain anonymous is only as good as your ISP's motivation to keep you anonymous. An ISP may reveal your identity to avoid litigation.

Second, if you are a journalist posting a blog, make sure your employer knows and approves. Though a specific case has not arisen in Ohio as of the date of this publication, cases around the nation have indicated that blogging can cost an employee his or her job. Courts across the nation have upheld decisions by businesses and governments to fire employees for postings on websites that were in violation of the organization's personnel policies. From a practical standpoint, journalist bloggers should be aware of their company's policies on the subject; many news

organizations impose the same level of pre-publication review on blogs as on published articles.

3) *Don't insult the president of Zimbabwe.*

The risks associated with being subject to another state's courts and laws are discussed above. Journalists should bear in mind that jurisdictional issues come into play on an international level as well. For example, what if an Internet journalist publishes an article insulting the president of Zimbabwe? While insulting the president of the United States is a hobby for some, insulting Zimbabwe's president is apparently a criminal offense (Zimbabwe, Public Order and Security Act 2001). Under traditional methods of publishing news, the likelihood of a local newspaper article making its way to another country was somewhat remote. With the Internet's distribution network, however, the likelihood of such a story reaching another country is hardly remote. Can a journalist who insults the president of Zimbabwe reasonably expect to end up in a Zimbabwe jail? Though international law can be a very murky area, the short answer is: probably not. Zimbabwe would have no authority to send someone to arrest the blogger in the United States for extradition back to Zimbabwe. And the United States would not likely extradite the author to Zimbabwe to face any such charges. Of course, if the author decides to travel to Zimbabwe, then he or she had better beware.

4) *Be aware of the Digital Millennium Copyright Act (DMCA).* Enacted in 1998, the DMCA criminalizes the production and dissemination of information that can be used to circumvent security measures intended to control access to copyrighted works. It also criminalizes the act of circumventing such controls, even when there is no infringement of copyright itself. Many social media websites also make it clear in their terms and conditions that their software and security controls may not be manipulated. Further, the DMCA provides a safe harbor for ISPs from copyright violation claims provided they follow certain guidelines and promptly remove infringing materials once they receive notice of the infringe-

ment from a copyright holder. Many sites have a section that explains their “takedown” policy and how to file a complaint.

Though there are many aspects of the DMCA that can potentially impact journalists using the Internet, there are a couple that deserve to be highlighted. First, journalists should take care not to circumvent Digital Rights Management (DRM) controls in the process of gathering news, and they should be careful when writing about technology, services or products that can be used to circumvent DRM controls. For example, publishing an online news story with links to DRM circumvention technology can be risky, as can accessing an online database containing copyrighted material with a password provided by a confidential informant. Each is potentially a violation of the DMCA and subject to criminal prosecution. Second, it should be noted that fair use of copyrighted materials can be somewhat thwarted under the DMCA. Seeking safe harbor protection under the DMCA, ISPs typically do not battle or question copyright holders who claim that their copyrighted work is being used without authorization. In other words, news articles and other postings legitimately using copyrighted information (including videos) can be pulled without any formal process or before the author even has a chance to respond. While there is a process that can be followed to challenge the removal, journalists should be aware of the DMCA’s impact in this area.

Resources

Electronic Frontier Foundation: www.eff.org.

“Unintended Consequences: Seven Years under the DMCA” (v.4) (April 2006).
<https://www.eff.org/deeplinks/2006/04/unintended-consequences-seven-years-under-dmca>

Gant, Scott. “We’re All Journalists Now: The Transformation of the Press and Reshaping of the Law in the Internet Age.” New York: Free Press, 2007.

McDonald, Stephen J. “Virtual Legality: An Overview of Your Rights and Responsibilities in Cyberspace,” <http://cio.osu.edu/policies/legality.html> (Last accessed on July 13, 2007).

Wikipedia: www.wikipedia.org

Media Law Resource Center: www.medialaw.org

First Amendment Center:
www.firstamendmentcenter.org

Papandrea, Mary-Rose. “Citizen Journalism and the Reporter’s Privilege,” March 19, 2007,
<http://lawdigitalcommons.bc.edu/lfp/167> (Last accessed July 24, 2007)

Citizen Media Law Project: www.citmedialaw.org

Section IV: Legal Contacts and Resources for Reporters

Also see web links on specific legal topics listed in and at the end of Sections I – III

SUPREME COURT OF OHIO

65 S. Front St. Columbus, OH 43215-3431
(614) 387-9000
www.supremecourt.ohio.gov

Public Information Officer
Chris Davey (614) 387-9250
email: C.Davey@sc.ohio.gov

Administrative Director
Steven C. Hollon (614) 387-9500

Clerk of Supreme Court
Kristina D. Frost (614) 387-9530

Attorney Services Division

Susan B. Christoff, Esq., director
(614) 387-9327
email: Susan.Christoff@sc.ohio.gov
Bar Admissions
Lee Ann Ward (614) 387-9340
email: BarAdmissions@sc.ohio.gov

Grievances & Discipline (Board of Commissioners)

Richard A. Dove, secretary to the board
Michelle A. Hall, senior staff counsel
65 S. Front St., 5th FL
Columbus, OH 43215-3431
(614) 387-9370

Office of Disciplinary Counsel

Jonathan E. Coughlan
250 Civic Center Dr., Ste. 325
Columbus, OH 43215-7411
(614) 461-0256 or (800) 589-5256

OHIO DISTRICT COURTS OF APPEALS

www.supremecourt.ohio.gov/JudSystem/districtCourts

OHIO TRIAL COURTS

Go to Ohio Clerk of Courts Association website:
www.occaohio.com. Choose county from statewide directory and link to clerk's office.

OHIO JUDICIAL CONFERENCE

(directory of state courts & judges)
65 S. Front St., 4th Fl
Columbus, OH 43215-3431
(614) 387-9750; (800) 282-1510
<http://ohiojudges.org>

OHIO ETHICS COMMISSION

(administers Ohio ethics laws)
30 West Spring St., L3
Columbus, OH 43215-2256
(614) 466-7090
www.ethics.ohio.gov

OPEN ONLINE

(public record searches; fee for services)
1650 Lake Shore Dr., Ste. 350
Columbus, OH 43204
(614) 481-6999 or (888) 381-5656
www.openonline.com

TEXT OF OHIO REVISED CODE

<http://codes.ohio.gov/orc>

OHIO PUBLIC DEFENDER

(criminal defense for indigents)
250 E. Broad St., Ste. 1400
Columbus, OH 43215
(614) 466-5394 or (800) 686-1573
Media inquiries: (614) 644-1587
Amy Borrer, public information officer
Email: Amy.Borrer@opd.ohio.gov
www.opd.ohio.gov

OHIO LEGAL ASSISTANCE FOUNDATION

(civil legal aid; administers IOLTA)
10 W. Broad St., Ste. 950
Columbus, OH 43215-3483
(614) 752-8919
email: mail@olaf.org
www.olaf.org

OHIO ATTORNEY GENERAL

30 E. Broad St., 14th Floor
Columbus, OH 43215
(614) 466-4986 or (800) 282-0515
www.ohioattorneygeneral.gov
Sunshine laws:
www.ohioattorneygeneral.gov/Sunshine.aspx

Ohio Law Schools

Capital University Law School
303 E. Broad St.
Columbus, OH 43215-3200
(614) 236-6500
<http://law.capital.edu>

Case Western Reserve University
School of Law
11075 East Blvd.
Cleveland, OH 44106
(216) 368-3600
<http://law.case.edu>

Cleveland State University
Cleveland-Marshall College of Law
2121 Euclid Ave., LB #138
Cleveland, OH 44115
(216) 687-2344
www.law.csuohio.edu

Ohio Northern University Pettit College of Law
525 S. Main St.
Ada, OH 45810-1391
(419) 772-3051 (dean's office)
Email: lawdean@onu.edu
www.law.onu.edu

The Ohio State University Moritz College of Law
55 W. 12th Ave.
Columbus, OH 43210-1391
(614) 292-2631
<http://moritzlaw.osu.edu>

University of Akron School of Law
150 University Ave.
Akron, OH 44325-2901
330-972-7331
www.uakron.edu/law

University of Cincinnati College of Law
Clifton Ave. and Calhoun St.
Cincinnati, OH 45221-0040
(513) 556-6805
www.law.uc.edu

University of Dayton School of Law
300 College Park
Dayton, OH 45469
(937) 229-3211
www.udayton.edu/law

The University of Toledo College of Law
2801 W. Bancroft, MS #507
Toledo, OH 43606-3390
(419) 530-2882
<http://law.utoledo.edu>

National Legal Resources

Supreme Court of the United States
One First Street, NE
Washington D.C. 20543
www.supremecourt.gov/publicinfo/publicinfo.aspx
Public information:
(202) 479-3211, reporters press 1

United States Courts
www.uscourts.gov

American Bar Association
321 N. Clark St.
Chicago, IL 60654-7598
(800) 285-2221; (312) 988-5000
740 15th Street N.W.
Washington, D.C. 20005-1019
(202) 662-1000
www.americanbar.org/aba.html

American Judicature Society
(background on judicial issues)
The Opperman Center at Drake University
2700 University Ave.
Des Moines, Iowa 50311
(515) 271-2281; (800) 626-4089
www.ajs.org

National Center for State Courts
(nationwide court data/statistics)
300 Newport Ave.
Williamsburg, VA 23185
(800) 616-6164
Media inquiries: (757) 259-1525
www.ncsc.org

Media Law Resource Center (MLRC)
520 Eighth Ave., North Tower 20th Floor
New York, N.Y. 10018
(212) 337-0200
www.medialaw.org

Bar Association Contact Information

American Bar Association (ABA)
(800) 285-2221
www.americanbar.org/aba.html

Ohio State Bar Association (OSBA)
1700 Lake Shore Dr.
Columbus, OH 43204
Mailing address:
P.O. Box 16562, Columbus, OH 43216-6562
(800) 282-6556 or (614) 487-2050
Fax: (614) 487-1008
www.ohioabar.org
Kenneth Brown, Director of Public & Media
Relations
(614) 487-4426 (direct line)
email: kbrown@ohioabar.org
Deborah Cooper, Public Information Manager
(614) 487-4425 (direct line)
email: dcooper@ohioabar.org

Metropolitan Bar Associations

Akron Bar Association
(330) 253-5007
Fax: (330) 253-2140
www.akronbar.org

Cleveland Metropolitan Bar Association
(216) 696-3525; (for media requests after
5 p.m., contact marketing/PR director at
extension 5000)
www.clemetrobar.org

Cincinnati Bar Association
(513) 699-1391
Email: info@cincybar.org
www.cincybar.org

Columbus Bar Association
(614) 221-4112
Fax: (614) 221-4850
www.cbalaw.org

Dayton Bar Association
(937) 222-7902
Media inquiries to William B. Wheeler, exec. dir.:
bwheeler@daybar.org
www.daybar.org

Toledo Bar Association
(419) 242-9363
Media inquiries to Jenna Grubb: (419) 244-1044;
jgrubb@toledobar.org
<http://toledobar.org>

Web Links:

From the OSBA's "Law You Can Use" column:

www.ohioabar.org/lawyoutocanuse (search by title or topic)

“Be Careful When Blogging”

“Federal Law Regulates Advertising”

“Law Gives Citizens Right to Attend Most Public Meetings”

“Privacy and Shield Laws Govern Press”

“Privacy Laws Govern Tape Recordings

“Public Records Are Not Always Accessible”

“Reading the Fine Print: Who Owns What on Popular Websites”

“Reporter's Rights to Keep Sources Confidential Unclear in a Changing Media World”

“What Is Commercial Speech?”

“What You Should Know about Copyright Protection and Infringement”

“What You Should Know about Defamation”

“What You Should Know about Ohio's Sunshine Laws”

From the Media Law Resource Center:

(information about journalist's privilege, libel and privacy)

www.medialaw.org

The International Forum of Responsible Media Blog (INFORM):

<http://inform.wordpress.com>

International Press Institute (IPI): www.freemedia.at

Media Legal Defence Initiative (MLDI – London, UK): <http://mediadefence.org>

Inter American Press Association (IAPA): www.sipiapa.com (English language option)

Reporters Committee for Freedom of the Press: www.rcfp.org

Committee to Protect Journalists (CPJ – Defending Journalists Worldwide):

www.cpj.org

A

ABSTRACT OF TITLE—A chronological summary of all official records and recorded documents affecting the ownership of (title to) a parcel of real property. *See* title, title examination.

ABUSE OF PROCESS—The improper use of court process (orders of a court such as a subpoena or summons). *See* citation, service of process, subpoena, summons, warrant.

ABUSED CHILD—Under Ohio law, a minor (usually defined in the law as a person who is under the age of 18 or a physically or mentally challenged person under the age of 21) who has been purposely injured or endangered may be considered an abused child. The abuse can be physical, emotional or sexual. *See* child endangerment, neglected child.

ACCELERATION OF PAYMENTS—The provision in an installment contract under which all unpaid installments are immediately due and payable upon the debtor's default (failure to make a payment). Consumer transactions are governed by a variety of laws, including the Ohio Retail Installment Sales Act and the Fair Debt Collection Practices Act, which may affect retailers' rights and obligations in collecting consumer debt.

ACCEPTANCE—In contract law, the acceptance of an offer, consisting of some outward expression of agreement. Acceptance is one of the three basic requirements for a valid contract; the others are an offer and consideration. *See* consideration, contract, offer.

ACCIDENT REPORT—The written report of a traffic accident. Aside from whatever report may be filed with the police, so long as both drivers are insured, Ohio's financial responsibility law no longer requires the drivers to file a report with the Bureau of Motor Vehicles (BMV). However, if a driver believes that the other driver is not insured, he or she has six months following the accident within which to file a report with the BMV (Form 3303), stating that belief. Thereafter, the BMV will investigate the insurance status of the second driver. Forms for this report may be obtained from, and filed with, any law enforcement agency. *See* financial responsibility law.

ACTUS REUS—Literally, "guilty act." Generally, no crime occurs unless a guilty act (the *actus reus*) is done with a guilty mind (the *mens rea*). *See* culpable mental state, *mens rea*.

ADEQUATE YEARLY PROGRESS (AYP)—A school accountability system under the No Child Left Behind Act that seeks to narrow the achievement gaps among students by requiring schools and districts to report achievement ratings of state-developed annual goals to the state. The achievement ratings, gathered through the use of a statewide assessment, determine how well schools are performing.

ADMINISTRATOR—In probate law, a person appointed by the probate court to settle the estate of a person who has died. His or her duties are essentially the same as those of an executor. An estate administrator is a fiduciary, meaning that he or she is authorized to act on behalf of another and is entrusted to properly handle another's estate. Administrators are appointed when there is no will, or when there is a will, but the previously appointed executor has died, resigned or has been removed by the court. *See* executor, fiduciary, probate, will.

ADMINISTRATIVE LAW—Written rules adopted by, and legal interpretations issued by, various government agencies (such as the governmental bodies of a city, county, state or federal government) under limited authority granted by legislative bodies. Administrative laws have to do with rules, regulations, applications, licenses, permits, available information, hearings, appeals and decision-making. Examples of administrative agencies authorized to create administrative law are the Federal Aviation Administration (FAA) and the Ohio Liquor Control Commission. Administrative rules differ from agency to agency and are not usually found in the statutes, but only in those regulations themselves. A member of the public must exhaust all administrative remedies (must take every step, including appeals within the agency and its system) before challenging an administrative ruling in court.

ADULT—For most purposes under Ohio law, a person age 18 or older.

ADVANCE DIRECTIVE—A document that conveys an individual's wishes about medical or end-of-life treatment *before* such treatment may be needed. Examples include the living will, the durable power of attorney for health care and the "Do Not Resuscitate" (DNR) order. *See* Do Not Resuscitate (DNR) order, durable power of attorney for health care, living will.

ADVERSARY SYSTEM—An approach to law in which a trial is viewed as a contest between opponents, each of whom has the burden of establishing his or her own case. The adversary system is a major element of the Anglo-American legal system. *See* burden of proof.

ADVERSE POSSESSION—The transfer of title of real property from its original owner to one who, although not an owner, actually occupies the property (that is, possesses it adversely to the owner) continuously for 21 years, provided the occupation is obvious and the owner does nothing significant to assert his or her rights during that time. In the same way, adverse, regular and long-term use of another’s property—short of occupation—may give rise to the user’s right to continue to use the property, by operation of the doctrine of prescription. In lay terms, adverse possession is similar to “squatter’s rights.” *See* rule against perpetuities.

AFFIRMATIVE DEFENSE—Evidence brought by a defendant that, if found credible, negates criminal or civil liability, even if the defendant is determined to have committed the alleged acts. Examples of affirmative defenses in criminal law are self-defense, entrapment and insanity. In a civil law case, assumption of risk may be an affirmative defense for a negligence charge, and fraud by the plaintiff may be a defense in a case for breach of contract. In both criminal and civil cases, these defenses are called affirmative because the defendant must take the initiative to prove them. The defendant has the burden of going forward with the evidence and the burden of proof by a preponderance of the evidence. *See* burden of proof, evidence, degree of proof.

AGE CERTIFICATE—*See* schooling certificate.

AGENT—One who acts for another. For example, “agent” describes someone who is named to act for another through a power of attorney or in real estate or insurance matters. In employment law, an employee may be considered an agent of an employer for liability purposes (since, according to the rule of *respondeat superior*, “The master must answer”). *See* *respondeat superior*, attorney-in-fact.

ALIBI—Literally, in another place. As used by a person accused or suspected of a crime, an alibi provides evidence that the accused was not present when the crime was committed. *See* affirmative defense, evidence.

ALIMONY—*See* spousal support.

ALTERNATIVE DISPUTE RESOLUTION—*See* dispute resolution.

ANNUAL PERCENTAGE RATE (APR)—The cost of credit expressed as a yearly percentage rate. The APR of a particular contract is derived from a formula that relates the finance charge (the actual dollar amount that credit will cost a buyer) to the amount financed (the actual dollar amount of credit provided to, or on behalf of, a buyer). The APR, finance charge and amount financed must be disclosed in most

consumer transactions by authority of the federal Truth in Lending Act.

ANNULMENT—A legal declaration that a marriage is void, that is, to declare that the parties were never validly married. A marriage may be annulled for reasons including, but not limited to, the following: because a party was underage or mentally incompetent, or because consent to the marriage was obtained by fraud or force. In an annulment proceeding, the court can determine support and allocate parental rights and responsibilities, as in a divorce case. Annulment does not affect the legitimacy of children.

ANONYMOUS POSTING—Comments following published articles that are written by anonymous individuals other than the article’s author. Anonymous posts are commonly seen in online blogs and “comments” sections that frequently accompany articles appearing on the Internet (for example, in the online version of a newspaper).

ANSWER—In civil law, an official document filed with the court in which the defendant responds to the plaintiff’s complaint by admitting or denying the plaintiff’s allegations. *See* complaint, pleading.

APPEAL—A procedure in which a party to a legal proceeding asks a higher court to reverse or modify the judgment or other final order of a lower court or of an administrative agency. Appeals generally must be made on the ground that the lower court misinterpreted or misapplied the law, rather than on the ground that the lower court made an incorrect finding of fact. *See* court of appeals, harmless error, plain error.

APPELLANT—The party who appeals the judgment or final order of a court or administrative body.

APPELLEE—The party against whom an appeal is taken.

ARBITRATION—A voluntary process in which a third party neutral, the arbitrator, hears the facts of the case and renders a decision that may be binding upon the parties. Parties may agree to arbitration in a contract or after the dispute arises. Court-ordered arbitration in Ohio is mandatory and non-binding. Arbitration is less formal than a court or jury trial. *See* dispute resolution.

ARRAIGNMENT—In criminal procedure, a (usually brief) proceeding during which the court confirms that the accused person understands the charge and his or her rights as a defendant. During this proceeding, the court also takes the accused plea to the charge and sets bail if appropriate. If the charge is a felony, the arraignment is usually a separate proceeding before trial. If the charge is a misdemeanor, the

arraignment is usually the initial step in the trial itself. *See* bail, charge, felony, misdemeanor.

ARREST—The process of placing a person in legal custody or otherwise legally restricting a person’s freedom. Usually an arrest involves a person accused of a criminal offense, but other persons also may be arrested: a material witness; the reputed father of an illegitimate child to further a lawsuit against him for child support; and a person charged with contempt of court.

ASSAULT—The criminal act of threatening or actually inflicting physical injury. *See* battery.

ASSUMPTION OF RISK—In tort law, one of the defenses to a lawsuit based on negligence. The defendant must prove that the plaintiff knew of the high risk involved in encountering the condition that was the cause of the injury, and went ahead anyway. In Ohio, this defense has been merged with the defense of comparative negligence in most circumstances. *See* comparative negligence, negligence.

ATTORNEY-IN-FACT—Someone specifically named by a person in a written power of attorney to act for that person in the conduct of his or her business. Also referred to as an agent. *See* agent, fiduciary, power of attorney.

B

BAIL—1) The pretrial release of an accused provided the court is satisfied that the accused will attend all court hearings. Where the accused is charged with a felony, bail may include conditions such as restrictions on travel and an order to stay away from the victim. 2) The deposit of money or property with the court, or the promise to pay or forfeit money to the court, designed to guarantee that the accused will appear at court for all proceedings. *See* bail bond, bail schedule, cash bond, personal recognizance.

BAIL BOND—A type of insurance policy that helps to ensure an accused will appear at court for all proceedings. The bail bond is posted with the court by a professional bail bondsman, who promises to forfeit a specified sum of money if the accused (the person giving bond) fails to appear in court as required. Payment of the cost of the bond is similar to the payment of an insurance premium. Usually, the cost of a bail bond is 10 percent of the face amount of the bond. None of the cost is refundable even if the accused appears as required.

BAIL SCHEDULE—A list of misdemeanor offenses and the dollar amount of the bail for each offense. Every court is

required to publish a bail schedule covering all misdemeanor offenses.

BAILIFF—A court official who acts as an aide to the judge. Generally, the bailiff’s duties include opening and closing each session of court and maintaining administrative control of the courtroom and the jury. The bailiff’s duties also may include escorting accused persons to and from court, calling and swearing in witnesses and other matters.

BALLOON NOTE—A promissory note requiring repayment in a series of small installments and a final, large installment (balloon payment) for the remaining balance. Ohio permits balloon notes in consumer transactions only if the note specifically allows the buyer to refinance the balance due on the final installment at the same, or better, terms as the small installments. *See* promissory note.

BANKRUPTCY—A legal process designed to help consumers and businesses eliminate (“discharge”) their debts or pay their debts in an orderly way under the protection of the U.S. Bankruptcy Court. There are four types of bankruptcy, named for the chapters in the Bankruptcy Code that describes them: Chapter 7, Chapter 11, Chapter 12, and Chapter 13. The type best suited for a business or individual depends on the nature of the debts and the nature and value of assets.

BATTERY—The unlawful touching of another, as, for example, in the crime of sexual battery. Under the Ohio statutes, assault combines the elements of traditional assault and traditional battery. *See* assault.

BEQUEST—A gift of personal property made in a will. *See* personal property, will.

BEYOND A REASONABLE DOUBT—The highest degree of proof: proof of such character that an ordinary person would be willing to rely and act on it in the most important of his or her own affairs. In a criminal case, it is necessary for the prosecution to prove each element of the crime charged beyond a reasonable doubt—that is, so that the jury is firmly convinced of the defendant’s guilt. If the jury believes that the defendant *probably* is guilty, but they have a reasonable (not merely speculative) doubt about it, they must find the defendant not guilty. *See* crime, degree of proof, evidence.

BIGAMY—Having more than one wife or more than one husband at the same time. A married person who knowingly enters into another marriage is a bigamist. Bigamy is a crime that automatically makes any later marriage(s) invalid. Ohio law permits the injured party to get a divorce or annulment, which confirms the invalidity of the marriage and helps to resolve questions of property or support. *See* annulment, divorce.

BILL OF INFORMATION—*See* information.

BINDOVER—To hold for trial or for further inquiry. For example, after a preliminary hearing in a felony case establishes probable cause to believe that the accused committed the crime charged, the municipal court or county court binds over the accused for indictment by a grand jury. Also, the transfer of a child from juvenile court to a common pleas court for trial and punishment as an adult in serious cases and under limited circumstances is often called a bindover.

BLENDED SENTENCE—A sentence imposed by a juvenile court that blends a juvenile disposition and an adult sentence for certain serious youthful offenders (SYOs). In imposing a blended sentence, the juvenile court first gives a juvenile disposition (for example, a term in an Ohio Department of Youth Services facility). The court then gives a sentence as if the offender were before an adult court, and then must suspend the adult sentence. If the offender completes the juvenile disposition without serious incident, that is the end of the sentence. However, if the offender commits certain other offenses and engages in certain threatening conduct during the juvenile term, the court may invoke the adult sentence after a hearing on the new violation. *See* serious youthful offender.

BREACH—Breach is the violation of a duty and must be shown to have occurred for a tort suit to be successful. In contract law, a material breach is the failure of a party to perform one side of a contract that is serious enough to excuse the other party from performing his or her part of the contract. *See* contract, tort.

BROWSER—Computer software used to locate, retrieve and display content of World Wide Web pages.

BURDEN OF PROOF—The duty to establish a claim or defense. The burden of proof is on the party asserting the claim or defense. This requirement is a hallmark of the adversary system. If a complaining party fails to meet the burden of proof the complaining party must lose the case, at least as to that particular claim. If a defendant fails to meet the burden of proof as to a particular defense the defendant will not be relieved of liability by that defense, although he or she may win the case for another reason. *See* adversary system, degree of proof.

C

CAUSE OF ACTION—The legal basis for a lawsuit or a claim.

CAPITAL OFFENSE—A felony for which death is a potential penalty. *See* felony.

CASH BOND—A type of bail in which the accused in a criminal case deposits the full amount of bail in cash with the court. *See* bail.

CERTAINTY—In contract law, the requirement that the parties have a reasonably certain expectation concerning what they are to do, when they are to do it, and awareness of the consideration given by each party. Without such reasonable certainty, the contract will not be enforceable. *See* contract.

CHALLENGE—1) A request that a prospective juror be dismissed. 2) The right to make such a request. *See* challenge for cause, peremptory challenge, *voir dire*.

CHALLENGE FOR CAUSE—The right to have a prospective juror dismissed for any one of a number of good, specific reasons, such as friendship with one of the parties or an inability to follow and understand the proceedings. There is no limit to the number of prospective jurors who may be challenged for cause. *See* peremptory challenge, *voir dire*.

CHANGE OF VENUE—In criminal law, a change (from one county to another) in the place where the trial is held, in order to secure a fair trial. *See* venue.

CHARGE—1) The judge's instructions to the jury on its duties, the law involved in the case, and how the law must be applied. The charge is given just before the jury retires to consider its verdict. 2) The accusation in a criminal case.

CHILD ABUSE—*See* abused child.

CHILD CARETAKER AUTHORIZATION AFFIDAVIT—A document that allows grandparents to exercise parental authority over a grandchild who lives with them, including the ability to enroll the child in school, obtain school information and consent to school-related matters.

CHILD ENDANGERMENT—An act or omission that exposes a child to psychological, emotional or physical abuse. Child abuse based on the offense of child endangerment is normally a misdemeanor, but endangerment that results in mental illness or serious physical illness or injury is a felony. *See* abused child, neglected child.

CHILD NEGLECT—*See* neglected child.

CHILD SUPPORT—Money or property that the court orders a party to pay to care for his or her children in a lawsuit for

divorce, dissolution of marriage, annulment or legal separation. The Ohio Child Support Guidelines provide a starting point for the calculation of child support; the actual support may vary from the guidelines if special circumstances are proved. Child support differs from spousal support (formerly called alimony), which is the support of a former wife or husband. *See* spousal support.

CIRCUMSTANTIAL EVIDENCE—Indirect evidence, that is, evidence that does not directly prove a fact, but from which the fact can be inferred. *See* direct evidence, evidence, Rules of Evidence.

CITATION—A form of combined complaint and summons that may be used in minor criminal cases. It informs the defendant of the violation, and when and where he or she must appear in court. A traffic ticket is a form of citation. *See* summons.

CITIZEN’S ARREST—The arrest of an accused without a warrant by any person, upon probable cause to believe that a felony has been committed and that the person detained committed it. In Ohio, a citizen’s arrest is the only power of arrest conferred on the general public. Law enforcement officers have the same powers of arrest without a warrant as any citizen. Law enforcement officers have the additional power to arrest without a warrant for misdemeanors, and to execute arrest warrants issued for any offense.

CIVIL ACTION—1) A lawsuit based on a private wrong (such as a tort). 2) A lawsuit to enforce rights through remedies of a private nature. All legal proceedings that are not criminal actions are civil actions. *See* tort.

CIVIL LAW SYSTEM—The civil law system, based on the foundation laid by Roman law, is the most common type of legal system in the world, operating in Europe, Central and South America, and parts of Asia including China, parts of Africa. In the United States, the state of Louisiana operates under a civil law system, as does Quebec in Canada and Puerto Rico. Civil law is governed entirely by statutes (written laws), which aim to cover every area of the law. The goal in the civil law system is to find and apply a relevant statute to solve the legal problem. This is done in an “inquisitorial” fashion, in which the judge asks questions and is actively involved in solving the legal problem. *See* common law system.

CIVIL RULES—*See* Rules of Practice and Procedure.

CIVIL SERVICE LAWS—Federal and state civil service laws requiring that employment decisions be based on merit, not political considerations. After completing a probationary period, a civil-service protected employee usually cannot be fired except for a good reason (cause). Some jobs, including

high-level policy-making positions, are exempt from civil service laws. Those “exempt” or “unclassified employees” not protected by the civil service laws are higher-level employees who are appointed by the governor or state agency director and/or whose responsibilities include carrying out the policies of a current political administration.

CLEAR AND CONVINCING EVIDENCE—An intermediate degree of proof in a legal proceeding. Clear and convincing evidence is a lesser degree of proof than beyond a reasonable doubt, but a higher degree of proof than preponderance of the evidence. Clear and convincing evidence is required in a civil action to establish the right to an extraordinary remedy, such as an injunction. *See* beyond a reasonable doubt, degree of proof, evidence, extraordinary writ, preponderance of the evidence, writ.

CLOSING—The final step in the sale and purchase of real estate, in which a deed of title, financing documents, title insurance policies and remaining funds due are exchanged. *See* deed, real property, title.

CODICIL—An amendment to or addition to a will. A codicil must be executed with the same formalities as the will itself, that is, it must be in writing, dated, signed at the end by the maker (the testator) and acknowledged before at least two witnesses who must also sign the codicil. *See* will.

COGNOVIT NOTE—A promissory note (a written promise to pay money) in which the maker acknowledges a debt with the understanding that, if the debt is not repaid, a court may order a judgment against the maker without the usual notice or hearing. Cognovit notes are prohibited in consumer transactions in Ohio. *See* promissory note.

COLLECTIVE BARGAINING—Negotiations between an employer and a labor union regarding wages, benefits, hours and working conditions.

COMMERCIAL PAPER—A written document (such as a check or a promissory note) evidencing an obligation of one party to pay another.

COMMON LAW—The body of principles, rules and forms of procedure that is based on case law, that is, on the written opinions of judges in deciding specific cases. Common law is different from statutory law, which is created by a legislative body. *See* precedent, *stare decisis*.

COMMON LAW SYSTEM—Prevalent in the United States, the common law system was borrowed from England and relies heavily on previously decided cases. When deciding a case, courts in a common law system consider statutory law as well as past cases with fact patterns similar to the case at hand.

The way in which an earlier case was decided creates a legal “precedent,” which can be used to solve the legal problem. The common law system is often described as “adversarial” because the attorneys representing each side generally try to find legal precedents on behalf of their clients, while the judge functions as referee. Because the attorneys are charged with representing their own parties, whose interests generally oppose each other, their role is adversarial in nature.

COMMON PLEAS COURT—In Ohio, the trial court of countywide venue and jurisdiction to decide all levels of civil and criminal cases.

COMMUNITY CONTROL SANCTIONS—While often called “probation,” community control sanctions cover a wide variety of residential, non-residential and financial options that judges use in criminal sentencing, including traditional probation supervision and numerous other restrictions administered by the local court. Community control is used for felons when a prison term is not imposed. It is imposed on misdemeanants when a jail term is not warranted. Residential community control sanctions include community-based correctional facilities, halfway houses and others. Non-residential options include community supervision, drug and alcohol treatment, house arrest, electronic monitoring, community service and the like. Financial sanctions include fines, restitution and various reimbursements. Persons facing mandatory prison terms (*e.g.*, for murder, high level sex and drug offenses, felonies committed with firearms, certain repeat offenders, etc.) or mandatory jail terms (*e.g.*, for driving under the influence of alcohol or drugs) are not eligible for community control, other than financial sanctions. *See* sentence.

COMPARATIVE NEGLIGENCE—In Ohio, the law used to determine the degree to which a party is responsible for injury or loss. The law provides that: 1) where a plaintiff’s own negligence is more than 50 percent responsible for his or her injury or loss, the plaintiff cannot recover damages from the defendant; and 2) where the plaintiff’s own negligence is 50 percent or less responsible for his or her injury or loss, the amount of damages that the plaintiff can recover from the defendant will be reduced in proportion to the plaintiff’s negligence. *See* assumption of risk, negligence, tort.

COMPETENCE—Generally, the legal ability to act. For example, a contract cannot be enforced if one of the parties was not competent (in reasonable possession of his or her wits). *See* contract, guardian, probate division, will.

COMPETENCE TO STAND TRIAL—In criminal law, a requirement for prosecution. No defendant may be brought to trial if he or she is incapable of understanding the nature of the

criminal case and proceedings or of assisting in his or her own defense. In such a case, the court may order treatment and the probate court may issue civil commitment orders. If the accused is restored to competence, the criminal trial may proceed. *See* competence, crime, criminal insanity.

COMPLAINT—1) In civil procedure, a pleading that is a written statement of the facts on which the plaintiff’s cause of action is based. *See* pleading. All civil actions are begun by the filing of a complaint. 2) In criminal procedure, a statement of the facts that constitutes the offense charged, and is one type of formal accusation of a criminal offense. Criminal actions may be begun by the filing of a complaint or a bill of information, or by an arrest or an indictment. *See* arrest, indictment, information.

CONDOMINIUM—1) A hybrid form of individual and group ownership of real property in which the owner has title to space in a multi-unit building or group of buildings, and also (in common with the owners of the other condominium units) the common areas of the project, such as driveways and recreation and landscaped areas, which are managed by a homeowners’ or tenants’ association. 2) Real property so owned.

CONSIDERATION—In contract law, the valuable right, benefit, thing or promise that each party gives in return for the promise of the other party to the contract. An offer, an acceptance and consideration are the three basic requirements for a valid contract. *See* contract.

CONSTITUTION—The written document that is the fundamental law of a nation or a state. The United States Constitution is the fundamental law of the nation. It outlines the federal government’s structure and powers and establishes basic law in the United States. Similarly, the Ohio Constitution establishes basic law for the people of Ohio. Should a conflict arise between the state and federal constitutions, the U.S. Constitution takes precedence.

CONTEMPT OF COURT—Any act or omission calculated to hinder a court in administering justice, or to compromise a court’s dignity or authority. Direct contempt is an act, usually of a disruptive nature, committed in a courtroom or in the presence of a judge. Indirect contempt is, in general, the failure or refusal to obey a lawful order of the court. Both kinds of contempt may result in criminal penalties.

CONTIGUOUS SCHOOL DISTRICT—Refers to a school district that geographically touches another school district. For purposes of school enrollment, a child may attend a contiguous school district without tuition payment as long as the

residential district of the child's parents has an open enrollment policy.

CONTINGENT FEE—A lawyer's fee that is dependent (contingent) on a recovery being obtained for the client. If there is no recovery, there is no fee, although the client is or may be liable for expenses. Often, the fee is calculated as a percentage of the amount recovered.

CONTINUANCE—A postponement of a legal proceeding. In general, continuances are granted only for good cause, such as the illness of counsel or a party, or the unavailability of a witness.

CONTRACT—A legally binding agreement between parties who promise to perform stated duties. The basic requirements for a contract are *mutual agreement*, usually made through a process of *offer and acceptance*, and *consideration*, or one of its substitutes. In addition, the parties must be 18 years of age, and otherwise mentally competent, the terms of the agreement must be defined in enough detail that a court (and the parties) can determine their obligations, and the subject matter of the agreement must not be illegal. The offer and acceptance show the agreement of the parties; the consideration is some benefit flowing to each party sufficient to justify the promises. It is not necessary that the parties use any particular words or any particular form of agreement. Commonly used words and phrases are sufficient if they, in fact, make an agreement. The terms "express contract" and "implied contract" refer to nothing more than the formality or informality of the method used to create the contract. Further, contracts may be written or oral. Some contracts must be in writing to be enforceable. *See* acceptance, consideration, offer, unjust enrichment.

CONVERSION—The civil aspect of property theft, which occurs when one person improperly assumes control of another's property for his or her own use or benefit. *See* personal property.

CONVEYANCE—Any written document, such as a deed, lease or mortgage, which transfers (conveys) title to real property or real property interests from one party to another. *See* covenants, conditions and restrictions (CC&Rs), real property.

COOKIES—In online law, files stored on a hard drive that a website server gives to a browser the first time a user visits the site, and that are updated with each return visit. Cookies hold information about users' browsing habits, such as what sites they have visited and what newsgroups they have read. Generally, cookies cannot be used to corrupt or steal data, such as an email address, from a visitor's hard drive.

COPYRIGHT—A right that protects the particular fixed expression of an original work of authorship. It protects, for example, an artist's specific painting of a sunset scene rather than the broad concept of sunset scenes. A copyright gives its owner the exclusive right to reproduce, modify, distribute, perform or display the copyrighted work and to authorize others to do the same. This right exists from the moment the work is created and is fixed on some type of tangible media, such as paper, film, tape, computer disk, etc. No further action is required to obtain a copyright, but creators of certain types of intellectual property may protect their interests, by registering a copyright *See* fair use, intellectual property.

CORPORATION—A legal entity, also known as a C-corporation, that is liable for its own taxes and obligations, and is formed with state governmental approval (usually by the secretary of state) to carry on business or other activities. A corporation is an artificial person that can sue or be sued and (unless it is nonprofit) can sell ownership interests, or shares, in the company to raise capital. A corporation's liability for damages or debts is limited to its assets, so the shareholders and officers are protected from personal liability for taxes, debts and other claims against the corporation, unless they commit fraud. *See* S-corporation.

CORPUS DELICTI—Literally, "the body of the crime." In law, *corpus delicti* refers to the fact that a crime was committed; it is part of the basic proof required to sustain any criminal charge, from overtime parking to treason. *Corpus delicti* does not mean the corpse of a murder victim. If the prosecutor proves through testimony or other evidence that a murder was in fact committed, the *corpus delicti* has been proved, even though the victim's body is not found.

COSIGNER—One who signs a promissory note to guarantee its payment by the principal (primary) maker of the note. If the principal maker defaults (fails to make the required payments), the cosigner is responsible for the debt. *See* promissory note.

COUNTERCLAIM—1) A claim by a defendant against a plaintiff in a civil lawsuit. 2) A pleading asserting such a claim. *See* civil action, pleading.

COUNTEROFFER—In contract law, an offer made in response to a previous offer. *See* contract, offer.

COUNTY COURT—In Ohio, a lower trial court that operates only in the areas of a county not included in the territory of a municipal court.

COURT—1) An institution for resolving legal disputes. 2) A formal term for the judge or judges of a court as when, during

a trial, an attorney addresses the judge with the phrase, “May it please the court.” 3) An imprecise way of referring to the judge or judges. For example, “The court, on its own motion, declared a mistrial,” means that the judge stopped the trial on his or her own, without a motion or request from a party.

COURT OF APPEALS—In Ohio, an intermediate court having jurisdiction to hear appeals from the judgments and other final orders of common pleas courts, municipal courts and county courts, and the power to reverse or modify such judgments or orders, or to remand cases back to the lower courts for further proceedings. The court of appeals has similar powers as to appeals from the decisions of administrative agencies. Applications for extraordinary writs must be made (in all but *habeas corpus* cases) first in the court of appeals, rather than in a trial court. An appeal from the decision of a court of appeals may be taken to the Supreme Court of Ohio. The federal court system also has courts of appeals. The decisions of a federal court of appeals may be appealed to the United States Supreme Court. *See* administrative law, appeal, extraordinary writ, judgment.

COURT OF CLAIMS—1) In Ohio, a special court with jurisdiction over civil lawsuits brought against the state or its agencies, and over all victim of crime claims. 2) The United States Court of Claims, a federal court having jurisdiction to try certain civil claims against the United States. *See* sovereign immunity, victim of crime claim.

COURT REPORTER—A court official responsible for the accurate recording of court proceedings and the transcription of such recordings into typewritten or printed form. Court reporters record proceedings through the use of shorthand, stenotype, voice recording, videotape and other means. The court reporter is also a notary public.

COVENANTS, CONDITIONS AND RESTRICTIONS (CC&Rs)—Certain restrictions on how real estate may be used. Covenants, conditions and restrictions in a private purchase contract may, for example, dictate how a home in a subdivision or condominium may be built, designed or used; they may set forth conditions on such things as lot size, architectural design or vehicle parking. When a property is sold, these restrictions are passed on to the new owners of the property; buyers must be notified about any CC&Rs before sale.

COVENANT NOT TO COMPETE / NON-COMPETE AGREEMENT—An agreement that prohibits a former employee from working for a competitor or soliciting customers for a certain period of time after the employment ends.

CRIME—An offense against the public, as well as (usually) against an individual victim. Criminal law spells out rules of conduct and provides sanctions for breaking those rules. In Ohio, all crimes are defined either by state statute or municipal ordinance, and they must each: 1) prohibit a specific act or course of conduct, or impose a specific duty; and 2) provide a criminal penalty for doing the prohibited act or conduct, or for failing to meet the required duty. There is a great variety of criminal penalties, some of which are fines, imprisonment and, in capital offenses, death. *See* ordinance, statute.

CRIMINAL ACTION—A court proceeding involving a crime (a public wrong), in which the state or one of its municipalities is the complaining party.

CRIMINAL INSANITY—An affirmative defense to a crime. To establish this defense under Ohio practice, it must be shown that the defendant, because of a severe mental illness or defect, did not know what he or she was doing was wrong. Persons found not guilty by reason of insanity can be committed to mental institutions for treatment, and released when their sanity is restored. *See* affirmative defense, competence to stand trial, crime, *mens rea*.

CRIMINAL RULES—*See* Rules of Practice and Procedure.

CROSS-EXAMINATION—The questioning (examination) of a witness during a legal proceeding, conducted by the opposing party. Generally, cross-examination takes place after direct examination by the party who called the witness. Leading questions may be asked on cross-examination. *See* direct examination, leading question.

CULPABLE MENTAL STATE—Synonymous with *mens rea* (guilty mind). Generally, a crime requires that a guilty act or omission (the *actus reus*) be committed with the required degree of guilty mind. Therefore, Ohio law provides that certain acts are crimes only if done with a particular state of mind, and that a certain sort of criminal act is more or less serious depending on the perpetrator’s state of mind at the time. For example, consider the killing of one person by another person. That conduct may be 1) no crime (if done in self-defense), 2) a serious crime if done negligently (negligent homicide) and 3) the most serious sort of crime if done purposefully (murder). The four culpable (blameworthy) states of mind recognized by Ohio law—in ascending order of severity—are negligence, recklessness, knowledge and purpose. In order to convict the accused, the prosecutor must prove beyond a reasonable doubt that, when he or she did the unlawful act charged, the accused did so with the state of mind required for the commission of that particular crime. A very few acts (strict liability offenses) are criminal, however they

are done. *See* beyond a reasonable doubt, crime, *mens rea*, murder, strict liability.

CYBERPIRATE—Also known as a cybersquatter. *See* cybersquatting.

CYBERSQUATTING—In online law, buying a domain name reflecting the name of a business or famous person so that the name can be sold back to the business or celebrity for a profit. The Anti-Cybersquatting Consumer Protection Act of 1999 authorizes a cybersquatting victim to file a federal lawsuit to regain a domain name or sue for monetary compensation. Victims of cybersquatting can also use the provisions of the Uniform Domain Name Dispute Resolution Policy adopted by ICANN, an international organization that administers domain names. Through this policy, disputes are resolved through arbitration rather than litigation. Cybersquatters are also known as cyberpirates.

D

DAMAGES—Money awarded as compensation for loss or injury to person, property or rights, caused by the improper act or omission of another. Punitive damages also may be awarded both to punish outrageous conduct and to warn other members of the community not to follow that example.

DAMNUM ABSQUE INJURIA—Literally, “a wrong without injury.” The rule that, when a wrongful act or omission of a potential defendant has caused no harm to person, property or rights, there is no cause of action (there is no claim that the law recognizes). The courts will not hear a case in which the wrongful act or omission of the potential defendant did not cause any harm to person, property or rights. *See de minimus non curat lex*.

DECLARATION OF MENTAL HEALTH TREATMENT—A document that allows an individual to state his/her own preferences regarding mental health treatment and to appoint a person to make mental health care decisions when he/she is unable to do so.

DEED—A document that transfers ownership of real property. *See* mortgage, real property.

DEEP LINK—In online law, a link from one website to another that bypasses the second website’s home page and takes the user directly to an internal page on the site. For example, a deep link from the OSBA website takes the user directly to the portion of the Environmental Protection Agency’s site that affects Ohioans: (www.epa.gov/region5) rather than to its home page (www.epa.gov).

DEFAMATION—A public, derogatory and knowingly false statement about another’s character, morals, abilities, business practices or financial status. Libel and slander are two kinds of defamation. *See* libel, slander.

DEFAULT—1) In civil procedure, a failure to file a pleading (generally, an answer) within the time allowed, or a failure to appear in court when required. Except in certain instances, final judgment may be entered without a trial against a party in default. 2) In contract law, the failure to abide by the terms of a contract (often the failure to pay a debt, or the failure to pay a debt on time). *See* contract, pleading.

DEFENDANT—The party against whom a civil action or criminal action is brought.

DEFINITE SENTENCE—A prison or jail sentence for a specific time (say, two years), currently used for misdemeanors and most felonies in Ohio. It is sometimes also referred to as a “determinate” or “flat time” sentence. Note: Definite sentences replaced the “indefinite” (also called “indeterminate”) sentences that were used in Ohio law for misdemeanants until 1974 and for felons until 1996. The indefinite or indeterminate sentence contained a minimum and a maximum prison or jail terms (say, 18 to 36 months). Typically, the offender was required to serve the minimum time and had to be released at the maximum time. In the period between the minimum and maximum, the offender could be released administratively (usually by a parole board). Thus, the exact amount of jail time to be served was indefinite when the sentence was imposed.

DEFINITE SUSPENSION—In Ohio, one of the four basic types of discipline that can be brought against an attorney or a judge. A definite suspension suspends the right to practice law for a specified period of time, ranging from six months to two years.

DEGREE OF PROOF—The level of persuasiveness by which a case or defense must be established. The degree of proof required to establish guilt in a criminal case is “beyond a reasonable doubt.” The degree of proof necessary to permit an extraordinary remedy in a civil case is “clear and convincing evidence” (extraordinary remedies include most remedies other than money damages—an injunction, for example). The degree of proof required to prevail in other civil cases or to establish an affirmative defense in a criminal case is “preponderance of the evidence.” A lesser degree of proof, required to make a valid arrest or to hold a criminal accused for trial, is “probable cause.” Degree of proof does not mean the sheer amount of evidence, but the believability and reliability of the evidence. The testimony of one reliable and believable witness may be more persuasive than the testimony of 10 unreliable witnesses. *See* beyond a reasonable doubt,

clear and convincing evidence, preponderance of the evidence, probable cause.

DELINQUENT CHILD—A delinquent child is one who commits any act (other than a juvenile traffic offense) that would be a crime under state, municipal or federal law if committed by an adult, or who fails to obey an order of a juvenile court. For example, a child is charged with delinquency whether the offense in question is murder or merely disorderly conduct. *See* crime, juvenile division.

DE MINIMUS NON CURAT LEX—Literally, “The law does not cure trifles.” The rule that a minimal or trifling injury to a person, property or rights does not justify the time and trouble of a lawsuit, and that the courts will refuse to hear such a suit. *See damnum absque injuria*.

DEPENDENT CHILD—A child who is homeless, destitute or without proper care or support; who lacks proper care or support because of the mental or physical condition of the child’s parents, guardian or custodian; whose condition or environment warrants the state becoming the child’s guardian; or who is in danger of being abused or neglected by a household member who has abused or neglected a child and lives in the household. The dependent child’s condition or situation is not, generally, the fault of the parents, guardian or custodian. This kind of dependency should not be confused with “dependents” that are named by parents for tax purposes. *See* juvenile division, neglected child.

DEPOSITION—A type of discovery in which the sworn testimony of a party, a witness, a medical expert or any other person who has information that may be useful in a case is given in a legal proceeding that occurs outside of court but with court authority. *See* discovery.

DESCENT AND DISTRIBUTION—*See* statute of descent and distribution.

DEVELOPMENTAL DELAY—A delay in one or more areas of development (cognitive; physical, including vision, hearing and nutrition; communication; social or emotional; and/or adaptive behavior).

DIRECT EVIDENCE—Evidence that was seen, touched or heard by a witness directly. For example, a witness who sees rain coming down has direct evidence that it is raining. Also, a written document introduced in a trial is direct evidence of its own contents. *See* evidence, circumstantial evidence, Rules of Evidence.

DIRECT EXAMINATION—The questioning (examination) of a witness in a legal proceeding by the party who called the

witness to testify. Leading questions are prohibited on direct examination except when the court rules that the witness is hostile to the party that called him or her. *See* cross-examination, hostile witness, leading question.

DISBARMENT—The revocation (taking away) of an attorney’s license to practice law as punishment for certain wrongful acts. In Ohio, unlike some other states, disbarment is for life; there is no possibility of reinstatement. Because of its authority to regulate the practice of law in this state, the Supreme Court of Ohio is in charge of such professional discipline.

DISCHARGE OF DEBTS—*See* bankruptcy.

DISCOVERY—Any of various pretrial procedures by which a party to a case may learn about information or evidence in the possession of another party, a witness, or other person. The purposes of discovery are to prevent unfairness (including unfairness resulting from surprise during a trial), to make it easier to prepare an effective lawsuit and to help narrow the questions to be tried in the case. Discovery is more limited in criminal than in civil cases. *See* deposition, evidence, interrogatory.

DISPOSITION—A final court determination regarding a lawsuit or a criminal charge.

DISPUTE RESOLUTION—Processes that seek to resolve civil disputes without requiring full court trials. Some common dispute resolution techniques are negotiation, arbitration, mediation, early neutral evaluation, settlement conference, mini-trial, summary-jury trial and trial to a private judge. Generally, these methods are faster, less expensive and less adversarial than a court trial. *See* arbitration, early neutral evaluation, mediation, mini-trial, private judge trial, settlement conference, summary jury trial.

DISSOLUTION OF MARRIAGE—The legal termination of a marriage by the joint request of the spouses. In dissolution, unlike divorce, no grounds for the termination must be proved. The parties must agree about the distribution of property, support, the custody of children (if any) and all other issues, and describe those agreements in a document (a separation agreement) submitted for the court’s consideration and approval. Dissolution of marriage is sometimes called “no-fault divorce.” *See* divorce, separation agreement.

DIVORCE—The legal termination of a marriage when the complaining party establishes any one of the reasons (grounds) for divorce recognized in Ohio. Among the grounds commonly used are extreme cruelty, gross neglect of duty and incompatibility. Divorce is an adversary proceeding, unlike

dissolution of marriage, which is *not* an adversary proceeding. *See* adversary system, child support, dissolution of marriage, spousal support.

DOMAIN—Computers that share a common part of an Internet address are said to be in the same domain. The last part of an Internet address, following the “dot,” identifies the domain. Common current domains are .com, .org, and .net.

DOMESTIC RELATIONS DIVISION—In Ohio, a division of the common pleas court that deals with divorce, dissolution of marriage, annulment, legal separation and related questions of property division, spousal support, child custody and child support.

DO NOT RESUSCITATE (DNR) ORDER—Under its DNR Comfort Care Protocol, the Ohio Department of Health has established two DNR order forms. When completed by a doctor (or certified nurse practitioner or clinical nurse specialist), these DNR orders allow patients to choose the extent of the treatment they wish to receive at the end of life. A patient with a DNR Comfort Care-Arrest Order will receive all appropriate medical treatment, including resuscitation, until the patient has a cardiac or pulmonary arrest, at which point comfort care will be provided. By requesting a DNR Comfort Care Order (DNR-CC), a patient chooses other measures such as drugs to correct abnormal heart rhythms. With this order, comfort care or other requested treatment would be provided at a point before the heart or breathing stops. Comfort care involves keeping the patient comfortable with pain medication and providing palliative care. A DNR-CC does not mean “do not treat.” *See* durable power of attorney for health care, living will.

DOUBLE JEOPARDY—Properly, once in jeopardy, but also called former jeopardy. Both the U. S. and Ohio constitutions provide that no person can be placed in jeopardy (that is, tried) more than once for the same crime. With some exceptions, then, the state has only one chance to prove an accused guilty. In general, an accused is in jeopardy at the point in a trial when the jury is impaneled and sworn or, in a case tried without a jury, when the presentation of evidence begins.

DOUBLE TAXATION—In corporate law, the application of two layers of taxation: a corporation is subject to corporate income tax on its profits, and its shareholders are taxed at ordinary income rates on any dividends paid by the corporation out of the same profits. Also known as dual taxation.

DOWER INTEREST—The right of a surviving spouse to a one-third interest (for his or her life) in real property owned by the deceased spouse. This is seldom an issue in Ohio today

because buyers rarely acquire real property without obtaining a release of dower rights. *See* real property.

DUAL AGENCY—In property law, dual agency refers to the representation of both the buyer and the seller by a real estate agent.

DUAL TAXATION—*See* double taxation.

DUE PROCESS OF LAW—The 14th Amendment to the United States Constitution provides that no person may be deprived of life, liberty, or property without due process of law. That is, rights, obligations, and liabilities must be determined through a rational legal procedure that is intended, and used, to insure fundamental fairness. In the context of criminal law, this means that an accused person may not be arbitrarily fined, jailed or otherwise punished. Guilt or innocence must be determined fairly, impartially and in a timely manner, and the accused must have the opportunity to face his or her accusers and to offer a defense. *See* constitution.

DURABLE POWER OF ATTORNEY FOR HEALTH CARE—A legal document (also called a “health care power of attorney” or “DPOA”) that authorizes another person (called an *attorney-in-fact*) to make health care decisions for the maker of the power of attorney when the maker is not competent to make such decisions. *See* advance directive, attorney-in-fact.

E

EARLY NEUTRAL EVALUATION—Early neutral evaluation is a dispute resolution method involving a neutral or an impartial third party retained by the parties and their counsel to provide an objective evaluation of the strengths and weaknesses of a case and how the matter may be decided in court. The parties usually make informal presentations to the neutral party to highlight their cases or positions. The recommendations of the neutral party are influential but non-binding.

EARNED CREDIT—In Ohio criminal law, the reduction of an inmate’s sentence by one day (the earned credit) for each month the inmate participates in meaningful school, work, training or treatment programs. This is the only type of time off for good behavior still available to inmates.

EASEMENT—A right of access across, or a limited right to use, real property. A common type of easement gives a utility company access to property for the purpose of installing and

maintaining its lines and equipment. An easement is usually granted in writing by deed or similar document and “runs with the land,” meaning it remains valid even though the property involved is rented, mortgaged, sold or transferred through a succession of owners.

ELECTRONIC FUND TRANSFER—Any transfer of funds that is initiated by electronic means, such as an electronic terminal, telephone, computer, automatic teller machine (ATM) or magnetic tape.

ELECTRONIC SIGNATURE—A paperless way to enter into an electronic contract. To sign a contract electronically, a person may be asked to type his or her name into a box, paste a scanned version of his or her signature into a box, click an “I Accept” button or use a key to encrypt (scramble) information that uniquely identifies the signer using a method called Public Key Infrastructure (PKI). According to the Electronic Signatures in Global and International Commerce Act (E-SIGN)—effective Oct. 1, 2000—electronic signatures are as binding as those on paper. Also in 2000, Ohio enacted the Uniform Electronic Transactions Act, which is similar to E-SIGN; it makes the electronic record of a transaction equivalent to a paper record and gives electronic signatures the same legal effect as manual signatures. The electronic signature is also called a digital signature, but it is becoming standard to save the term “digital signature” for cryptographic signature methods such as PKI and to use electronic signature for any of the paperless signature methods.

EMANCIPATION—The act or process of releasing a person from the parental control, care and custody of his or her parent(s). In general, emancipation occurs automatically when a person reaches age 18, the age of majority for most purposes, or upon graduation from high school if a child turns 18 during his or her last year of high school. However, a person may be emancipated before he or she attains the age of 18 if the child gets married or joins the military service. Ohio law does not provide a way for someone under the age of 18 to petition a court to “become emancipated.” Even if a court relieves parents of financial responsibility for a minor child, the child is not emancipated and the parents still may be held responsible for the child’s actions.

EMINENT DOMAIN—The power of a government to take (to appropriate) private property for public use. Under the constitutions of Ohio and the United States, private property cannot be taken for public purposes unless the owner of the property receives just compensation.

EMPLOYMENT AT WILL—The doctrine that an employee serves at the will of the employer, and that the employer is free to terminate the employee at any time, for no reason or for any

lawful reason. (At the same time, an at-will employee is free to quit at any time, for any reason or no reason, with or without notice.) The employer has no duty to treat employees fairly, only lawfully. An employment contract, whether written or merely implied, can restrict the employer’s freedom to discharge an employee. Also, for reasons of public policy, employers may not terminate an employee on the basis of race, national origin, gender, religion, disability or age. Nor can an employer fire an employee in retaliation after the employee has exercised his or her legal right to, say, file a workers’ compensation claim or engage in whistleblowing. An employee’s exercise of such legal rights is *protected conduct*. Further, an employer may not terminate an employee for serving on a jury or for refusing to break the law. *See* contract, whistleblower.

ENCRYPTION—The process of putting data into a secret code so only authorized users can read it. Encryption is often used to make the transmission of credit card numbers secure for those who buy items and services on the Internet.

ENDORSEMENT—The procedure for transferring a negotiable instrument. A check, for example, is customarily endorsed by signing it on the back in the area reserved for signatures. An endorsement may be unconditional or qualified. The signature of the endorser is a type of unqualified endorsement, and makes the instrument payable to bearer, that is, payable to the person who has it at the time it is negotiated. Endorsements to pay to the order of a named person, or to deposit the instrument in a bank account, are “qualified” endorsements. *See* negotiable instrument.

ENTRAPMENT—An affirmative defense to a criminal charge. The defense is established if the defendant proves that the offense was incited or induced by law enforcement officers, and that the accused would not have been inclined to commit the offense without that incitement or inducement. *See* affirmative defense, charge.

EQUAL PROTECTION OF THE LAWS—The 14th Amendment to the United States Constitution provides that persons are entitled to equal protection of the laws. Generally, that means that persons similarly situated must be treated equally, without discrimination on some improper basis. For example, the law can provide that all people over age 62 get a public pension, but not that only white males (or black females) over age 62 get a public pension. Similarly, the law can require that all citizens pay income taxes, but not that only residents of Alabama and Ohio pay income taxes. In the context of criminal law, equal protection means that the law must be the same for all, regardless of (for example) rank, status, creed, color or political persuasion. *See* constitution.

ESCHEAT TO THE STATE—The reversion to the state of title to property. This can occur when an owner dies with no legal heirs or when a corporate owner is dissolved while holding legal title to the property. *See* statute of descent and distribution.

ESCROW—An arrangement by which the parties to a contract agree that a neutral third person will hold money, property or documents, and distribute these items at certain times or upon the happening of a certain event. Escrow is often used in real estate transactions. All or part of the purchase money is deposited with an escrow agent pending the time when the seller is prepared to convey good title to the buyer. Financial institutions are often used as escrow agents. *See* contract, title.

ESTATE—A generic term meaning all the property owned by a person, including real property, personal property of any kind and property rights. *See* personal property, real property.

EVICITION—A lawsuit to remove a tenant from rental property. The technical term for eviction in Ohio is “forcible entry and detainer.”

EVIDENCE—Anything that can be presented in a legal proceeding to prove a fact or disprove an alleged fact. Some of the more important classes of evidence are: 1) testimony; 2) tangible evidence (things); 3) documentary evidence (information shown in letters, memoranda or other writings); and 4) demonstrative evidence (evidence that shows how an event happened, relationship, or cause and effect). *See* circumstantial evidence, direct evidence, *prima facie*, Rules of Evidence, testimony.

EXECUTOR—In probate law, a person nominated in a will to settle the estate of the person making the will. An executor is a *fiduciary*, meaning that he or she is authorized to act on behalf of another and is entrusted to properly handle that person’s estate assets. Although the probate court is not bound to do so, the court will normally appoint the person nominated in a will if that person is qualified to act as executor. *See* administrator, fiduciary, will.

EXEMPT EMPLOYEE—An employee who is exempt from the overtime provisions of the Fair Labor Standards Act (FLSA). To be exempt, the employee must meet certain duty requirements and typically be paid a salary. The “white collar exemptions” include executive, administrative or professional workers whose salaries, with some exceptions, are at least \$455 per week. Also, certain outside sales people and professionals are considered exempt employees even though they are not paid a salary. For example, computer specialists can either be paid a salary of at least \$455 per week or earn at least \$27.65 per hour, and outside salespeople can be paid on a commission basis, as long as certain requirements are met.

Exempt employees are not entitled to overtime pay under federal law. *See* also civil service laws.

EX POST FACTO—Literally, “after the fact.” Ex post facto laws—prohibited by the constitution of the United States—are laws enacted after an act was done that: 1) impose a criminal penalty for the act where none previously existed; 2) impose a higher penalty than that previously applicable; or 3) eliminate a defense available at the time the act was done. The Ohio Constitution prohibits the enforcement of retroactive laws, whether criminal or civil, but gives effect to laws that establish a remedy or advantage not available when the act was done—that is, laws which put a person in a better place than he or she would have been under the law in effect when the act was done.

EXTRADITION—1) The formal process in which one state may surrender to a second state a person accused of committing a crime in that second state. Extradition is used only in felony cases and in cases involving the failure to support children. 2) A similar surrender, used between nations that are parties to an extradition treaty.

EXTRAORDINARY WRIT—Any of five special types of lawsuit. *See* *habeas corpus*, *mandamus*, *procedendo*, prohibition, *quo warranto*, writ.

F

FAIR USE—In intellectual property law, fair use is something that is permitted by law that would otherwise constitute copyright infringement. Reproducing, distributing, displaying or performing a copyrighted work may, in limited circumstances, be found to be a fair use. For example, if a page from an encyclopedia is copied at the public library for personal use, it is probably a fair use. Some of the factors in determining whether a use is a fair use are: the purpose and character of the use; the nature of the work; the amount of the work involved; the effect of the activity on the market for the original work; and whether the original work is published or unpublished. *See* copyright, intellectual property.

FALSE ARREST—An arrest (a deprivation of a person’s liberty, or detention) without legal justification. False arrest can be the basis of a tort lawsuit where the plaintiff was detained by the defendant when the defendant knew, or should have known, that the detention was illegal. False arrest is considered to be a type of false imprisonment in which the individual being held mistakenly believes that another individual has the legal authority to restrain him or her. *See* tort.

FALSE IMPRISONMENT—*See* false arrest.

FALSE LIGHT—Similar to defamation, a “false light” claim requires proof that a reporter gave “publicity” to a matter that shows a defendant in a false light. The false light must be “highly offensive to a reasonable person,” but need not be defamatory. In order to prove such a claim, the publishing party must have known the information was false or acted with reckless disregard as to the probable falsity of the information.

FEE— 1) In general, payment for services rendered, such as the charge made by an attorney for work done for a client. 2) In real property law, fee often means the highest, most complete form of ownership. *See* fee simple.

FEE SIMPLE—Absolute ownership of real property. *See* real property.

FELONY—A serious crime carrying a potential penalty of imprisonment for six months or more, or death. Aggravated murder is the most serious felony; some of the others are murder, drug trafficking, kidnapping, rape and robbery. *See* crime, misdemeanor, murder.

FIDUCIARY—A person or institution serving in a position of trust, charged with acting for the benefit of a third person and not for the fiduciary’s own gain. Administrators, attorneys-in-fact, conservators, executors, guardians, and trustees (among others) are fiduciaries. *See* administrator, attorney-in-fact, executor, guardian, trustee.

FINANCE CHARGE—*See* annual percentage rate (APR).

FINANCIAL RESPONSIBILITY LAW—A “financial responsibility” law requires you to prove your financial ability to pay for damages if you are involved in an accident. In Ohio, the law requires persons registering a vehicle (applying for license plates) and a person operating a motor vehicle to prove their ability to pay for damages caused in an accident, no matter whose conduct causes the accident. The most common way to show financial responsibility is proof of a valid insurance policy with liability coverage. Failure to demonstrate the required level of financial responsibility at the time of an accident or traffic violation can result in suspension of a driver’s license or revocation of a vehicle registration. *See* accident report.

FIREWALL—A computer or computer software system that prevents unauthorized Internet users from accessing private information (as on a company’s local network or Intranet). All messages going into or out of the Intranet pass through the firewall, which examines the messages and blocks those that do not meet certain security standards.

FIXTURE—In real property law, any item that normally would be personal property but, because it is attached to real property so securely that it cannot be removed without damage, is considered part of the real property. A house or barn is a fixture. Equipment necessary for the proper use of real property (such as heating or plumbing equipment) may be considered fixtures. *See* mixed property, real property.

FORCIBLE ENTRY AND DETAINER—*See* eviction.

FORECLOSURE—A type of lawsuit to enforce payment of a debt by the sale of property the debtor has pledged to the creditor as security for the debt. *See* lien, marshaling of liens, mortgage, priority of liens.

FREE APPROPRIATE PUBLIC EDUCATION (FAPE)—Special education and related services that: 1) have been provided at public expense, under public supervision and direction, and without charge; 2) include an appropriate preschool, elementary or secondary school education in the state involved; and 3) meet individual education program (IEP) requirements. Each school district must adopt and implement written procedures ensuring FAPE to all children with disabilities, aged three through 21 years. *See* individualized education program (IEP).

G

GAG ORDERS—Trial court judges in Ohio have several options available to insure that a defendant receives a fair trial. One of these options is to limit or even forbid comment by those involved in a court case. Journalists sometimes refer to this limiting of comment as “gag orders.” The “gag” order often applies to trial participants, including witnesses.

GARNISHMENT—A type of lawsuit to enforce payment of a money judgment, in which the judgment debtor’s property being held by a third person is paid into court to satisfy the debt. Common types are garnishment of unpaid wages and garnishment of bank accounts. *See* judgment debtor.

GRAND JURY—*See* jury.

GRANTOR—The party, sometimes called the seller or giver, who transfers ownership of (title to) real property to another, referred to as the buyer, grantee, recipient or donee, by means of a deed. “Grantor” also may refer to the maker of a trust who transfers property to himself/herself or to another person (a trustee). *See* deed, real property, trust.

GUARDIAN—A person legally charged with the care of another. Parents are the natural guardians of their minor children. The probate court may appoint guardians to care for minors or persons who cannot care for themselves because of physical limitations, mental illness, mental deficiency, age or other causes. The person for whom a guardian is appointed is called a *ward*. A guardian may be appointed by the court to be a guardian of the person, or as a guardian of the property, or as guardian of both the person and property of the ward. A limited guardian may be appointed to handle only certain particular affairs that the ward cannot do alone; a conservator may be appointed to assist a person mentally competent but physically infirm. The court also may appoint an interim guardian or an emergency guardian for short periods in special situations such as when there is a temporary disability, or until a full hearing can be arranged to determine if a full guardianship is necessary. *See* fiduciary, probate division, ward.

GUARDIAN AD LITEM—A guardian “at law” (often called a GAL) who is appointed by the court for the specific purpose of protecting the interests of a minor during the course of legal proceedings. In Ohio, GALs must now have training specific to their role in representing a child’s best interests. The Supreme Court of Ohio provides this training. *See* guardian, next friend.

H

HABEAS CORPUS—An extraordinary writ designed to test the legality of any kind of detention. This writ may be initiated in the court of appeals, the Supreme Court of Ohio or in a common pleas court. It is most often used in criminal cases, but also may be used to test the legality of a person’s continued confinement in a mental hospital. *Habeas corpus* cannot be used as a substitute for appeal. A post-conviction relief proceeding is used instead of *habeas corpus* in some cases in Ohio. *See* extraordinary writ, writ.

HARMLESS ERROR—In appellate practice, an error committed by a trial court that was not prejudicial to the rights of the appellant (the party who brought the appeal)—that is, the error did not affect the outcome of the trial. An appellant must show prejudicial error in order to win an appeal; harmless error is not enough. The doctrine of harmless error prevents an unnecessary new trial when the alleged error would not have affected the outcome at trial. *See* appeal, prejudicial error.

HEARSAY—Testimony concerning matters not within the personal knowledge of the witness; in essence, second-hand testimony. With certain exceptions, under the rules of

evidence, hearsay cannot be allowed or admitted for consideration in a trial. For example, the state will not be allowed to prove that Mary committed a crime by having Susan testify: “I heard John say that Mary did it.” *See* evidence, rules of evidence.

HOLDER IN DUE COURSE—In commercial law, a person who, in good faith, gives value (pays) for a negotiable instrument, without notice of any reason that the instrument should not be honored (paid) when presented for payment. The holder in due course doctrine gives some assurance to parties not involved in an original transaction that the commercial paper (or negotiable instrument) is valid, moves freely and is honored (paid) by the business and banking worlds. In most consumer transactions, the traditional concept of holder in due course has been modified. Under the consumer laws, a buyer can take all appropriate legal actions against any person or entity to which the seller has transferred the buyer’s contract or note. *See* negotiable instrument.

HOME SCHOOLING— An exception to the compulsory attendance laws that allows parents or other qualified persons to provide school-aged children with educational programming in the home setting, assuming the county or district school superintendent approves the application. The person(s) providing the schooling must agree to provide education in all areas prescribed by state standards and must provide details about how this instruction will be done, who will teach the child and what textbook, courses or teaching materials will be used. Also, the parent must provide assurance that the child will receive a minimum of 900 hours of home education per school year.

HOME SOLICITATION SALE—A type of sale concluded at the buyer’s home following a personal solicitation by the seller. Home solicitation sales are not regulated by the *Uniform Commercial Code*, but by other Ohio consumer laws. Home solicitation sales do *not* include: sales under \$25; buyer-initiated sales conducted and consummated entirely by mail or telephone without any other contact between the buyer and the seller (or representative) before delivery of goods or services; sales by licensed brokers or dealers of real estate, insurance, stocks, bonds, cars or automotive services; or sales at auctions.

HOMESTEAD EXEMPTION—An Ohio law that allows debtors to keep certain property free of the claims of their creditors. The homestead exemption allows a debtor to protect most or all of the equity in his or her home. In 2007, Ohio expanded the homestead exemption to make property tax relief available to more than 500,000 additional senior citizens and permanently and totally disabled Ohioans.

HOSTILE WITNESS—A witness whose interests or attitude can be shown to be adverse to the party calling the witness to

testify at a trial or other legal proceeding. Although normally a witness cannot be cross-examined by the party that calls him or her, a party can cross-examine his or her own witness if the court declares that the witness is hostile. *See* cross-examination, direct examination, leading question.

HUNG JURY—A jury that cannot agree on a final verdict. In criminal cases in Ohio, all members of the jury must agree on a verdict; one dissenting vote is enough to deadlock the jury. In civil cases, three-fourths of the jury must agree on a verdict, so a civil case with eight jurors can be deadlocked by three dissenting votes. If the judge is convinced that the jury will not be able to reach a verdict, the judge will declare a mistrial. The case may have to be retried at a later date to a new jury. *See* mistrial.

I

IMPANEL—To seat, or complete, a jury. When the *voir dire* (questioning of jurors) is finished and both sides have exercised their challenges for cause and peremptory challenges, the jury is impaneled. The jurors are then sworn (given an oath to do their duty) and the trial is ready to proceed with the introduction of evidence. *See* challenge, challenge for cause, jury, *voir dire*.

INDEFINITE SUSPENSION—Suspension of the right to practice law for an unstated period of time. Reinstatement is a possibility, but not a certainty, and a reinstatement application cannot be filed until two years after the indefinite suspension begins.

INDEPENDENT CONTRACTOR—One who performs some act on behalf of another in carrying out a contract. The question of whether a person is an agent or employee on the one hand, or an independent contractor on the other, is often an issue when someone claims that the principal (the person who hires the worker) is liable for some negligence or other wrongful conduct by the worker. Generally, a worker is considered an independent contractor when the principal exercises significant control only over what work is done, and minimal control over how the work is done. *See* agent, contract, negligence, *respondeat superior*.

INDICTMENT—A formal accusation made by a grand jury, charging a named person with a specific crime. In serious offenses, an accused is entitled to indictment by a grand jury under both the United States and Ohio constitutions. *See* information, jury.

INDIVIDUALIZED EDUCATION PROGRAM (IEP)—Written program of specific special education and related services designed to meet the unique educational needs of a child with a disability. The IEP is developed by a team of parents, educators and others. Each child with a disability is to have an IEP in effect at the beginning of each school year, and it must be implemented as written. However, it is a working document and must be reviewed and revised at least once per year.

INFORMATION, BILL OF INFORMATION—A formal written accusation made by a prosecuting attorney charging a named person with a specific crime. An information can be used instead of an indictment by a grand jury except to charge offenses carrying a potential penalty of death or life imprisonment, but it cannot be used in any case unless the accused waives indictment.

INITIAL APPEARANCE—The first appearance of an accused before a municipal (or county) court judge or magistrate, during which the Rules of Criminal Procedure require the judge or magistrate to inform the accused of his or her constitutional rights (particularly the right to remain silent and the right to be represented by counsel) and to set bail for the accused if bail has not already been set. When a person is arrested without a warrant, the initial appearance must be held without unnecessary delay, that is, the accused must be brought before a judge or magistrate at the first reasonable opportunity—within hours or a few days at most after arrest. In misdemeanor cases, a defendant might decide to plead guilty and be sentenced during the initial appearance. In felony cases, the defendant is not permitted to make a plea at the initial appearance because the municipal/county court does not have jurisdiction to decide felonies. A defendant who cannot afford bail is generally incarcerated until his or her trial.

INJUNCTION—A court order commanding a specific person to do—or not do—a particular act under pain of punishment for contempt of court. An injunction is an extraordinary remedy requiring clear and convincing evidence, and is generally restricted to cases in which money damages would be an inadequate remedy. *See* clear and convincing evidence, contempt of court.

INSANITY—*See* competence, criminal insanity.

INTANGIBLE PERSONAL PROPERTY—*See* personal property.

INTELLECTUAL PROPERTY—Intellectual property laws protect those who create property that comes from the work of

the mind, such as an invention, a program, a method, a painting or a trade secret. Creators of certain types of intellectual property may protect their interests, for example, by registering a copyright or trademark, or by applying for a patent. *See* copyright, patent, service mark, trademark, trade name.

INTERFERENCE WITH CONTRACT—A person, not a party to a contract, who improperly interferes with performance of the contract. Such interference is the basis for a tort lawsuit for damages. *See* contract, tort.

INTERNET—Worldwide collection of computer networks that communicate with each other.

INTERNET PROTOCOL (IP) ADDRESS—The numerical sequence identifying an Internet server. Each server has its own unique IP address, which appears as a series of four groups of numbers separated by dots.

INTERNET SERVICE PROVIDER (ISP)—A business that provides access to the Internet through its servers. An ISP also may provide software packages (such as browsers), email accounts and a personal website or home page. Most ISPs are also Internet access providers, and provide extra services including wireless Internet connections for their customers as well as help with design, creation and administration of websites, training and administration of Intranets and domain name registration.

INTERROGATORY—A type of discovery in civil cases in which one party submits written questions to another party and the recipient must provide written answers within a certain time. *See* discovery.

INTESTATE—1) A person who dies without a valid will. 2) The status of having died without a will. 3) Property that is not governed by a will. Intestate property is distributed according to the statute of descent and distribution. *See* statute of descent and distribution, testate, will.

INTRUSION—The act of being in a place where one has no right to be, and acting in a fashion that the average person would find highly offensive. In media law, the validity of a claim of intrusion usually rests on whether the journalist has obtained unauthorized access to an area where another person would have a reasonable expectation of privacy.

INVASION OF PRIVACY—A cause of action based on the defendant's unwarranted and gross interference with the plaintiff's solitude or personal life. *See* cause of action.

J

JAIL TIME CREDIT—Credit given for the time served in a local jail by a person before he or she is sentenced for a crime. For example, offenders are incarcerated in local jails: 1) after arrest; 2) while awaiting bail; 3) while awaiting a hearing or trial; 4) while awaiting a physical or mental examination; and 5) while awaiting transportation after conviction. Many offenders have already served time before they technically begin their sentences. In general, offenders are entitled to have their sentences reduced by all the time they have been incarcerated.

JOINT AND SEVERAL—Together and separately. The phrase normally refers to the liability of two or more persons with respect to a single transaction. For example, when two people are jointly and severally liable on a debt, the creditor may collect the entire debt from either person, or may collect any part of the debt from each.

JOINT AND SURVIVOR—*See* joint tenancy.

JOINT TENANCY—A type of ownership in which two or more persons own an undivided fractional interest in property; that is, instead of owning some designated part of the property, each owns a designated percentage of all the property. Both tenancy in common and survivorship tenancy are forms of joint tenancy. Unlike that of some other states, Ohio's law does not provide that property owned jointly automatically passes to the survivor or survivors upon the death of one of the owners, so a right of survivorship must be specifically described in the document that creates it—for example, a deed granting real property to the new owners jointly, with right of survivorship. A survivorship feature is common in joint bank accounts. *See* partition, tenancy by the entirety, tenancy in common.

JOURNALIST'S PRIVILEGE—The journalist's right not to be compelled to testify about or disclose sources of confidential information in court. This privilege is rooted in the idea that the First Amendment free speech protection will not function as intended if journalists are forced to reveal their sources. As increasing numbers of non-traditional journalists are reporting news stories via the Internet, questions have been raised about who qualifies for protection under the journalist's privilege and under what circumstances. *See* shield statutes.

JUDGE—The presiding officer of a court. In a trial court, the judge's chief duties are to supervise the conduct of the trial and to rule on all questions of law. *See* court.

JUDGMENT—A final order of a trial court that puts into effect the court’s decision in the case. Judgment should be distinguished from verdict. A verdict is a finding of fact by a jury. The court must implement the verdict by issuing an appropriate order, or judgment. In a criminal case, the sentence is part of the judgment.

JUDGMENT CREDITOR—In civil practice, the party in whose favor a money judgment is entered by a court.

JUDGMENT DEBTOR—In civil practice, the party against whom a money judgment is entered by a court.

JUDGMENT JOURNAL ENTRY—A document stating the final decision of the court—in civil cases, judgment for a particular party and the terms of that judgment (for example, an amount of money damages to be paid), and in criminal cases, imposing sentence on the defendant. The filing of either judgment entry begins the running of the time within which an appeal must be taken. *See* appeal, judgment.

JUDGMENT LIEN—A lien filed by a creditor that attaches to property of a judgment debtor (a debtor who has been ordered by the court to satisfy a debt to the creditor). When a money judgment is entered by a common pleas court, a lien automatically attaches to all real property of the judgment debtor in the county where the court is located. The lien does not attach to property in another county until the judgment is filed with the clerk of the common pleas court in that county. All money judgments of a municipal court or county court must be filed with the clerk of the common pleas court in order to have a judgment lien on real property of the judgment debtor. *See* foreclosure, lien.

JUDICIAL RELEASE—A release from prison granted by a sentencing judge. Generally, the judge can modify an eligible offender’s sentence by granting judicial release (formerly known as shock probation), and allow the offender to be placed on community control with sanctions. The law prevents the parole board from releasing people from non-life sentences committed after July 1996, and ultimate control over each offender’s actual sentence is currently left to the sentencing judge.

JURISDICTION—The obligation and authority of a court. *Territorial jurisdiction* refers to the geographical extent of a court’s authority. A court that has the power to hear a case to the exclusion of all other courts is considered to have *exclusive jurisdiction*. For example, in Ohio, only the juvenile division of the common pleas court hears matters related to unruly, abused, neglected or dependent juveniles and juvenile traffic offenders. If different courts are able to exercise judicial review at the same time, within the same territory, and over

the same subject matter, they are said to have *concurrent jurisdiction*. A trial court is said to have *general jurisdiction* if it has authority to deal with most types of civil and criminal cases. *Subject-matter jurisdiction* refers to the power of a court to deal with specific types of lawsuits or to award certain kinds of remedies. *Monetary jurisdiction* refers to the court’s authority to deal with lawsuits depending on the minimum or maximum amount of money in controversy. A court in which a given type of action may be begun is said to have *original jurisdiction*. A court with power to review the decisions of other courts, or administrative agencies, has *appellate jurisdiction*. In some cases, such as domestic relations cases involving parenting time and child support, the court retains the ability to change its orders according to (for example) changes in family circumstances. This is referred to as the court’s *continuing jurisdiction*.

JURISPRUDENCE—The philosophy of law, or the science of classifying law and legal principles.

JURY—A group of citizens, selected and sworn to make a factual determination in a legal proceeding. A grand (large) jury’s function is to review alleged offenses presented to it and determine whether there is probable cause to believe that a crime was committed, and that the accused person committed the crime. A petit (small) jury’s duties are to decide the factual questions in a trial and to render a verdict on those questions. In Ohio, grand juries consist of nine jurors and up to five alternates. Petit juries consist of 12 jurors in felony cases and eight jurors in misdemeanor cases. In civil cases, petit juries consist of eight jurors, or of whatever lesser number the parties may agree. All jurors are chosen at random. Petit jurors are screened through *voir dire* before being allowed to sit on the jury. *See* felony, misdemeanor, no bill, probable cause, sequester, true bill, verdict, *voir dire*.

JUVENILE—In Ohio, any person under age 18. *Juvenile* is synonymous with *minor* and *child* for most purposes.

JUVENILE COURT—*See* juvenile division.

JUVENILE DELINQUENT—A minor who has committed any act (other than a juvenile traffic offense) that would be a crime if committed by an adult.

JUVENILE DIVISION—In Ohio, a division of the common pleas court with exclusive jurisdiction to deal with juveniles who are unruly, abused, neglected, or dependent, and juvenile traffic offenders, and to try adults charged with contributing to the delinquency of, or abuse or neglect of, juveniles. Juveniles charged with criminal offenses and retained for trial by the juvenile division (juvenile court) are not subject to adult penalties if found guilty, but may be dealt with according to a

wide range of treatment options available to the juvenile judge. Under certain circumstances, juveniles who are accused of serious crimes may be bound over (transferred) to the court of common pleas for trial and punishment as adults. Also, where the parents involved have never been married to each other, the juvenile division has jurisdiction to determine matters concerning parentage and child support. *See* abused child, child support, delinquent child, dependent child, jurisdiction, neglected child, unruly child.

L

LANDLORD—A real property owner who grants the use of the property to another, called the tenant, by means of a lease or through a tenancy at will, in return for the payment of money or something else of value. *See* lease, tenancy at will.

LEADING QUESTION—A question phrased so that it suggests the answer. In general, leading questions are prohibited on direct examination but are permitted on cross-examination. A direct question to a witness might be phrased, “What did you do then?” The same question would be leading if it were phrased, “You ran away then, didn’t you?” *See* cross-examination, direct examination, hostile witness, Rules of Evidence.

LEASE—A document that is both a contract and a conveyance of an interest in property, the interest being the right to occupy and use the property for a stated period of time, or term. The landowner is the lessee and the person taking possession of the property is the tenant. The term of a lease may be short or long (leases of 99 years or more are sometimes used). Leases may provide for their own renewal. Historically, leases were used only to rent real property. Increasingly they are used to rent personal property, especially expensive farm machinery, motor vehicles, industrial machines and business equipment.

LEGAL SEPARATION—A legal procedure providing for a husband and wife to live apart from each other without ending the marriage. The court determines the continuing rights and responsibilities of the husband and wife with regard to property and their obligations to their children, if any. *See* dissolution of marriage, divorce, domestic relations division.

LEGAL TENDER—Any form of money that the law requires a creditor to accept as payment of a debt.

LEMON LAW—The popular name for laws that protect consumers against manufacturers’ defects that substantially impair the use, value or safety of a new motor vehicle, either purchased or leased.

LENDER—A private, public or institutional entity that makes funds available to others to borrow.

LIBEL—Injury to reputation through the written word, also known as written defamation (untrue statements made in writing about another that damage his/her reputation). In the law, libel is a *tort*, a type of injury where the remedy is a civil suit for damages. To win such a civil suit, the injured party, or *plaintiff*, must prove that the *defendant* published or broadcast damaging information and did so either negligently or deliberately, knowing it was false. Spoken defamation is slander. *See* defamation.

LICENSEE—In general, any person holding a license, such as a driver’s license. In real property and tort law, a licensee is someone who has permission to use property for his or her own benefit. In tort law, a person’s status as a licensee may affect the duty of the property owner to protect the person from unreasonable risks. While a license to use property may amount to an interest in that property, it is not an interest that can be conveyed by deed, or left to one’s heirs by will. Therefore, in disputes over property, the question sometimes arises whether a person’s interest is an easement (which can be deeded or willed) or only a license.

LIEN—Any of a variety of charges or encumbrances on property imposed to secure the payment of a debt or the performance of some act. Liens are enforced by foreclosure proceedings. Liens can be imposed on real property or personal property. Some of the more common real property liens result from judgments, mortgages, property bonds and unpaid taxes. Some of the more common personal property liens result from security interests, attachment, and the furnishing of labor or materials in work on another’s property. *See* foreclosure, judgment, judgment lien, marshaling of liens, mechanic’s lien, mortgage, personal property, priority of liens, real property, security interest, tax lien.

LIFE ESTATE—A type of ownership in which property is granted to a person (called the *life tenant*) only for his or her lifetime. When the life tenant dies, the property passes to a named person, called a *remainderman*, or reverts to the original owner or that owner’s heirs. Since a life estate always carries a remainder interest with it, a life tenant must not destroy or waste the property to the disadvantage of the remainderman. A life tenant can sell or mortgage his or her life interest, but the interest sold or mortgaged is limited to the lifetime of the seller or mortgagee. *See* mortgage, remainderman.

LIFE TENANT—*See* life estate.

LIMITED LIABILITY COMPANY (LLC)—Ohio’s newest form of business entity, an unincorporated company whose owners are identified as members. Members of an LLC are not liable out of their personal assets for debts or obligations of the business, unless they have specifically agreed to personally guarantee the debt. Members are liable only for the amounts they have agreed to invest in the business. An LLC may elect to be taxed under the same rules that apply to partnerships. This means that the business itself only files an information return with the IRS, and the income and losses of the limited liability company are taxed to the members on their personal income tax returns. For businesses that wish to avoid the double taxation of a C-corporation, but want flexibility in management and distributions, the LLC is an increasingly popular choice. *See* corporation, S-corporation.

LIMITED PARTNERSHIP—*See* partnership.

LIVING WILL—A formal, written statement by a person (the principal) identifying the kind and extent of medical treatment to be given to the principal when he or she is in a terminal condition and/or permanently unconscious state and is no longer able to make and communicate decisions about medical care. A living will does *not* appoint another person to make these decisions. Rather, another document, the durable power of attorney for health care, appoints another person (an attorney-in-fact) to make such decisions. *See* advance directive, attorney-in-fact, durable power of attorney for health care, fiduciary.

M

MALICIOUS PROSECUTION—A cause of action based on the defendant’s having the plaintiff prosecuted for a criminal offense, knowing there is no probable cause to do so. *See* crime.

MALPRACTICE—A tort arising from the failure of a professional person, such as a doctor or lawyer, to follow the reasonable standards of the profession. For example, in representing his or her clients, a lawyer must do what a person trained and skilled in the law would do and not merely what a reasonably careful person would do. When a client is injured as a result of that negligence, the lawyer may be liable to pay damages. *See* damages, negligence, tort.

MANDAMUS—An extraordinary writ used to compel a public official to do his or her duty in a particular matter. The duty involved must be clearly defined by statute, ordinance or case law. *See* extraordinary writ, writ.

MANDATORY REPORTERS—Those who are bound by Ohio law to immediately report known or suspected child abuse or neglect to local law enforcement or human services agencies. Mandatory reporters cannot be sued for following through on this obligation, but may face both criminal and civil liability if they fail to report known abuse or neglect. Mandatory reporters include teachers and other authorized school employees, counselors, health care professionals, child care workers, attorneys, priests and others who work closely with children or are charged with protecting children.

MANSLAUGHTER—The unlawful killing of another, short of murder. Ohio law recognizes two types of manslaughter: voluntary and involuntary. Voluntary manslaughter is knowingly killing another while under extreme emotional stress brought on by sufficient provocation to incite the use of deadly force; involuntary manslaughter is the killing of another (even accidentally) as the result of the offender’s committing, or attempting to commit, a felony or misdemeanor. *See* felony, misdemeanor, murder.

MARKETABLE TITLE—Title to a parcel or piece of real property that is sufficiently free from defects to be relied on when buying and selling property. For the most part, the standards of marketability are prescribed by statute in Ohio. Generally, a title will not be classed as marketable if the ownership of record is questionable, or if the exact boundaries of the property cannot be determined or are in dispute. *See* real property, title, title examination.

MARSHALING OF LIENS—Part of a foreclosure action. The process of locating all potential lienholders, notifying them of the foreclosure and determining the validity of liens and the priority of all valid liens. The result of the marshaling of liens is to foreclose all outstanding liens within the same suit, thereby avoiding a series of foreclosures and forced sales. When one lienholder sues to foreclose his, her or its lien, it is necessary to marshal all liens to: 1) give all lienholders a fair chance to collect at least some of their debts; 2) avoid multiple sales of the property; and 3) help obtain the best price for the property under the circumstances. *See* foreclosure, lien, priority of liens.

MAYOR’S COURT(S)—In Ohio, a lower trial court in which the mayor of a city or village (although not a lawyer) may sit as judge. Mayor’s courts are the trial courts with the most limited authority. Mayors must take training and become qualified to hear cases; even then, they can hear only “guilty” and “no contest” pleas. Mayor’s courts have no civil jurisdiction. Their criminal jurisdiction is limited to minor, non-jury cases arising under the ordinances of their own city or village, and moving traffic violations under state law occurring on state highways within the municipal boundaries.

MECHANIC'S LIEN—In Ohio, a statutory lien imposed on real property to secure payment to a person who furnishes labor or material to build or repair that property. In a typical case, a landowner who has paid the contractor for building a house finds that the contractor has not paid some or all of his or her subcontractors, laborers, or suppliers. All of those persons can perfect liens on the landowner's property to secure payment of the money due them. The landowner can protect himself or herself through procedures that enable the owner to determine the identity of potential lienholders and either pay them directly or ensure that they are paid. *See* lien.

MEDIATION—Any process in which a mediator (a neutral third party) facilitates communication and negotiation between parties to help them reach a voluntary agreement regarding a dispute. Because no agreement can be resolved without the agreement of all the parties, mediation does not always result in a settlement. On the other hand, no settlement unacceptable to a party can be imposed during mediation. *See* dispute resolution.

MENS REA—Literally, guilty mind. Generally, no crime occurs unless a guilty act (*actus reus*) is done with a guilty mind (*mens rea*). In Ohio, four degrees, or types, of guilty mind are defined. *See* *actus reus*, culpable mental state.

MINI-TRIAL—A dispute resolution method used primarily to resolve large-scale disputes involving complex questions of mixed law and fact, such as product liability, massive construction and antitrust cases. In a mini-trial, each party presents its case as in a regular trial, but with the notable difference that the parties themselves “try” the case, and their presentations are much shorter. *See* dispute resolution.

MINOR—For most purposes in Ohio, anyone under age 18. *Minor* is synonymous with *juvenile* and *child* for most purposes.

MIRANDA WARNINGS—The requirement, called the Miranda rule, set by the U.S. Supreme Court in *Miranda v. Arizona* (1966), that a person suspected of committing a crime and taken into custody by law enforcement officers may not be interrogated until he or she has been advised of the right to remain silent, the right to legal counsel and the right to have counsel paid at state expense if necessary, and also has been warned that anything the suspect says can be used against him or her in further legal proceedings.

MISDEMEANOR—A crime that generally carries a local jail term of six months or less (but can be up to one year for repeat drunken driving). Typically, a fine is imposed instead of or in addition to jail time. Probation supervision, community service, restitution and other local sanctions are common. **Misdemeanors**—which include a great variety of offenses

from littering and speeding to drunken driving (the first three times) and simple assault (with minimal harm)—are generally less serious offenses than felonies. Misdemeanants are not eligible for prison terms. *See* crime, felony.

MISTRIAL—The suspension of a trial by the court (the judge) because of some act or event that seriously compromises the fairness of the proceeding and that cannot be corrected. The judge usually declares a mistrial due to a mistake or misconduct that jeopardizes a party's right to a fair trial, or due to the inability of a jury to agree on a verdict (hung jury). If a mistrial has been declared in a civil case, the case will be set for a new trial. If a mistrial is declared in a criminal case, there may be a retrial, a plea bargain or a dismissal of the charges. *See* hung jury.

MIXED PROPERTY—In the law of property, fixtures such as crops and minerals having some characteristics of both real and personal property. *See* fixture, personal property, property, real property.

MORTGAGE—1) A transaction in which a debtor grants a creditor a lien (called a *mortgage* or *mortgage lien*) on the debtor's property in order to secure payment of the debt. 2) A conveyance of title to property (called a *mortgage* or *mortgage deed*) given to ensure payment of debt. *See* deed, lien, real property, security interest.

MOTION—1) A written request asking the court to take some action (for example, to dismiss a complaint). 2) An oral request made at a trial or hearing asking the court to take some action (for example, to rule on the admissibility of evidence).

MUNICIPAL COURT—In Ohio, a lower trial court with jurisdiction in a variety of minor civil matters and which can try lawsuits involving not more than \$15,000. In criminal cases, municipal courts have jurisdiction to try misdemeanors and to hold preliminary hearings in felonies. The territorial jurisdiction of a municipal court is established by statute to include a city, or a group of cities, or one or more cities plus unincorporated areas in the county, or an entire county. *See* bindover, county court, jurisdiction, preliminary hearing, small claims division.

MURDER—The unlawful, purposeful killing of a person. The most serious form of murder is aggravated murder, of which there are two kinds: premeditated murder and felony murder. Premeditated murder is the purposeful killing of another with prior calculation and design. Felony murder is purposely killing another while committing or attempting to commit—or fleeing immediately after committing or attempting to commit—the crime of kidnapping, rape, arson, robbery, burglary or escape. The death penalty may be inflicted for aggravated murder. *See* culpable mental state, felony.

MUTUALITY OF OBLIGATION—In contract law, an element needed to establish consideration in certain types of contracts. For example, if the promise of each party is the consideration for the promise of the other, but one of the parties is not bound (or is not equally bound) by his or her promise, the obligation of the contract is one-sided—that is, it lacks mutuality. In such a case, there is insufficient consideration to make a binding contract. *See* consideration, contract.

N

NECESSARIES—In contract law, necessities are generally defined as food, clothing, shelter and medical care. While a minor is not competent to enter into a contract, a person who, in good faith, provides necessities to a minor may be able to enforce the contract for the necessities.

NEGLECTED CHILD—A child who is endangered by an act or omission of a parent, guardian or custodian. *See* abused child, child endangerment, dependent child, juvenile division, unruly child.

NEGLIGENCE—In tort law, the failure to exercise due (or reasonable) care, including the failure to protect another or the property of another from an unreasonable risk of harm. In general, carelessness is a synonym of negligence. *See* negligence per se, *res ipsa loquitur*, strict liability, tort, workers' compensation.

NEGLIGENCE PER SE—Literally, “negligence in and of itself.” In Ohio, the violation of any specific safety statute, such as a traffic law, is negligence per se. Therefore, in a civil lawsuit arising out of a traffic accident, for example, the plaintiff can prove that the defendant was negligent merely by showing that he or she broke the law governing traffic lights; the plaintiff is not required to show what negligent act or omission of the defendant (inattention, drunkenness, speeding or whatever) caused the defendant to run the red light. *See* evidence, negligence, tort.

NEGOTIABLE INSTRUMENT—In commercial law, a document is a negotiable instrument if it: 1) is signed by the maker or person on whose account it is drawn; 2) contains an unconditional promise or order to pay a specific sum of money; 3) is payable either on demand or at a definite time; and 4) is payable either to the order of a particular person or to the bearer. Common types of negotiable instruments are checks, drafts, bills of exchange, certificates of deposit and promissory notes. A negotiable instrument (also called commercial paper) is a substitute for cash, and is used in

commerce because it can be more convenient and secure than cash. *See* endorsement, holder in due course, promissory note.

NEGOTIATION—1) An exchange of negotiable instruments such as the transfer of a check, bill of exchange or promissory note to another for money, goods, services or some other benefit. 2) A back-and-forth discussion or conference between parties attempting to reach mutual agreement or settle a dispute. *See* negotiable instrument, dispute resolution.

NEXT FRIEND—A legally competent adult who brings a lawsuit on behalf of a minor. For example, a child injured in an auto accident may have a legal claim against the negligent driver. Because a minor cannot bring a lawsuit, the lawsuit would be brought in the child's name by the child's next friend, usually a parent. *See* competence, guardian *ad litem*.

NO BILL—1) A phrase endorsed on an indictment which evidences that a grand jury has refused to issue an indictment because probable cause was not shown that: a) an offense was committed; or b) the accused committed the offense. 2) A rejected indictment. *See* jury, indictment, true bill.

NO-FAULT DIVORCE—A term used to describe a type of divorce in which proof of the traditional grounds for divorce is not required. Dissolution of marriage is Ohio's version of no-fault divorce. *See* dissolution of marriage.

NOLLE PROSEQUI—Literally, “It will not be pursued.” A document filed by the prosecuting attorney that dismisses a criminal case. Unless the offender has been in jeopardy, a *nolle prosequi* does not prevent the state from retrying the case, but it ends most cases. In courthouse slang, the phrase is usually shortened to “nolly pross” or “nolly,” and is used both as a noun and a verb. *See* double jeopardy.

NON-EXEMPT EMPLOYEE—An employee who qualifies for protection under state wage and hour laws, or under the federal Fair Labor Standards Act (FLSA). A non-exempt employee must be paid at least the minimum wage established by the U.S. Congress or the state in which he or she works, whichever is higher. A non-exempt employee also must receive overtime pay at the rate of one and one-half times their regular rate of pay for every hour worked above 40 hours per week. *See* civil service laws.

NONPROFIT CORPORATION—A legal structure that is not formed for its members' financial gain or profit, but for the benefit of an organization's members or for a public purpose. The net earnings of a nonprofit corporation are not distributed to its board members, directors, officers or other private persons. A nonprofit must follow the specific guidelines set forth in Section 501(c) of the *Internal Revenue Code* of 1986 to

obtain an exemption from federal and state income taxes. *See* corporation, tax-exempt organization.

NUISANCE—A condition put on a parcel of real property that improperly interferes with the use or enjoyment by other persons of their real property. A *public nuisance* is one that adversely and unreasonably affects a community's safety, health, morals, convenience or comfort and may be treated as a criminal offense, such as the maintenance of a brothel or crack house. A *private nuisance* interferes with an individual's right to use and enjoy property, such as an incessantly barking dog or unsanitary, noxious or unsightly property. A private nuisance may prompt a civil lawsuit.

NUNCUPATIVE WILL—Oral will. *See* will.

O

OBJECTION—The act of taking exception to some evidence, statement, conduct, proceeding or event believed to be improper. If an appropriate objection is made at trial, the court will sustain it and take whatever corrective measures are necessary. If an objection is made to something that is *not* improper, the court will overrule it.

OFFER—In contract law, an offer is the outward expression of a willingness to enter into an agreement. An offer may be verbal, written or even implied from conduct. An offer is one of the three basic requirements for a valid contract; the others are acceptance and consideration. *See* contract, counteroffer.

ONLINE LAW—A term that refers to the rules and regulations established by Congress, legislatures, courts and international conventions to govern, prevent and resolve disputes that arise from the use of computers and the Internet.

OPEN MEETING LAW—In Ohio, a law that governs the ways in which public meetings must be conducted. The law gives the public a right of access to the meetings of a large number of government bodies at the state and local level. It entitles the public to notice of public meetings and allows citizens to inspect and copy meeting minutes.

OPENING STATEMENT—A statement, made by a party's attorney in a trial or other legal proceeding, that outlines what the party expects to prove and how the party intends to prove it. In a jury trial, opening statements are made immediately after the jury is impaneled and sworn.

ORDINANCE—A written law enacted by the legislative body of a village or municipality. *See* statute.

P

PARENTING TIME—This term, formerly known as "visitation," describes the time a court allocates to parents to spend with their children following a breakup of the family. When a court terminates a marriage involving a minor child or children and declares one parent the residential parent, the non-residential parent is almost always granted parenting time with his or her child(ren). Courts refer to standard guidelines in allocating parenting time, but these may be modified under special circumstances. *See* dissolution of marriage, divorce, residential parent.

PARTITION—The division of real or personal property interests between or among co-owners (people who own the entire, undivided property together) so that each co-owner becomes the sole owner of a portion of the property. *See* joint tenancy, personal property, real property, tenancy in common.

PARTNERSHIP—A form of business organization similar to a sole proprietorship, except that two or more persons own and operate the business. The partners pay the partnership taxes themselves and are personally liable for business obligations. Ohio recognizes two forms of partnership: 1) In a general partnership, the partners share equally in the right and responsibility to manage the business; any partner can bind the entire group to a legal obligation; and each partner is responsible for all of the business's debts and obligations. 2) In a limited partnership, the limited partners have no say in managing the business and are not liable for its debts, but are liable for the tax on their share of the partnership income. Every limited partnership must have at least one general partner, who manages the partnership and is liable for its debts. *See* limited liability company.

PATENT—A patent is a grant given to an inventor by the U.S. Patent and Trademark Office (PTO). The PTO issues the grant after considering and approving the inventor's patent application. A patent grants the right to exclude others, for a period of up to 20 years, from making, using, offering to sell, selling or importing an invention. The United States issues three kinds of patents: 1) utility patents (for new processes, machines, articles of manufacture or compositions of matter, or improvements to such processes or articles); 2) design patents (to protect the aesthetic or ornamental external appearance of articles of manufacture); 3) plant patents (for the invention or discovery and asexual reproduction of any new variety of plant, including trees, shrubs and flowers—except for tuber-propagated plants and those found in an uncultivated state). *See* intellectual property.

PAYABLE-ON-DEATH (POD) ACCOUNT—An account (such as a bank account) owned by one person during his or her lifetime, which passes, on the owner’s death, to one or more named persons. This is not the same thing as a joint account or joint and survivorship account. In a POD account, the named second person has no ownership interest until after the account holder’s death. *See* joint tenancy, transfer-on-death (TOD) designation affidavit.

PAYDAY LENDERS—Money lenders that make small, short-term, high-rate loans, called payday loans, cash advance loans, post-dated check loans or deferred deposit check loans. Such a loan is typically secured by a personal check and includes a fee. This type of credit is very expensive. The federal Truth in Lending Act requires payday lenders to disclose the cost of payday loans. Borrowers must receive, in writing, the dollar amount of the finance charge and the annual percentage rate. Ohio law allows these check-cashing businesses to make loans, but imposes certain restrictions.

PENITENTIARY—In Ohio, any of several institutions for the imprisonment of persons convicted of a felony. The historic distinction between “penitentiary” and “reformatory” no longer exists, except in the names of certain institutions. While offenders are segregated by gender and, to a certain extent, age, programming and supervision are about the same whether a prison is called a penitentiary or a reformatory. *See* reformatory.

PEREMPTORY CHALLENGE—The right to have a prospective juror dismissed from a jury without stating a reason. During *voir dire*—after all challenges for cause have been exhausted and the jury is tentatively complete—each party may exercise peremptory challenges, one at a time, and in turn. In criminal cases, the number of peremptory challenges allowed each party is six in capital offense cases, four in all other felony cases, and three in misdemeanor cases. In civil cases, each party is allowed three peremptory challenges. *See* challenge, challenge for cause, *voir dire*.

PERSONAL PROPERTY—Property other than land or interests in land. Tangible personal property includes things having a physical existence that can be transported, seen and touched, such as an automobile, a television, clothing, furniture or tools. Intangible personal property includes things capable of being owned, but which have no physical existence, such as stock in a corporation or a right to take legal action. *See* property, mixed property.

PERSONAL RECOGNIZANCE—A type of bail consisting simply of an accused’s written promise to appear in court when required. Generally, when there is no good reason to

believe an accused will not appear when required, the accused may be released on personal recognizance. *See* bail.

PER STIRPES—Literally, “by roots” or by representation. The term is commonly used in wills and trusts to describe one method for the distribution of property when a beneficiary dies before the person whose estate is being divided. The members of the nearest generation of descendants with a living member inherit equally. Example: If Mary leaves \$200,000 to her daughter, Carol, and Carol dies before Mary dies, then the \$200,000 that Carol would have inherited will be divided equally among Carol’s children. *See* trust, will.

PETIT JURY—*See* jury.

PLAIN ERROR—A type of prejudicial error committed during a trial or other legal proceeding that is so obviously and extremely prejudicial to the rights of a party that an appellate court can address the error even though no party objected when it was made. (Normally, errors not brought to the attention of the trial court at the time of trial are not considered on appeal). *See* court of appeals, harmless error, objection, prejudicial error.

PLAINTIFF—The complaining party in a civil action. *See* civil action, complaint.

PLANNED UNIT DEVELOPMENT (PUD)—A housing development in which a homeowners’ association administers common property owned and shared by all dwelling owners in the project. Dwellings are often clustered to allow for more common space, and special zoning is required for this kind of development. *See* condominium.

PLAT—A map of subdivided land, showing the various lots, the portions of the land dedicated for roads and other public uses, and the easements for utilities and other features.

PLEA—In criminal law, any of four formal responses an accused may give to a criminal accusation. The four pleas are: 1) not guilty, which is a denial of the charges; 2) not guilty by reason of insanity, which asserts the defense of criminal insanity (this plea may be joined with a plea of not guilty); 3) no contest, which denies guilt but admits the facts on which the charge is based (this often is used when the accused person fears a guilty plea may be used against him or her in a later civil suit); and 4) guilty, which is an admission that the accused person committed the crime charged. *See* charge, plea bargaining.

PLEA BARGAINING—In criminal law, pretrial negotiations between the defense and prosecution. If a plea bargain is

made, the accused normally will be permitted to plead guilty to a lesser offense than was originally charged, or to plead guilty to a principal offense and have other charges dismissed. The accused person may be willing to plead guilty to a lesser offense (or to a reduced number of offenses) because he or she has some doubt about the chance of winning at trial and is hoping to secure a lesser sentence because, by pleading guilty, he or she has saved the state the time, expense and uncertainty of a trial. The prosecution may accept a plea bargain if it has some doubt that it can obtain a conviction on the offense charged, or if it believes that it is more economically feasible and in the interest of justice to accept the plea. The underlying basis for a negotiated plea in a felony case must be stated in open court. *See* crime, charge, plea.

PLEADING—1) In civil practice, any of various written documents designed to identify the questions to be tried in a lawsuit. 2) The process of preparing and filing such documents. In Ohio, the most basic pleadings are the statement of the plaintiff's claim, called the complaint, and the response, called the answer, of the party against whom the claim is made. A complaint filed by a defendant as part of the defendant's response to the plaintiff's complaint is called a counterclaim. The plaintiff may respond to the defendant's counterclaim with a reply. Sometimes a plaintiff or defendant may have a claim, supplementary or subordinate to the main lawsuit, against a co-plaintiff or a co-defendant; this claim is stated in a cross-claim. A response to a cross-claim is an answer. A defendant may file a complaint against a person who is not a party to the original lawsuit and who is or may be liable to the defendant if the defendant is found liable to the plaintiff. That pleading is called a third-party complaint. Also, when a defendant has filed a counterclaim against the plaintiff the plaintiff may file a third-party complaint against a person who is or may be liable to the plaintiff if the plaintiff is found liable to the defendant. *See* answer, complaint, counterclaim.

POST-CONVICTION RELIEF PROCEEDING—A type of proceeding in criminal matters designed as a partial substitute for *habeas corpus*, in which the court reviews claims of a convicted offender that his or her constitutional rights were violated. *See* *habeas corpus*.

POWER OF ATTORNEY—A document by which a person (called the principal) authorizes another person to act on the principal's behalf, either for limited or for broad purposes. The person receiving the power of attorney is called an attorney-in-fact or agent. With a general power of attorney the attorney-in-fact can conduct all business or sign any document for the appointer, with the exception of some powers that must be specifically granted. With a special power of attorney the attorney-in-fact can sign documents or act in relation only to matters specified in the written power of attorney itself. *See*

agent, attorney-in-fact, durable power of attorney for health care, fiduciary.

PRECEDENT—1) The reported decision of an appeals court establishing a legal rule that is binding on lower courts in future cases involving the same legal question. The doctrine that a lower court must follow a precedent is called *stare decisis*. 2) Before, as in the term *condition precedent*, which means, for example, that a certain event (a condition) must occur before a party is required to perform under a contract. *See* court of appeals, *stare decisis*.

PREDECEASED BENEFICIARY—A person, named as a beneficiary in a will, who dies before the death of the maker of the will (the testator). The gift is not automatically invalidated unless the will makes clear that the beneficiary must survive the testator in order to inherit. Instead, the gift goes to the beneficiary's lineal descendants if the beneficiary is a relative of the testator. If the beneficiary is not a relative of the testator, or the will makes clear that the gift lapses unless the beneficiary survives the testator, the gift becomes part of the residuary estate. *See* bequest, residuary estate, will.

PREJUDICIAL ERROR—An error that affects (or is presumed to have affected) a trial's outcome and may provide a ground for reviewing the judgment that was rendered in the proceeding. The most blatant and extreme type of prejudicial error is called *plain error*. *See* court of appeals, harmless error, plain error.

PRELIMINARY HEARING—A type of proceeding held when a person is arrested for a felony. The purpose of the hearing is to determine whether there is probable cause to believe that a crime has been committed, and that the accused committed it. If the answer to both questions is yes and the crime appears to be a felony, the accused will be bound over (transferred) to the grand jury for possible indictment. In Ohio, municipal courts and county courts have preliminary hearing jurisdiction. *See* bindover, jury.

PREPONDERANCE OF THE EVIDENCE—In a legal proceeding, a measure or degree of proof that is less than *beyond a reasonable doubt* and *clear and convincing evidence*, but greater than *probable cause*. A fact is proven by a preponderance of the evidence if the evidence favoring something is more weighty and believable—even if only by a tiny fraction—than the evidence against it. Preponderance of the evidence is the degree of proof required to prevail in most civil actions and to establish an affirmative defense in a criminal case. *See* affirmative defense, beyond a reasonable doubt, clear and convincing evidence, degree of proof, evidence.

PRESCRIPTION—*See* adverse possession, easement.

PRE-SENTENCE REPORT—A report ordered by a judge in a criminal case for the purpose of giving the judge basic information about the history, character and condition of the offender. The contents of the report assist the judge in determining the proper sentence. The report assists the judge in determining, among other things, the need for incarceration, the length of incarceration, the need for treatment, and whether local sanctions, such as probation, are appropriate. In Ohio, pre-sentence reports are required in felony cases in which community control sanctions, such as probation, may be granted, and optional in other cases. A victim impact statement is an analogous report concerned with the effects of the offense on the victim. *See* community control sanctions, felony, victim impact statement.

PRETERMITTED HEIR—A person born after his or her parent has made a will. In general, such a person (also called an after-born child or an omitted heir) is entitled to share in the estate in the same way as the testator's other children. However, if the will clearly shows that after-born children are to be treated differently from children alive at the time the will was made, the court will follow the testator's direction. *See* will.

PRE-TRIAL CONFERENCE—A meeting of the parties, their attorneys and the judge held before the trial. The purpose of the meeting is to agree on stipulations, questions to be tried, and other matters so that the trial proceeds smoothly and quickly. A pre-trial conference also may be a forum for settlement negotiations.

PREVAILING WAGE LAW—In Ohio, the law that applies to construction projects undertaken by certain public authorities and requires that the public authorities pay the prevailing rate (the going rate) of wages to workers on the project.

PRIMA FACIE—Literally, “on its face.” Evidence is said to be *prima facie* when, standing alone, it amounts to the degree of proof required to make a particular finding. In a criminal case when the prosecution rests after completing the introduction of its evidence, the state's case is said to be *prima facie* if the evidence so far introduced is sufficient to convict. *See* evidence.

PRIORITY OF LIENS—The order in which liens on property are honored and paid. The general rule is first in time, first in priority, although certain liens, such as liens for unpaid taxes, may have priority regardless of when they attached to the property. Typically, questions of priority arise in foreclosure actions. When the property is sold, the first mortgagee or lienholder will be paid first and, if any money is left over, the

second mortgagee or lienholder will be paid, and so on in descending order of priority. *See* foreclosure, lien, marshaling of liens, mortgage.

PRIVATE JUDGE TRIAL—A private judge trial resembles a court trial, except the parties themselves choose an individual, usually a retired judge, to be a “judge pro tempore” and render a decision in the case. The trial is held in private and may be confidential. Private judges are appointed according to a “stipulation” signed by the parties and filed with the court. The court then endorses the stipulation and holds the dispute in abeyance until a decision is reached. The verdict is entered in court as if the trial had been conducted there. A verdict in a private trial can be appealed under the same grounds as a public trial verdict. *See* dispute resolution.

PROBABLE CAUSE—A measure or degree of proof that is less than preponderance of the evidence, and is the lowest degree of proof normally used in a legal proceeding. Proof amounting to probable cause exists where there is good reason to believe, based on specific evidence, that a specific allegation or accusation is true. It is the degree of proof required to: 1) sustain an arrest; 2) bind over an accused to a grand jury following a preliminary hearing; 3) return an indictment; or 4) issue a search warrant. *See* arrest, bindover, degree of proof, evidence, indictment, warrant.

PROBATE—1) The administration of an estate under the supervision of the probate court. 2) The filing and acceptance of a will with the probate court before the actual administration of the estate. 3) Assets administered through the probate court. *See* estate, probate division, will.

PROBATE COURT—*See* probate division.

PROBATE DIVISION—A division of the common pleas court, concerned with wills and the administration of estates, adoptions, guardianships, commitment of mentally ill or retarded persons, supervision of fiduciaries and the issuance of marriage licenses. *See* estate, fiduciary, guardian, will.

PROBATION—*See* community control sanctions.

PRO BONO—In the legal arena, legal services that are donated to individuals or organizations that could not otherwise afford them and who would otherwise be denied equal access to the law.

PROCEDENDO—An extraordinary writ, designed to compel a court to proceed in a particular case. *See* extraordinary writ, writ.

PROCEEDING IN AID OF EXECUTION—In general, any of various proceedings designed to help a judgment creditor enforce (collect) a judgment granted to the creditor by the court. The usual proceedings in aid of execution are debtor’s examinations and garnishments. In a debtor’s examination, the judgment debtor is questioned under oath about the nature, extent and location of his or her property. *See* garnishment, judgment creditor, judgment debtor.

PRO HAC VICE—“For this occasion.” Most states will admit an attorney from another state by courtesy for a particular occasion (*pro hac vice*) for the purpose of participating in a single case, even though the attorney is not specifically licensed to practice law in that state. However, the attorney must receive admission by the other state’s court to participate in the case.

PROHIBITION—An extraordinary writ designed to prevent a court from proceeding in a particular case. *See* extraordinary writ, writ.

PROMISSORY ESTOPPEL—Even though the promise to make a gift cannot usually be enforced, such a promise *may* be enforced if the beneficiary of the gift takes some concrete action in reliance on the promise. Thus, if a person promises to make a donation to a college and the college, relying on the promised donation, constructs a building, the promise likely will be enforceable even though the college gave nothing in exchange for the pledge. This is sometimes called *promissory estoppel*, because the person who made the promise is “stopped” from claiming that there was no consideration for the promise.

PROMISSORY NOTE—A written promise to pay a specified sum of money to a named person. If the note meets the four requirements for negotiability, it is a negotiable instrument. *See* cognovit note, negotiable instrument.

PROPERTY—Anything capable of being owned. The main classifications of property are real property and personal property. *See* fixture, mixed property, personal property, real property.

PROSECUTING ATTORNEY—In Ohio, an elected county official who is the attorney for local government agencies in governmental matters and who prosecutes criminal cases. In other states, the counterpart of the prosecuting attorney might be called the district attorney or state’s attorney. The prosecuting attorney’s counterpart in the federal system is the United States Attorney.

PROTECTED CONDUCT—*See* employment at will.

PROXIMATE CAUSE—1) A principal element of liability in tort cases. Unless the plaintiff can prove that the wrongful conduct of the defendant was the proximate cause of the plaintiff’s injury, the defendant cannot be held liable. It is not enough that the defendant did something wrong which eventually or indirectly led to the injury; in order to be the proximate cause of injury an act or omission must, in a natural and continuous sequence, directly produce the injury, and it must be shown that the harm would not have occurred but for the defendant’s act or omission. 2) Similarly, in criminal law the defendant’s act must have been the proximate cause of the death of the victim in order to prove murder or manslaughter. *See* tort.

PUBLIC BODY—According to the Ohio Open Meetings Act, the definition of “public body” includes most, but not all, government entities made up of more than one member that make decisions on matters of public business. At the state government level, the term “public body” means “any board, commission, committee, council, or similar decision-making body of a state agency, institution, or authority.” At the local government level, a “public body” is “any legislative authority or board, commission, committee, council, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution.” At both the state and local government level, the term “public body” also includes any committee of one of the above-described public bodies.

PUBLIC RECORD—With respect to the Ohio Public Records Law, the definition of “public records” is “any record that is kept by any public office, including, but not limited to, state, county, city, village, township, and school district units and any record pertaining to the delivery of educational services by an alternative school in Ohio kept by a nonprofit or for-profit entity operating the school.” Ohio law also creates three categories of public records: 1) those that are public and must be released upon request; 2) those whose release is discretionary with the record-keeper; and 3) those that are confidential and may not be released.

Q

QUASI-CONTRACT—*See* unjust enrichment.

QUITCLAIM DEED—A real property deed that a person (the grantor) makes to transfer only that interest in the property for which the grantor has title. Quitclaim deeds are commonly used to transfer title or interests in title, and are often made to

family members, divorcing spouses, or in other transactions between people who are well-known to each other. Quitclaim deeds are also used to clear up questions of full title when a person has a possible, but unknown, interest in the property. Grant deeds and warranty deeds guarantee (warrant) that the grantor has full title to the property or to the interest the deed states is being conveyed, but quitclaim deeds do not provide this sort of guarantee. *See* real property, title, warranty deed.

QUO WARRANTO—A type of extraordinary writ used to test a person's right to hold a particular public office, or to challenge certain undertakings by private corporations. *See* extraordinary writ, writ.

R

REAL PROPERTY—Land, fixtures and any interest in land or fixtures. *See* fixture, mixed property, property.

REASONABLE DOUBT—*See* beyond a reasonable doubt.

RECISSION—The cancellation of a contract. *See* contract.

REDACTION—Removal of a portion or portions of text from an original document, usually by cutting out, whiting-out or blacking-out parts of the document. In legal proceedings, redaction is justified for “privilege” reasons that call for some information to be kept confidential. Examples of information that might properly be redacted before disclosing a document in a legal proceeding include confidential and non-relevant medical or psychological information and trade secrets. Within the context of public record law, redaction generally refers to the crossing out of portions of a public document in order to keep some information from public scrutiny or protect privacy.

REFERENDUM—The process by which the public votes on the repeal or approval of an existing or proposed statute or state constitutional provision. Many states, including Ohio, provide that a referendum will be placed on the ballot if its supporters file a petition containing a required number of voter signatures. *See* constitution, statute.

REFORMATORY—In Ohio, an institution for the imprisonment of persons convicted of felony offenses, now generally synonymous with the term *penitentiary*. The term *reformatory* should not be confused with the term sometimes used in other states to designate juvenile correction facilities. *See* felony, penitentiary.

REMAINDER INTEREST—The right to receive title to real property upon the death of the life tenant. A remainder interest

can be bought and sold, but its sale does not affect the interest of the life tenant during his or her lifetime. *See* life estate, real property, title.

REMAINDERMAN—A person who owns a remainder interest. *See* life estate.

RESIDENTIAL PARENT—The parent with primary responsibility for a child after the court terminates a marriage. The other parent is called the non-residential parent. These terms are not used if the court orders shared parenting. *See* dissolution of marriage, divorce, domestic relations division, shared parenting.

RESIDUARY ESTATE—All of what is left of an estate once the deceased person's debts and costs of administration have been paid and all specific bequests have been distributed. *See* bequest, estate, will.

RES IPSA LOQUITUR—Literally, “A thing speaks for itself.” In tort law, the rule that permits a jury to find a defendant negligent even without specific evidence about the defendant's acts and omissions. The rule is used in cases where the cause of the plaintiff's injury is entirely under the defendant's control, and the injury could have been caused only by negligence. For example, if a surgical tool is left in a patient after an operation, the jury will be permitted to infer that the person in charge of the operation was negligent. *See* evidence, negligence, tort.

RESPONDEAT SUPERIOR—Literally, “The superior [master] must answer.” In tort law, the rule that says a principal or employer is responsible automatically for the acts and omissions of his or her employees or agents, when those acts are done within the scope of their duties as employees or agents. *See* agent, independent contractor, tort.

RESTRAINT ON ALIENATION—In real property and probate law, limitations on the ability to sell, mortgage or rent real property. In general, the law does not permit grantors to keep future owners from selling, leasing, mortgaging or otherwise doing what they like with the property. When fee simple title to property is granted any attempted restraint on alienation is void (of no effect). *See* fee simple, real property, rule against perpetuities, title.

RETAIL INSTALLMENT SALE—A type of sale of goods at retail where payment is made in a series of installments. Retail installment sales are regulated by statute (written law) in Ohio.

RETAINER—An advance payment to an attorney for services to be performed, intended to insure both that the lawyer will represent the client and that the lawyer will be paid at least that

amount. Clients who need regular legal services often make periodic payments (retainers) to ensure that the lawyer's services will be available whenever they are needed.

RETALIATION—*See* employment at will.

REVOCABLE (“LIVING”) TRUST—A trust established during the maker's (the grantor's or settlor's) lifetime (as opposed to a testamentary trust, which is created by the maker's will). *See* trust.

REVOLVING CHARGE ACCOUNT—A type of credit sales arrangement regulated by statute (written law) in Ohio. Most credit card accounts are revolving charge accounts.

RIGHT OF PUBLICITY—A specialized form of invasion of privacy that prevents someone from making money by using another's name or likeness without permission. For example, it would not be appropriate to take a woman's picture and use it in a clothing ad without her permission. *See* invasion of privacy.

RULE—1) A written regulation adopted by a government agency to carry out specific authority granted the agency by a legislative body. When properly adopted, and within the limits of the authority granted by the legislative body, a rule has the force of law. 2) A legal doctrine (for example, *respondeat superior* or the rule against perpetuities). *See* administrative law, Rules of Practice and Procedure.

RULE AGAINST PERPETUITIES—In real property and probate law, a doctrine designed to encourage free transfer of property by limiting the period of time a property owner can delay a change of ownership. A person who conveys land can control to whom and how its ownership is to be transferred in the future, but only for the period of the life or lives of beneficiaries alive at the time of the original grant, plus 21 years. *See* real property, restraint on alienation.

RULES OF EVIDENCE—The common law, statutory and procedural-rule guidelines governing the introduction and use of evidence. The primary purposes of the rules are to promote the orderly presentation of evidence and to insure that evidence is excluded from consideration if by its nature, or its manner of presentation, it is unreliable or unfair. The Ohio Rules of Evidence are established by the Supreme Court of Ohio, as are other rules of practice and procedure. *See* evidence, Rules of Practice and Procedure.

RULES OF PRACTICE AND PROCEDURE— In Ohio, rules established by the Supreme Court of Ohio governing practice and procedure in all courts of the state. In addition to rules of evidence, there are separate sets of rules governing civil,

criminal, traffic, juvenile and appellate cases. *See* Supreme Court.

RULES OF SUPERINTENDENCE—In Ohio, rules established by the Supreme Court of Ohio as part of its duty to oversee the operation of all courts in the state. In general, the rules are designed to promote efficiency in the administration of justice. *See* Rules of Practice and Procedure.

S

S-CORPORATION —A corporation that has chosen to be treated under Subchapter S of the *Internal Revenue Code*. This allows the corporation to be treated like a partnership for taxation purposes while maintaining the protections of a corporate structure, and may provide the benefit of passing losses (particularly in the early development of the business) to the stockholders. However, S-corporations are rigidly structured and there are restrictions on who can be a shareholder. Corporations and other entities generally cannot own S-corporation stock. *See* corporation, limited liability company, partnership.

SCHOOL CHOICE—Students who are enrolled in a school that has failed to meet the state's "adequate yearly progress (AYP)" standard for two consecutive years can choose to enroll in another of the district's schools that is not under "school improvement status."

SCHOOLING CERTIFICATE—Allows a student to work if that student has attended school within his/her school district for the past two years and has diligently attempted to complete the necessary course work.

SEARCH AND SEIZURE—The process of searching for and seizing evidence in a criminal action. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. A general rule (subject to many exceptions) is that a search is unreasonable unless it is made: 1) with the authority of a search warrant; 2) in connection with a lawful arrest; or 3) with the permission of the person whose property is searched. *See* constitution, search warrant.

SEARCH WARRANT—A warrant (order of a court) commanding a law enforcement officer to conduct a search and seizure. Under the Fourth Amendment to the United States Constitution, a search warrant may be issued only when there is probable cause to believe that the search will uncover particular evidence of a crime, and must specifically describe the place to be searched and the things to be seized. *See* probable cause, search and seizure.

SECURITY INTEREST—A lien (or charge) on personal property, acquired by a security agreement, to ensure repayment of a loan or other debt. In Ohio, security agreements and security interests are governed by the Uniform Commercial Code. A security agreement is similar to a chattel mortgage (a generally outmoded written document that made a chattel, or a tangible, personal asset, security for a loan of a certain amount). Security agreements must be filed with a specific public agency (*e.g.*, a state’s secretary of state) to protect buyers of the personal property and lenders making loans secured by the property. It is common for the seller to take a security interest in installment sales of consumer goods, particularly expensive items such as automobiles and appliances. *See* foreclosure, personal property, Uniform Commercial Code (UCC).

SELF-INCRIMINATION—The act of acknowledging one’s guilt during a criminal investigation or prosecution. The term is also used to describe the making of any guilty or damaging statement. Compulsory self-incrimination is prohibited by the Fifth Amendment to the United States Constitution; a person may not be tortured, abused, frightened or tricked into confessing to a crime or making an incriminating statement. For the same reason, at trial an accused person cannot be required to testify (be a witness).

SENTENCE—The judgment in a criminal case. The sentence follows a guilty plea, a jury verdict finding the accused guilty, or, where a jury is waived, a judge’s (or panel of judges’) finding that the accused is guilty. In most felony cases in Ohio, the court will impose a definite sentence of imprisonment (from six months to life, depending on the nature of the crime and, sometimes, the surrounding circumstances), and may include a fine and other sanctions. Also, the sentence for a felony often includes post-release sanctions, meaning that a convict released from prison will be monitored to some extent for up to five additional years. In a misdemeanor case (except minor misdemeanor cases, where jail is never an option) the sentence may include a definite jail term of up to six months, a fine of up to \$1,000, or both. In felony and misdemeanor cases, the sentence may also include some form of community control sanctions (formerly called probation). Until 1996, persons sent to prison were given indeterminate sentences (say, from two to five years); since 1996, most prison-bound felons serve a definite sentence (imprisonment for a fixed time). *See* community control sanctions, felony, misdemeanor.

SEPARATION AGREEMENT—A contract entered into between a husband and wife in connection with a divorce or dissolution of marriage. Typically, the agreement covers such things as child custody, child support, parenting time, division of property and spousal support. Generally, these agreements are made a part of a court order granting a divorce. A

separation agreement that has been approved by the court is required for a dissolution of marriage. *See* dissolution of marriage, divorce.

SEQUESTER—To keep separate or apart. In some criminal cases, members of the jury may be sequestered (prevented from having contact with their families, the news media or the general public, except under supervision) by being lodged in a hotel during the trial. This is done to make sure that the jury makes its decision based only on the evidence presented in court. Also, a witness who has not already testified may be sequestered (or excluded from the courtroom) to prevent him or her from hearing the testimony of another witness. This is done to prevent the excluded witness from being influenced by the testimony of the previous witness. *See* jury.

SERIOUS YOUTHFUL OFFENDER (SYO)—A person under age 18 who has committed a serious criminal offense. Such a person may be eligible for a “blended” sentence that combines a juvenile disposition and an adult sentence depending on the youth’s age and the severity of the offense. *See* blended sentence.

SERVICE MARK—When a word, phrase, logo, symbol or other device is used by a business to identify services, it is referred to as a service mark. *See* intellectual property, trademark.

SERVICE OF PROCESS—Notification of a person that he or she has been named a party to a lawsuit or has been accused of an offense. Process itself consists of a summons, citation or warrant, to which a copy of the complaint or other pleading is attached. Service may be by: 1) personal delivery to the person to be notified; 2) delivery to the person’s home; 3) certified mail to the person; and, 4) in limited situations, by ordinary mail or by publication in a newspaper. *See* citation, pleading, summons, warrant.

SETTLEMENT CONFERENCE—Many states require parties and their attorneys to meet before trial with a judge or other appointed neutral person to see if their dispute can be settled. During the conference, the parties and their attorneys meet with a settlement judge who hears and then critiques the cases of both sides and tries to help the parties reach a compromise. The judge cannot force the parties to settle at this stage, but may strongly encourage settlement by indicating how the disputed issues likely will be ruled on during trial. Even if a settlement conference is not mandatory, a party generally can ask the court for one. *See* dispute resolution.

SEVERANCE PAY—A payment or benefit provided by some employers to terminated employees. No law compels employer to provide severance pay, although the employer

may be legally obligated to do so if severance pay was promised in a contract or employees' handbook. If an employer does create a severance plan, the employees covered by the plan's terms are entitled to plan benefits when the event that triggers benefits occurs. However, an employer may create, modify or abolish a severance plan as it sees fit. Because a severance package is a type of contract, terms and conditions may be set forth in it. For example, most severance agreements require the employee to promise not to sue the employer as a condition of getting the severance payment.

SEXUAL HARASSMENT—In the workplace, any unwelcome, unwanted and/or uninvited sexual advance, any conduct of a sexual nature, or any conduct based on sex that is severe or pervasive and creates an intimidating, hostile or offensive working environment. Any such conduct that an employee finds unwelcome has the potential to be sexual harassment. The harasser can be the victim's supervisor or manager, a co-worker, or even a non-employee who is on the premises with permission. Sexual harassment is illegal under federal and Ohio law and is also the basis of a cause of action in tort. *See* cause of action, employment at will, tort.

SHARE—A portion of ownership interest in a corporation, represented by a certificate stating the number of shares of an issue of the corporation's stock. The corporation sells shares in the company to raise capital. *See* corporation.

SHARED PARENTING—A court-approved plan under which both parents agree as part of a divorce or dissolution of marriage that their child or children will live with each parent at specific times. Shared parenting requires the parents' cooperation on child-rearing matters; a court will not agree to a shared parenting arrangement unless it is satisfied that the parents can cooperate to execute the arrangement. Shared parenting is also known as joint custody. *See* dissolution of marriage, divorce, residential parent.

SHIELD STATUTES—In Ohio, two written laws (one for broadcasters and one for print journalists) that protect them from having to reveal the source of any information gathered in the course of their work. Because these statutes make no distinction between confidential and other sources, all sources are covered. The statutes generally offer protection against having to testify, but may not stand up to a demand for testimony from someone asserting a constitutional right, such as a criminal defendant with a Sixth Amendment right to a fair trial. *See* journalist privilege.

SHOCK PROBATION—*See* judicial release.

SLANDER—Spoken defamation. Written defamation is libel. *See* defamation.

SMALL CLAIMS COURT—*See* small claims division.

SMALL CLAIMS DIVISION—A division of every municipal court and county court in Ohio. The small claims division (court) has jurisdiction over most suits that seek only monetary damages of not more than \$3,000. In small claims proceedings (cases), the parties generally do not have lawyers, and the court costs are lower than in regular municipal court or county court cases. Small claims division hearings (trials) use simplified and less formal procedures and are conducted by a municipal court judge, a county court judge, or a referee (a qualified attorney appointed by the court). *See* county court, jurisdiction, municipal court.

SOLE PROPRIETORSHIP—The simplest form of business organization, combining ownership and management in one person. A sole proprietorship has no existence separate from its owner (such as a corporation does), so income is taxed on the owner's personal return and, because the owner is personally liable for the debts and obligations of the business, his or her personal assets (such as a home) are not protected from creditors of the business. *See* corporation, partnership.

SOVEREIGN IMMUNITY—The doctrine that a government or governmental agency cannot be sued in its own court without its consent. In Ohio, this doctrine has been revoked in most situations. Most claims against state entities (for example, state departments, boards and commissions) may be brought in the court of claims. Further, recent statutory changes and court decisions allow many types of claims against governmental entities smaller than the state (for example, cities, counties and park districts). *See* court of claims.

SPOUSAL SUPPORT—Money or property that the court orders one party to pay for the support of the other party in a lawsuit for divorce, dissolution of marriage or legal separation. Formerly called alimony. *See* dissolution of marriage, divorce, legal separation.

STARE DECISIS—Literally, "to stand on decisions." The rule that the decision of a court, once made, will not be discarded lightly, but will be used as precedent for determining similar cases in the future. This rule is a foundation for the development of the common law. *See* common law, court of appeals, precedent.

STATUTE—In general, a written law adopted by any legislative body, such as the United States Congress or the Ohio General Assembly. *See* ordinance.

STATUTE OF DESCENT AND DISTRIBUTION—In Ohio, a statute that determines how the property of a deceased

person (the decedent) is to be distributed where the decedent did not have a will. In general, the statute favors the nearest relatives surviving the deceased. Priority is given to the decedent's surviving spouse, children, and the children's descendants; then the decedent's parents; then the decedent's brothers and sisters; then grandparents; then any kin. If there is no surviving kin, the decedent's property passes, or escheats, to the state. *See* escheat to the state.

STATUTES OF LIMITATIONS—Statutory (written) laws that limit the time within which a civil or criminal action may be brought (filed in a court), usually calculated from the date of the incident upon which the action is based. For example, negligence claims for personal injury usually must be brought within two years after the defendant's negligent conduct first caused injury to the plaintiff. Malpractice claims against professionals such as medical doctors or attorneys are usually covered by a one-year limitation, as are cases against those accused of assault offenses. The time limits vary depending on the type of action involved, and in some cases on the status of the parties (if, for example, a minor is involved) or the date of the discovery of the injury or loss or the discovery of the identity of the person causing the injury or loss. Because these laws are applied in such a complicated way, persons believing they might have a legal claim should speak with an attorney as quickly as possible. The unexcused failure to bring an action within the time allowed by the applicable statute of limitations is an absolute defense to the action, so no time should be lost in seeking legal advice. *See* cause of action.

STIPULATION—In legal proceedings, formal acknowledgment by the parties that a fact is undisputed. Parties may stipulate undisputed matters in order to save time and effort. Dates, times, weather conditions and the qualifications of expert witnesses often are stipulated. *See* pre-trial conference.

STRAIGHT LIQUIDATION—Term used to describe a “Chapter 7” bankruptcy that is available to individuals, corporations and business partnerships. As stipulated under Chapter 7 of the Bankruptcy Code, a Chapter 7 trustee, assigned by the U.S. Trustee's Office or chosen by the creditors, *liquidates* (sells) any assets that are not protected by the court (*non-exempt assets*) to pay all or a portion of the debts owed to creditors. *See* bankruptcy.

STRICT LIABILITY—1) In tort law, liability imposed without any showing of negligence or other wrongful conduct. Strict civil liability is usually imposed for injuries caused by some particularly dangerous substance or agency (such as explosives or poisons) under the control of the defendant. Strict liability also applies in product liability cases, where the

product caused the plaintiff's injury because it was defective and the product was designed, manufactured or sold by the defendant. In such a case, the plaintiff must prove that the product was defective, but not that the defendant failed to be reasonably careful in, say, manufacturing it. 2) In criminal law, strict liability is imposed for acts and omissions (dealing with food, drugs and sanitation, for example) where the act or omission is the crime; the culpable mental state (if any) of the defendant doesn't matter. *See actus reus*, culpable mental state, *mens rea*, negligence, tort.

SUBCHAPTER S-CORPORATION—*See* S-Corporation.

SUBPOENA—Literally, “under punishment.” An order issued by a court to a witness, commanding the witness to appear and testify under threat of punishment for contempt of court. A *subpoena duces tecum* (literally, “bring with thee, under punishment”) is a subpoena commanding a witness to bring specified books, papers or other tangible evidence to a hearing or trial. *See* contempt of court.

SUMMARY JUDGMENT—In civil practice, a judgment granted solely on the basis of the pleadings and certain supporting evidentiary documents. The court grants summary judgment where the pleadings and documents show that a trial is not necessary because it is clear the requesting party will win the case. *See* pleading.

SUMMARY JURY TRIAL—Summary jury trials are used primarily in federal courts. They give parties the chance to “try” their cases in an abbreviated way in front of a group of jurors. The jurors deliberate about the case and give an “advisory opinion.” This advisory opinion can help parties assess the strengths and weaknesses of their cases and may facilitate settlement of the dispute. Also, a summary jury trial can be scheduled more quickly than a full jury trial, which helps to avoid the delays, expense and anxiety of traditional litigation. *See* dispute resolution.

SUMMONS—1) In civil practice, an order of the court issued to a defendant commanding the defendant to appear and answer the complaint, or risk having default judgment entered against him or her. 2) In criminal practice, an order similar to that issued to a defendant in a civil action, except that the punishment for failure to appear and answer the charge is arrest and incarceration. *See* service of process.

SUNSHINE LAWS—In Ohio, as in many other states, the open records and open meetings laws are collectively known as the “sunshine laws.” They were enacted to give the public access to most government meetings and records.

SUPPLEMENTAL SERVICES TRUST—A trust for individuals with mental illness or mental retardation, or other developmental disability, that allows certain assets to be sheltered for limited purposes, while a portion of the assets goes to the State of Ohio for the use of other Ohioans with disabilities upon the death of the trust's beneficiary. *See* trust.

SUPREME COURT—An appellate court of last resort. The Supreme Court of Ohio is the highest court in Ohio, and the United States Supreme Court is the highest court in the nation. In New York, however, the court called the *supreme court* is a trial court with jurisdiction similar to Ohio's court of common pleas. *See* Rules of Evidence, Rules of Practice and Procedure, Rules of Superintendence.

SURVIVORSHIP TENANCY—*See* joint tenancy.

T

TANGIBLE PERSONAL PROPERTY—*See* personal property, security interest.

TAX-EXEMPT ORGANIZATION—A nonprofit organization (NPO) formed to carry out a charitable, educational, religious or similar purpose. Such an NPO does not pay federal or state corporate income taxes on profits it makes from activities related to the purpose of the organization. This is because the taxing authorities believe that the public derives such great benefit from the activities of these corporations that the tax laws should not prejudice their work. For the same reason, gifts to many charitable NPOs are tax-deductible to the givers. *See* corporation, nonprofit corporation.

TAX LIEN—A tax lien attaches to property at the beginning of each tax year, even though the actual amount of the property taxes has not been determined and the taxes are not yet due. A tax lien is like a mortgage lien, but it exists automatically, because all property owners have a duty to pay real estate taxes to the community. To ensure that those taxes are paid, the community automatically has the protection of this lien on the property. If taxes are not paid for a long enough period of time, the community—that is, county authorities—can have the property sold in order to pay off the tax debt. *See* lien, mortgage.

TENDER—Generally, an offer of money to satisfy a debt.

TEN PERCENT BOND—A type of bail for an accused's appearance in a criminal case. A 10 percent bond is posted by depositing 10 percent of the face amount of the bond with the clerk of court. If the accused appears as required, all but 10

percent of the deposit is refunded. For example, if bail is \$500, a 10 percent bond may be posted by depositing \$50 with the clerk. If the accused appears as required, a majority of the deposit, up to 90 percent, will be refunded. *See* bail.

TENANCY AT WILL—A tenancy (the right to possess and use a premises or real property) in which a landlord rents the tenant the premises or real property on a day-to-day, or week-to-week, basis. A tenancy at will may be terminated by either the landlord or the tenant at any time. *See* lease.

TENANCY BY THE ENTIRETIES—A type of joint ownership of real property by a husband and wife. Each owns the entire property, as contrasted with a tenancy in common or joint tenancy. (Tenants in common and joint tenants each own an undivided fractional interest of the property.) In Ohio, tenancy by the entireties was established by statute from 1972 to 1984. Although estates of tenancy by the entireties can no longer be created in Ohio, those interests established when the statute was in effect are still valid. In Ohio, tenancy by the entireties has been replaced by a statutory joint tenancy with right of survivorship. *See* joint tenancy, tenancy in common.

TENANCY IN COMMON—A type of joint ownership of real property in which each owner has an undivided fractional interest in the entire property. The interest may vary depending on how the property was granted. For example, one tenant in common may own an undivided one-half and two other tenants in common each may own an undivided one-fourth share. Regardless of the size of an individual's share, each tenant in common enjoys full ownership of his or her share, and can sell, mortgage, use or dispose of it as a full owner. If the amount of each share is not specified, each tenant in common owns an equal, undivided fractional share. When one tenant in common dies, his or her share passes to his or her heirs or to the person(s) named in the tenant's will. By contrast, where there is a joint tenancy with right of survivorship under the Ohio statute (or under traditional tenancy by the entireties), the deceased's share passes to the surviving tenant or tenants. Property owned in common may be divided in a partition action. A partition action is a lawsuit in which the property is sold and the proceeds divided, or, rarely, physically divided and parceled out. *See* joint tenancy, partition, tenancy by the entireties.

TENANT—1) A person who occupies rental property. 2) The owner of certain types of interest in real estate, such as a life tenant or a tenant in common. *See* landlord, life estate, real property, tenancy in common.

TESTAMENTARY TRUST—A trust created by the terms of a will, and which comes into being only after the will takes effect—that is, after the trust's creator dies. *See* trust, will.

TESTATE—1) The status of having died with a will. A person who has died with a will has died testate. 2) Property that is governed by a will is testate property. *See* will.

TESTATOR—The person who makes a will. *See* codicil, will.

TESTIMONY—Oral evidence given by a witness. *See* evidence.

TIME OFF FOR GOOD BEHAVIOR—*See* earned credit.

TITLE—1) Ownership. 2) A document evidencing ownership, such as the title to a motor vehicle. *See* evidence, fee, title examination.

TITLE EXAMINATION—The process of examining the public records of deeds, mortgages, liens, court proceedings, taxes and assessments, and other records to determine the status of the ownership of (title to) real property. *See* abstract of title, real property.

TORT—A private wrong as distinguished from a crime (which is a wrong against the public generally); a violation of a legal responsibility when that violation directly causes injury or loss to a person's body, property or rights. Four things together make a tort, and a tort lawsuit will succeed only if the plaintiff proves all four: 1) the defendant owed a legal duty to the plaintiff; 2) the defendant violated (or breached) that duty; 3) the plaintiff suffered an injury or other loss; and 4) the defendant's breach of duty *directly and proximately* caused the plaintiff's loss. Certain cases of workplace injury—arising out of certain dangerous conditions known to the employer—are called *intentional torts* and may form the basis of a tort claim even though injury lawsuits against employers are generally prohibited by the law that provides workers' compensation to injured employees. *See* proximate cause.

TRADEMARK—A trademark is a word or words, an emblem, logo, symbol, slogan or other device that identifies goods or services from a single source. *See* intellectual property, service mark, trade name.

TRADE NAME—A trade name is used to identify a business. If someone registers a trade name with a secretary of state, that company can do business under that name within that state, assuming the use of the name does not infringe another's trade name, trademark or service mark. A trade name does not guarantee that the name can be used on either goods or services. *See* intellectual property, trademark, service mark.

TRANSFER-ON-DEATH (TOD) ACCOUNT—*See* payable-on-death (POD) account, transfer-on-death (TOD) designation affidavit.

TRANSFER-ON-DEATH (TOD) DESIGNATION

AFFIDAVIT—An “effective-on-death deed” that allows a property owner to directly transfer the ownership of real estate upon the owner's death to whomever the owner designates by name. Individuals who own property titled as “joint and survivorship” can execute a TOD Designation Affidavit, but when such an individual dies, the property passes to the surviving survivor-owner(s). Only when the death of the last surviving survivorship tenant dies does the property pass to the TOD beneficiary or beneficiaries designated in the affidavit. The last survivorship tenant, however, must join in the affidavit.

TRESPASS—1) A civil wrong (tort) based on the unexcused intrusion on, or improper use of, property belonging to another. Both real property and personal property may be the subject of trespass, although the term usually refers to an intrusion on real property. Conversion is a type of trespass to personal property occurring when one person improperly assumes control of another's property for his or her own use or benefit (*e.g.*, stealing a watch and pawning it). 2) A criminal offense in Ohio based on the unexcused intrusion on real property of another. *See* conversion, personal property, real property, tort.

TRESPASSER—In criminal and tort law, a person who comes on the land or premises of another without permission. *See* trespass.

TRUE BILL—1) A phrase endorsed on an indictment which shows that a grand jury has found probable cause to believe that the crime stated in the indictment was committed and that the accused committed it. 2) An accepted or issued indictment. *See* indictment, jury, no bill.

TRUST—A legal device permitting the owner of real property or personal property to give the property to a trustee (a fiduciary) to hold and manage for a beneficiary. The beneficiary can be a third person or the person who created the trust. The person who creates a trust is called a maker, a settlor or a grantor. Trusts may be put into operation during the maker's life (a revocable “living” trust or *inter vivos* trust) or only after the maker's death (a testamentary trust). A trust may be *revocable* (meaning it can be canceled or amended by the grantor during his or her lifetime), or it may be *irrevocable* (meaning that, once it is created, it cannot be cancelled or changed). *See* fiduciary, personal property, real property.

TRUSTEE—The administrator of a trust. *See* fiduciary.

U

UNEMPLOYMENT COMPENSATION—Compensation paid at regular intervals, usually by a state agency, to an unemployed worker who meets certain statutory requirements. Ohio's unemployment compensation system is an insurance program that helps unemployed workers who are out of work through no fault of their own (for example, due to a layoff), and are available for work, able to work and actively seeking work. Unemployment benefits are paid out of employer taxes.

UNFAIR COMPETITION—The use of unfair, deceitful or fraudulent methods to gain a business advantage.

UNIFORM COMMERCIAL CODE (UCC)—A model set of statutes governing various business transactions, developed by the Commissioners on Uniform State Laws. The UCC has been adopted in Ohio and a number of other states. More than any other activity, commerce cuts across state lines; the chief value of the UCC is that it provides uniformity in interstate business transactions.

UNJUST ENRICHMENT—A benefit obtained unjustly, especially as the result of an accidental event or the innocent mistake of another. In order to prevent unjust enrichment, the law infers a contract-like relationship among the parties although no contract technically exists, and uses this inferred (or quasi) contract to prevent one party from taking unfair advantage of the other.

UNRULY CHILD—Under Ohio law, a minor who is: 1) habitually truant from school; 2) persistently disobedient (including behavior such as running away from home; 3) who acts in a way that injures or endangers another's (or his or her own) health or morals; or 4) who violates a law that applies only to minors (such as a curfew). Unruly children are sometimes referred to as *status offenders* because of their status as minors. The juvenile division of the common pleas court may deal with an unruly child by using any of the remedies available for neglected, dependent or abused children and, if necessary, the dispositions available for delinquents. *See* abused child, dependent child, delinquent child, juvenile division, neglected child.

UNSECURED APPEARANCE BOND—A type of bail consisting of the accused's written promise to appear in court, coupled with the accused's unsecured promise to pay a specified sum of money if the accused fails to appear as required. Generally, an unsecured appearance bond is used when there is little reason to believe that an accused will not appear as required. It is an alternative to personal recognizance. *See* personal recognizance.

USE TAX—A complementary tax to the sales tax. Generally, use tax is owed on a purchase when the vendor does not collect sales tax (assuming the item or service is taxable). In Ohio, the purchaser must pay the use tax directly to the state through his or her tax return. In the context of online purchases, consumers are obligated to keep track of their online purchases from out-of-state merchants and pay use tax to their own states.

USURY—The practice of charging excessive interest. In Ohio, the collection of usurious interest is prohibited.

V

VARIANCE—In property law, a "special case" exception to a zoning ordinance that may be granted by a government body such as a zoning board, planning commission or city council. A variance is granted when the government body agrees that applying a particular zoning regulation to a specific property is unreasonable.

VENUE—The place where a trial is held. In general, venue follows jurisdiction. In a criminal case, venue may be changed if necessary to secure a fair trial for the accused. *See* jurisdiction.

VERDICT—The factual decision by a jury in a trial. In a criminal case, a verdict might be guilty, not guilty or not guilty by reason of insanity. In a civil case, the verdict might be stated as a finding for the plaintiff (or defendant). In a suit for money, a verdict for the plaintiff (or the defendant, if the defendant has filed a counterclaim) will state a sum of money. When a jury retires to consider its decision, the court will furnish it with forms for all possible verdicts in the case. A verdict has no effect until it is formalized by a judgment journal entry. *See* judgment, judgment journal entry.

VICTIM IMPACT STATEMENT—A report used by judges in sentencing offenders. The report is generally prepared by the court's probation officer and provides the judge with information about the economic, physical and psychological damage the victim suffered as a result of the offender's crime. The victim impact statement is similar to the pre-sentence report, but is concerned with the victim rather than the offender. *See* pre-sentence report.

VICTIM OF CRIME CLAIM—A claim for compensation by a person who has suffered physical injury as the result of a crime. Ohio's court of claims hears claims on behalf of Ohio citizens who suffer injury as a result of crimes committed anywhere and on behalf of non-residents who suffer injury as a

result of crimes committed in Ohio. Compensation includes the reimbursement of out-of-pocket expenses, lost wages and medical expenses resulting from the crime, so long as those losses are not covered by other sources. Property loss and pain and suffering are not compensable. The dependents of a person who dies as the result of a crime may also make claims for the economic support the victim would have provided them. The maximum aggregate award for any one victim, or for all the dependents of one victim, is \$50,000. Dependents of a victim must share an award. Victim of crime claims may be filed with the court of claims or the clerk of the common pleas court of each county. *See* common pleas court, court of claims, crime.

VOIR DIRE—Literally, “to see, to say.” In legal procedure, the process of questioning prospective jurors to determine their fitness to hear and decide a particular case. *See* challenge, impanel.

W

WARD—1) A person in the custody or under the protection of a guardian because of youth or some mental or physical disability. 2) A person committed to a public or private institution for the care of children or of other persons in need of care. *See* fiduciary, guardian, probate division.

WARRANT—An official order granting some specific authority. An arrest warrant authorizes and commands the arrest of a specific person. A search warrant authorizes and commands the search of particular premises for specific evidence or contraband. Arrest and search warrants must be issued by or under the supervision of a court, and may be issued only on probable cause. *See* probable cause.

WARRANTY DEED—A legal document used to transfer (or convey) real property rights from one person or entity (the grantor) to another (the grantee). The maker or grantor of a warranty deed warrants to the grantee that the title to the real property, or interest being conveyed, is good. This means that the grantor has title to and possession of the property and has the right to transfer both. The grantor also promises the grantee that there are no encumbrances on the property, other than any that have been previously disclosed. A warranty deed is the most common form of deed. *See* quitclaim deed, real property.

WHISTLEBLOWER—In employment or workplace law, an employee who tells public authorities (such as a prosecuting

attorney or a regulatory agency) that his or her employer is breaking the law. *See* employment at will.

WILL—A document in which a person (the testator) directs how his or her property is to be distributed upon his or her death. To be competent to make a valid will, a person must be an adult. Further, the person must be sufficiently aware to know: 1) the nature and extent of his or her property; and 2) the identity of those who are the natural objects of his or her generosity (that is, his or her family and friends) even though these need not be made beneficiaries. The will must be in writing, signed at the end by the testator, and acknowledged in the presence of at least two witnesses, who also must sign. An oral will, called a nuncupative will, is valid only for personal property and provided: 1) it is made when the testator is dying and knows he or she is dying; and 2) it is made to at least two competent witnesses who 3) reduce it to writing within 10 days thereafter; and 4) file it with the probate court within six months. *See* bequest, codicil, nuncupative will, personal property.

WILL SUBSTITUTE—A device (for example, a trust) used instead of a will to transfer property upon death. *See* trust, will.

WORKERS’ COMPENSATION—A program that provides replacement income and medical expenses to employees who are injured or become ill in the course and scope of their employment. Financial benefits may also extend to the workers’ dependents and to the survivors of workers who are killed on the job. The employee is not required to prove that the injuries were caused by employer negligence to recover under workers’ compensation laws. Employers are liable even if they are not at fault. Under Ohio’s workers’ compensation law, participating employers pay workers’ compensation premiums into a state fund, administered by the Ohio Bureau of Workers’ Compensation (OBWC), to provide benefits for workers who are injured or become ill in the course and scope of their employment. Employers who comply with Ohio’s workers’ compensation laws generally cannot be sued in court for negligence. However, certain cases of workplace injury—arising out of certain dangerous conditions known to the employer—are called *intentional torts* and may form the basis of a tort claim even though injury lawsuits against employers are generally prohibited by the law that provides workers’ compensation to injured employees. *See* tort.

WRIT—1) An order of a court directing that a person or entity undertake a particular course of action or refrain from taking a particular course of action. 2) The application for such an order. For example, often the phrase *habeas corpus* is used to

mean both the application to the court and the court's order issuing the writ. *See* extraordinary writ.

are restricted to certain uses and development—for example, to industrial, commercial, public, agricultural, single-family residential or multi-unit residential purposes. *See* administrative law.

Z

ZONING—A plan or system adopted and administered by local government in which various geographic areas (zones)

index

A

- absolute ownership
 - see* fee simple ownership
- abuse of process
 - 69, 288
- abused child / child abuse
 - 159, 162—165, 208, 215, 288, 291, 307
 - see also* child
- acceleration of payments
 - 95, 288
- access easement
 - 114
 - see also* easement
- actus reus
 - 44, 288, 295, 308, 319
- Adequate Yearly Progress (AYP)
 - 204, 212, 213, 288, 316
- administrative law
 - 1, 3, 4, 11, 288
- adoption
 - 14, 133, 146—150, 159, 174, 175, 271, 313
- administrator
 - 14, 133, 140—142, 149, 243, 288, 301, 321
 - administrator, court
 - 23, 202
 - administrator, school
 - 204—207
- adverse possession
 - 115, 116, 130, 289
- after-born children
 - 137, 313
 - see also* pretermitted heir
- Age Discrimination in Employment Act (ADEA)
 - 179, 195, 196
- agency disclosure statement
 - 121
- agent
 - 66, 70, 94, 119, 121, 122, 131, 143, 144, 146, 260, 277, 279, 289, 290, 298, 300, 303, 312, 315
 - escrow agent
 - 122, 300
 - independent insurance agent
 - 67
 - real estate agent
 - 121, 298
 - title agent
 - 119, 122, 131
- age of majority
 - 156, 172, 299
- age / schooling certificate
 - 202, 214, 316
- alibi
 - 35, 289
- American Bar Association
 - 108, 229, 231, 245, 247, 249, 285, 286
 - see also* bar association
- Americans with Disabilities Act (ADA)
 - 177—179, 191, 196, 197, 212, 215
- annual percentage rate (APR)
 - 89—91, 93, 97, 289, 311
- annulment
 - 14, 152, 155, 166—168, 171, 173, 289, 290, 292, 298
- answer
 - 27, 35, 42, 43, 184, 289, 296, 312, 319

appeal

30, 31, 38, 40, 42, 48, 52, 53, 55, 56, 58, 59
74, 126, 158, 206, 211, 231, 235, 254, 259—
261, 263, 264, 271, 272, 277, 278, 280, 284,
288, 289, 295, 302, 305, 311

arbitration

29, 73, 76, 107, 183, 289, 296, 297

arraignment

32, 33, 42, 53, 289, 290

arrest

31—34, 41, 42, 45, 51, 53, 56—58, 61, 68, 113,
163, 236, 237, 248, 264, 271, 272, 282, 290,
292, 293, 296, 300, 303, 304, 312, 313, 316,
319, 323
citizen's arrest
31, 292
false arrest
68, 300
house arrest
34, 51, 163, 293
resisting arrest
45

asset

98—100, 102, 104, 110, 136, 137, 140—144,
149, 150, 168, 169, 174, 175, 189, 228, 290,
294, 300, 307, 313, 317—320

assumption of risk

71, 289, 290

at will employee

see employment at will

automatic teller machine (ATM)

96, 299

B

bail

32—34, 42, 53, 61, 113, 118, 157, 160,
289—291, 303, 304, 311, 320, 322

bail bond

33, 113, 290
see also bond

bailiff

19, 25, 36, 39, 59, 61, 264

balloon note

94, 290

bankruptcy

2, 18, 98—101, 105—108, 237, 290, 319
Chapter 7 bankruptcy
98—100, 290, 319
Chapter 11 bankruptcy
99, 100, 290
Chapter 12 bankruptcy
99, 290
Chapter 13 bankruptcy
98—100, 290

bar association

119, 145, 229, 231, 234—238, 244—249,
286
American Bar Association
229, 231, 234, 245, 247, 249, 286
Ohio State Bar Association
119, 145, 234—236, 238, 245—248, 286

bigamy

152, 166, 167, 290

bill of information

32, 293, 303

bindover

32, 34, 161, 291
mandatory bindover
161

blended sentence

160, 162, 291
see also sentencing

bond
33, 34, 47, 113, 118, 140, 290, 291, 306, 320, 322
bail bond
33, 113, 290
cash bond
291
property bond
118, 306
surety bond
33
ten-percent bond
33, 320
unsecured bail / appearance bond
33, 322

breach of contract
82, 83, 85, 278, 289
material breach
81, 85, 291
see also contract

browser
218, 223, 291, 294, 304

bullying
207, 208, 216, 246
cyberbullying
246

Bureau of Motor Vehicles (BMV)
67, 91, 145, 203, 288

C

case law
4, 9, 63, 89, 159, 169, 177, 187, 265, 280, 292, 307
see also common law

chain of title
119
see also title

challenge
29, 35—37, 42, 291, 303, 311
challenge for cause
36, 37, 291, 303, 311
peremptory challenge
36, 37, 303, 311

Chapter 7, 11, 12, 13 bankruptcies
see bankruptcy

child / children
3, 14, 45, 61, 63, 64, 70, 71, 76, 79, 80, 100, 110, 131, 133, 134, 136—139, 144, 148, 151—175, 180, 182, 184, 185, 189, 190, 196, 197, 200—202, 204, 207—216, 221, 222, 226, 228, 237, 246, 258, 259, 264, 269, 272, 288—294, 297—303, 305—311, 313, 315, 317—319, 322, 323
abused child / child abuse
169, 162—165, 208, 288
after-born child / children
137, 313
see also pretermitted heir
child endangerment
45, 162, 164, 165, 288, 291, 309, 322
child labor
185, 197
delinquent child
14, 157, 159—163, 165, 173, 297, 305, 322
dependent child
159, 161—164, 172, 196, 297
neglected child / child neglect
14, 151, 159—165, 170, 172, 208, 215, 297, 305, 307, 309, 322
unruly child
157, 159, 162, 165, 322

child caretaker authorization affidavit
200, 291

child support
14, 151, 152, 155, 166, 167, 170, 171, 173, 174, 182, 290—292, 298, 300, 305, 306, 317

Children's Online Privacy Protection Act of 1998 (COPPA)

221, 226, 228

circuit

18, 22, 181, 231, 256, 278

circumstantial evidence

37, 292

see also evidence

citation

3, 31, 32, 42, 292, 317

citizen's arrest

31, 292

see also arrest

civil rights

18, 45, 55, 177, 182, 196, 198, 199, 211, 212, 278

Civil Rights Act of 1964

177, 196

Civil Rights Act, Ohio

177

Civil Rights Commission, Ohio

182, 198, 199

Civil Rights, Office of

see U.S. Department of Education

civil service law

183, 197, 292

claim(s)

13—16, 18, 24, 27—29, 41, 56, 62, 64, 69, 71, 72, 74—76, 85, 86, 100, 113—115, 118, 119, 122, 129, 141, 142, 153, 166, 184, 187, 188, 194, 195, 198, 236, 242, 243, 253, 257—260, 278, 281, 282, 291, 294—296, 299, 301, 302, 304, 308, 309, 312, 318, 319, 321—323

claimant

16, 42, 243

cross-claim

27, 28, 312

counterclaim

27, 294, 312, 322

court of claims

13, 15, 24, 295, 318, 322, 323

small claims

14, 15, 318

Client Security Fund

236

closing

120, 122, 123, 239, 292

closing argument

30, 35, 38, 39, 42

escrow closing

122

round table closing

122

Code of Judicial Conduct

see Ohio Code of Judicial Conduct

Code of Professional Responsibility

see Ohio Rules of Professional Conduct

codicil

135, 292

cognovit note

89, 106, 292

collective bargaining

182—184, 198, 292

commercial paper

87, 88, 106, 292, 302, 309

commercial / consumer transaction

2, 87, 89, 90, 94, 95, 106, 288—290, 292, 302

see also transaction

common law

1, 2, 4—9, 11, 12, 18, 63, 65, 77, 85, 153, 154,

177, 187, 243, 292, 293, 316, 318

common law marriage

153

- common pleas court
 - 13—16, 18, 20, 24, 118, 153, 159—162, 165, 168, 173, 239, 291, 293, 295, 298, 302, 305, 313, 322, 323
- Communications Decency Act (CDA)
 - 10, 254, 278
- community sanctions / community control sanctions
 - 33, 40, 44, 45, 47, 48, 50, 51, 163, 293, 305, 313, 317
- comparative negligence
 - 71, 290, 293
 - see also* negligence
- compensatory damages
 - 8, 72
 - see also* damages
- complaint
 - 27, 28, 31, 32, 42, 43, 117, 157, 166, 192, 193, 196, 208—211, 219, 223, 234—236, 238, 249, 257, 258, 283, 289, 292, 293, 308, 312, 317, 319
 - third-party complaint
 - 28, 312
- compulsory school attendance
 - 201, 202, 302
- conciliation
 - 168, 257
 - conciliation court
 - 168
- condominium
 - 109, 112, 120, 127, 131, 293, 295
- conservator
 - 133, 147, 149, 301, 302
- consideration
 - 77—79, 85, 195, 288, 291, 293, 294, 309, 310, 314
- Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)
 - 195, 197
- constitutional law
 - 1, 11
- contingent fee
 - 238—240, 248, 294
- continuing jurisdiction
 - 166, 171, 305
 - see also* jurisdiction
- contract / contract law
 - 5, 9, 15, 26, 73, 77—98, 101, 103, 105—107, 115, 120—123, 127, 130, 131, 136, 151, 153—157, 172, 181, 184, 191, 194, 196, 201, 204, 218, 219, 222, 224, 226, 228, 237, 239, 240, 269, 270, 278, 288, 289, 291, 293—296, 299, 300, 302—304, 306, 309, 310, 312, 315, 317, 318, 322
 - breach of contract
 - 82, 83, 85, 278, 289
 - express contract
 - 79, 294
 - implied contract
 - 79, 80, 294
 - land contract
 - 121, 131
 - oral contract
 - 80, 85, 123, 130
 - quasi-contract
 - 84
 - see also* rescission (of contract)
- conventional mortgage
 - 121
 - see also* mortgage
- conversion
 - 68, 294, 321
- conveyance
 - 47, 115, 116, 119, 127, 130, 294, 306, 308

corporation

15, 70, 98—100, 102—106, 110, 117, 189, 237,
241, 246, 247, 294, 298, 307, 309, 311, 314—
316, 318—320

C-corporation

103, 104, 294, 307

nonprofit corporation

104—106

S-corporation

103, 104, 316

Covenants, Conditions and Restrictions (CC&Rs)

127, 295

cookies

218, 294

county court(s)

13—16, 24, 34, 125, 291, 294, 295, 303, 305,
308, 312, 318

court(s) of appeals

16—18, 23, 24, 38, 55, 56, 231, 254, 259—261,
264, 271, 272, 277, 280, 284, 295, 302, 312
see also Ohio courts of appeals, United States
courts of appeals

court of claims

13, 15, 24, 295, 318, 322, 323
see also claim(s)

credit (consumer)

45, 87—94, 96, 97, 101, 105—107, 220, 222,
240, 258, 289, 299, 311, 316

creditor

90, 98—101, 106, 140—142, 237, 301, 302,
304—306, 308, 314, 318, 319
judgment creditor
305, 314

culpable mental state

44, 295, 319
see also *mens rea*

custody

14, 54, 57, 151, 153—155, 159, 160, 162, 163,
165—167, 169—174, 200, 201, 290, 297—299,
308, 317, 318, 323

cybersquatting

223, 226, 296

D

damages

4, 8, 9, 13, 26—29, 55, 62, 63, 65, 66, 70—73,
81—85, 120, 124, 125, 127, 141, 163, 187, 188,
192, 221, 236, 251, 256, 268, 281, 293, 294,
296, 301, 303—307, 318
compensatory damages
8, 72
monetary / money damages
13, 83, 84, 236, 318
punitive / exemplary damages
8, 9, 62, 72, 192, 296
statutory damages
268

debt / debtor

80, 89, 92, 94, 98—108, 110, 113, 116, 121,
129, 132, 133, 136, 137, 140—142, 148, 149,
166—168, 170, 220, 237, 288, 290, 292, 294,
296, 297, 301—308, 310, 314, 315, 317—320
discharge of debts
100, 297
see also bankruptcy

declarant

145

defamation

10, 63, 68, 69, 72, 75, 223, 225, 259, 278, 281,
287, 296, 301, 306, 318

default judgment

27, 319

- defendant
2, 8, 26—42, 48, 54—56, 58, 59, 62, 63, 65,
68—73, 75, 113, 141, 166, 225, 233, 236, 248,
251—253, 255—257, 259, 261—264, 289—
296, 299—301, 303—307, 309, 312, 314, 315,
318, 319, 321, 322
- delinquency / delinquent
14, 157, 159—163, 165, 173, 297, 305, 306, 322
see also child, juvenile
- deposition
28, 35, 42, 297
- developmental delay
208, 297
- Digital Millennium Copyright Act of 1998
225, 228, 250, 282
- direct appeal
56
see also appeal
- direct evidence
37, 38, 297
see also evidence
- direct and proximate cause
62, 64, 75, 321
- directed verdict
30
see also motion
- disability(ies)
72, 79, 91, 133, 143, 144, 147, 148, 150, 153,
171, 177—179, 181, 182, 187—191, 195, 197,
198, 201, 203, 204, 206—213, 215, 216, 299,
301—303, 320, 323
- disbarment
231, 235, 244, 297
- Disciplinary Counsel (office of the Supreme Court of
Ohio)
234, 236, 244, 284
- disclosure statement
89, 121, 234
see also agency disclosure statement
- discovery
7, 28, 29, 35, 42, 175, 253, 281, 297, 304
- disposition
142, 159—163, 271, 291, 297, 317, 322
- dispute resolution
73, 75, 168, 169, 175, 223, 227, 296—298, 308
- dissolution
14, 26, 116, 135, 136, 151, 153, 155, 166—168,
171, 173—175, 292, 297, 298, 309, 317, 318
- distributive award
169
- district court(s)
16—18, 22—24, 231, 259, 261, 277, 280, 284
- divorce
14, 26, 100, 116, 135, 136, 151—153, 155, 159,
165—168, 171, 173—175, 190, 196, 200, 201,
216, 228, 237, 289, 290, 292, 297, 298, 309,
317, 318
ground(s) for divorce
166—168, 309
- Do Not Resuscitate (DNR) Order
146, 150, 288, 298
- domain name
222—224, 226, 280, 296, 304
- domestic relations / domestic relations court
13, 14, 153, 159, 166, 168, 171, 173, 232, 239,
298, 305

domestic violence
31, 45, 57, 155, 170, 201

double jeopardy
40, 42, 52, 298

double taxation
103, 104, 298, 307
see also taxation

dower interest
115, 136, 298
see also interest

Drug-Free Workplace Act of 1988
191, 197

due process
52, 184, 210, 298

durable power of attorney
144, 288, 298, 307
see also power of attorney

E

early intervention program(s)
208, 209

earned credit
46, 298

easement
111, 114, 117—119, 129, 131, 298, 299, 306,
311
access easement
114

education
2, 5, 51, 52, 90, 104, 148, 161, 163, 165, 167,
170, 171, 200—217, 221, 229, 230, 245—248,
267, 270, 272, 301—303, 314, 320
compulsory education
201, 214

egress
114

Electronic Communications Privacy Act
218, 226

electronic fund transfer
96, 106, 229

Electronic Fund Transfer Act
96

email
190, 218, 221, 223, 226, 227, 241, 242, 269,
294, 304

Employee Retirement Income Security Act (ERISA)
99, 176, 188, 197

employment at will
181, 183, 194, 196, 198, 299

encryption
242, 299

endorsement
88, 89, 106, 299

Equal Employment Opportunity Commission (EEOC)
177, 178, 199

Equal Pay Act
179, 196

escheat to the state
139, 300

escrow
122—124, 300
see also agent, closing

estate
14, 104, 111, 112, 116, 129, 130, 133, 134,
136—144, 148—150, 154, 237, 239, 243, 288,
300, 306, 311—313, 315, 320

leasehold estate
112, 129
life estate
111, 116, 129, 130, 306
residuary estate
137, 312, 315

eviction
14, 124, 125, 131, 300
evidence
7, 8, 17, 19, 29—32, 34—40, 42, 43, 53, 55—
57, 62, 65, 67, 69, 71, 92, 120, 122, 146, 156,
164, 187, 206, 210, 233, 242, 243, 252—254,
256, 261, 262, 264, 266, 268, 270, 274, 281,
289, 292, 294, 296—298, 300, 302, 303, 306,
308, 310, 312, 313, 315—317, 319, 321, 323
circumstantial evidence
37, 292
clear and convincing evidence
270, 292, 296, 297, 303, 312
direct evidence
37, 38, 297
false evidence
243
preponderance of the evidence
29, 312
prima facie evidence
313

executor
14, 133, 140—142, 149, 243, 244, 288, 300

exemplary damages
72
see also damages / punitive damages

exemption
98, 99, 104, 184, 198, 270—272, 300, 302, 310

express contract
79, 294
see also contract

ex post facto laws
54, 300

expulsion (school)
204—206, 216

extraordinary writ(s)
16, 17, 295, 300, 302, 307, 312—315, 323
habeas corpus
16, 295, 302, 312, 323
mandamus
16, 307
procedendo
16, 17, 313
prohibition
16, 314
quo warranto
16, 315

ex post facto laws
54, 300

F

Fair Credit Billing Act
93

fair use
221, 225, 226, 228, 277, 283, 300

Fair Labor Standards Act (FLSA)
184, 185, 197, 300, 309

false arrest
68, 300
see also arrest

Family and Medical Leave Act (FMLA)
155, 175, 178, 180, 181, 196

Family Educational Rights and Privacy Act (FERPA)
213, 215

Federal Housing Administration (FHA)
121, 127

fee simple ownership / fee simple title / ownership in fee
110—112, 115, 129, 301, 315

fee simple interest
111
see also interest, title

felony / felon
3, 13, 14, 31, 32, 34, 36, 37, 40, 42, 44, 45—54,
56—58, 60, 160, 161, 165, 264, 289, 290—293,
296, 300, 301, 303, 305, 307, 308, 311—313,
315, 317

fiduciary(ies)
14, 100, 133, 140, 142, 143, 147, 149, 189, 288,
300, 301, 313, 221

firewall
301

First Amendment
10, 59, 204, 205, 214, 217, 225, 260, 261, 263,
276, 279, 281—283, 304

fixture
109, 124, 129, 301, 308, 315

forcible entry and detainer
125, 300, 301
see also eviction

foreclosure
105, 107, 114, 131, 132, 301, 306, 307, 313

foreperson
30, 39

Free Appropriate Public Education (FAPE)
209, 301

G

good-faith tender
82
see also tender

Good Samaritan statute
68, 76

Gramm-Leach-Bliley Act
97

grand jury
32, 34, 35, 42, 43, 53, 261, 264, 279, 291, 303,
309, 312, 313, 321
see also jury

grantor / grantee
115, 117, 118, 143, 301, 314—316, 321, 323

ground(s) for divorce
166—168, 309
see also divorce

guardian / guardianship
14, 70, 71, 133, 143, 146, 147, 149—151, 154,
156—160, 163—165, 174, 200—202, 209, 237,
244, 272, 297, 301, 302, 309, 313, 323
emergency guardian
147, 302
interim guardian
147, 302
guardian *ad litem*
174, 302
limited guardian
147, 302

H

habeas corpus
16, 295, 302, 312, 323
see also extraordinary writ(s)

harassment
72, 177, 179, 181, 187, 190, 192, 196, 198, 207,
208, 318
see also bullying, sexual harassment

health care power of attorney
144—146, 149, 298
see also power of attorney

hearsay
7, 38, 43, 302

heir
111, 116, 133, 134, 137—139, 142, 228, 300,
306, 313, 320
pretermitted heir
313

holder in due course
88—90, 106, 302

home instruction
201, 216

home schooling
201, 202, 216, 302

home solicitation sale
87, 95, 96, 302

house arrest
34, 51, 163, 293
see also arrest

hung jury
39, 54, 303, 308
see also jury

I

Immigration Reform and Control Act of 1986 (IRCA)
179, 196

implied contract
79, 80, 294
see also contract

incompatibility
166, 167, 297

Independent Educational Evaluation (IEE)
210

independent insurance agent
67

indictment
32—35, 42, 47, 48, 53, 59, 264, 291, 293, 303,
309, 312, 313, 321

Individualized Education Program (IEP)
206, 209, 210, 212, 215, 301, 303

Individualized Family Service Plan (IFSP)
209

Individuals with Disabilities Education Act (IDEA)
204, 208, 209, 212, 215

ingress
114

injunction
10, 13, 26, 84, 85, 127, 182, 272, 275, 292, 296,
303

insurance
2, 3, 33, 66—68, 73, 76, 83, 91, 95, 99, 100,
116, 119—123, 131, 132, 136, 141, 142, 149,
150, 153, 156, 174, 193, 197, 239, 246, 288—
290, 292, 301, 302, 322

interest
63, 80, 89—95, 97, 98, 101—104, 106, 109—
121, 124, 129, 130, 133, 136, 137, 141, 147,
184, 239, 241, 242, 294, 298, 304, 306, 310,
311, 314, 315, 317, 318, 320, 322, 323
conflict of interest
45, 232, 241
dower interest
115, 136, 298
fee simple interest
111, 113, 115
interest rates
89, 91, 92, 94, 97, 120, 121
leasehold interest
112, 115, 129
partial interest
110

remainder interest
111, 116, 130, 306, 315
security interest
91—94, 106, 110, 306, 317

interim guardian
147, 302
see also guardian / guardianship

Internet
10, 67, 64, 85, 148, 190, 217—227, 250, 254,
256, 276—283, 289, 298, 299, 301, 304, 310
Internet Service Provider (ISP)
10, 218, 225, 254, 281, 304

interrogatories
28, 39, 304

inter vivos trust
321
see also living trust

intestate
137, 138, 140, 142, 149, 304

J

joint and survivorship property / ownership
136, 141, 150, 304, 311, 321

joint tenancy
112, 304, 320
see also tenancy

journalist's privilege
250, 260, 287, 304

judgment
8, 15—17, 27, 29, 30, 40, 55, 64, 67, 89, 106,
113, 116, 118, 129, 281, 289, 292, 295, 296,
301, 305, 306, 312, 314, 317, 319, 322
default judgment
27
judgment notwithstanding the verdict
40

motion for judgment
30
summary judgment
29, 319

judgment lien
113, 129, 305
see also lien

jurisdiction
4, 13—18, 26—28, 41, 44, 133, 153, 159—161,
165, 166, 171, 172, 176, 183, 198, 219, 223,
227, 231, 233, 234, 236, 256, 269, 280—282,
293, 295, 303, 305—308, 312, 318, 320, 322
appellate jurisdiction
15—17, 305
continuing jurisdiction
166, 171, 305
original jurisdiction
16, 17, 305
personal jurisdiction
26—28, 256, 280
subject-matter jurisdiction
26, 28, 305
territorial jurisdiction
15, 305, 308

jury / juror(s)
8, 11, 15, 29—32, 34—43, 53—55, 59, 63, 70—
73, 125, 157, 160, 176, 182, 198, 251—253,
259, 261—264, 279, 289, 290, 291, 297—299,
303, 305, 308—313, 315, 317, 319, 321—323
grand jury
32, 34, 35, 42, 43, 53, 261, 264, 279, 291, 303,
309, 312, 313, 321
hung jury
39, 54, 303, 308
petit jury
37, 261, 279
sequestering a jury
39, 262, 317

juvenile
13, 14, 17, 24, 33, 45, 148, 151, 156—163, 165,
172, 173, 202, 263, 264, 271, 272, 291, 297,
305, 306, 308, 315—317, 322

delinquency / delinquent
14, 157, 159—163, 165, 173, 297, 305, 306, 322
juvenile court
14, 33, 148, 151, 158—162, 165, 172, 173, 202,
263, 264, 291, 297, 305
juvenile traffic offender / offense
14, 159—161, 163, 173, 297, 305

L

labor union(s)
179, 182, 292

landlord
14, 112, 113, 115, 123—125, 128, 130, 131,
240, 306, 320

land registry
118

land use
3, 126, 127, 130

leasehold interest / estate
112, 115, 129
see also interest

legal separation
14, 166—168, 171, 173, 174, 292, 298, 306, 318

lemon law
76, 96, 106, 107, 306

lessee
111, 112, 115, 123, 130, 306

lessor
112, 115, 123, 130

liability
5, 10, 24, 33, 44, 45, 54, 66, 68—71, 75, 76, 93,
96, 102—106, 120, 131, 144, 149, 154, 155,
187, 208, 223, 225, 227, 246, 258, 278, 282,
289, 291, 294, 295, 301, 304, 307, 308, 314, 319

product liability
29, 68, 69, 308, 319
strict liability
44, 45, 69, 295, 319

libel
10, 41, 69, 250—257, 259, 277, 280, 281, 287,
296, 306, 318

license / licensee
3, 4, 14, 15, 17, 51, 66—68, 71, 95, 97, 102,
114, 129, 133, 146—149, 152, 153, 156, 161,
163, 172, 188, 201, 203, 209, 217, 221, 229,
230, 236, 238, 248, 258, 267, 288, 297, 301,
302, 306, 313, 314
driver's (operator's) license
66, 67, 71, 156, 161, 163, 203, 301, 306
licensed attorney / lawyer
14, 15, 17, 230, 248
marriage license
14, 133, 146—149, 152, 153, 313

lien
94, 98, 106, 113—116, 118, 121, 122, 129,
305—308, 313, 317, 320, 321
judgment lien
113, 305
marshaling of liens
114, 307
mechanic's lien
113, 118, 306, 308
priority of liens
114, 313
tax lien
113, 114, 320

life estate
110, 111, 116, 129, 130, 306

life tenant
111, 129, 306, 315, 320
see also tenant

limited guardian
147, 302
see also guardian / guardianship

limited liability company
102—104, 307

living trust / *inter vivos* trust
321
see also trust

living will
144, 145, 150, 154, 288, 307

loan
76, 84, 87, 89—92, 94—98, 100, 102, 105, 106,
113, 118, 121, 122, 131, 216, 311, 317
high-ratio loan
121
payday loan
97, 98, 311

M

magistrate
15, 34, 233, 303

malicious prosecution
69, 307

malpractice
72, 74, 236, 239, 243, 307, 319
malpractice insurance
239

mandamus
16, 268, 307
see also extraordinary writ(s)

mandatory bindover
161
see also bindover

mandatory reporter
208, 215, 307

marital property
169
see also property

marketable title
119, 307
see also title

marriage license
14, 133, 146—149, 152, 153, 313
see also license

marshaling of liens
114, 307
see also lien

mayor's courts
13—15, 24, 53, 307

mechanic's lien
113, 118, 308
see also lien

mediation
5, 8, 14, 15, 51, 73, 74, 76, 166, 168, 169, 175,
183, 203, 210, 297, 308

Medicaid
131, 143, 144, 150, 188, 190

mens rea
44, 288, 295, 308
see also culpable mental state

metes and bounds
119

mini-trial
73, 297, 308

minor(s)
70, 71, 79, 133, 136, 147, 151, 154—162, 164,
165, 168, 169, 171—174, 201, 214, 216, 222,
271, 288, 299, 302, 305, 308—310, 319, 322

minor misdemeanor
31, 36, 45, 51, 317
see also misdemeanor

Miranda warnings
54, 61, 308

misdemeanor / misdemeanant
4, 14, 15, 31, 34, 36, 37, 40, 44—46, 48, 49, 51,
53—55, 60, 161, 165, 289, 290—293, 296, 303,
305, 307, 308, 311, 317

misdemeanor penalty table
51

mistrial
30, 39, 295, 303, 308

monetary damages
13, 83, 84, 236, 318
see also damages

mortgage
87, 94, 98, 100—102, 106, 107, 111, 113—116,
118, 121—123, 129—131, 294, 299, 306, 308,
313, 315, 317, 320, 321
conventional mortgage
121
mortgage assumption
121
reverse mortgage
131

motion(s)
7, 27—30, 35, 40, 42, 58, 168, 255, 260, 295,
308
motion for directed verdict / motion for
judgment
30, 40
motion for summary judgment
29
pre-trial motion
28

municipal court
14—16, 24, 34, 291, 294, 295, 305, 308, 312,
318

N

National Labor Relations Act (NLRA)
182, 183, 197

National Labor Relations Board (NLRB)
182, 192, 198, 228

necessaries
154, 157, 309

negligence
4, 44, 62, 65, 66, 68—72, 75, 105, 252, 256,
289, 290, 293, 295, 303, 307, 309, 315, 319, 323
comparative negligence
71, 290, 293

negotiable / negotiability / negotiable instrument
87, 88, 97, 106, 240, 299, 302, 309, 314

negotiation
5, 8, 35, 42, 73, 74, 87—89, 93, 168, 261, 292,
297, 308, 309, 311, 313

no bill
34, 309

No Child Left Behind Act
204, 207, 212, 213, 215, 288

no contest plea
15, 33, 55, 61, 307, 311
see also plea

nonprofit organization / nonprofit corporation
104—106, 193, 246, 267, 294, 309, 314, 320

O

Occupational Safety and Health Act (OSHA)
186, 187, 192, 197

- offer
 - 68, 74, 77, 78, 80, 81, 85, 120, 178, 191, 194, 202, 288, 293, 294, 310
 - counteroffer
 - 74, 78, 194, 294
 - Office of Civil Rights
 - see* U.S. Department of Education
 - Ohio Administrative Code*
 - 3
 - Ohio Bureau of Motor Vehicles (BMV)
 - see* Bureau of Motor Vehicles
 - Ohio Bureau of Workers' Compensation (OBWC)
 - 187, 199, 323
 - Ohio Child Support Guidelines
 - 171, 292
 - Ohio Code of Judicial Conduct*
 - 231, 233, 248
 - Ohio courts of appeals
 - 15, 331
 - Ohio Criminal Code
 - 45—48, 51, 56, 60
 - Ohio Department of Education (ODE)
 - 207, 208, 210, 213, 216
 - Ohio Department of Health (ODH)
 - 208, 209, 215, 298
 - Ohio Graduation Test (OGT)
 - 204, 213
 - Ohio Public Records Act
 - 213, 264, 265, 267, 270, 273
 - Ohio Revised Code (ORC)*
 - 2, 45, 58, 60, 68, 99, 123, 130, 137, 145, 168, 182, 196, 197, 265, 266, 268, 270, 271, 273, 274, 279, 284
 - Ohio Rules of Professional Conduct*
 - 230—234, 236, 239, 241, 244, 248, 249
 - Ohio State Bar Association (OSBA)
 - 119, 145, 234—236, 238, 245—248, 286
 - see also* bar association
 - Ohio Supreme Court
 - see* Supreme Court of Ohio
 - open meetings / Open Meetings Act
 - 214, 273—275, 310, 314, 319
 - oral contract
 - 80, 85, 123, 130
 - see also* contract
 - ordinance
 - 2—6, 11, 15, 44—46, 60, 63, 193, 295, 307, 310, 322
 - municipal ordinance
 - 3, 15, 45, 60, 295
 - original jurisdiction
 - 16, 17, 305
 - see also* jurisdiction
- P**
- partial performance
 - 81, 310, 320
 - see also* performance
 - partition
 - 111, 310, 320
 - partnership
 - 100, 102—104, 106, 153, 154, 237, 241, 307, 310, 316, 319
 - domestic partnership
 - 153, 154
 - limited partnership
 - 102, 103, 310

payable-on-death (POD) account
110, 136, 311

payday lender / loan
96—98, 106, 311

performance
80—83, 85, 113, 129, 140, 304, 306
partial performance
81
substantial performance
81

personal jurisdiction
26—28, 256, 280
see also jurisdiction

personal property
54, 68, 87, 98, 99, 109, 110, 112, 116, 120, 129,
135, 142, 169, 207, 290, 300, 301, 306, 308,
310, 311, 314, 317, 321, 323
see also property

personal recognizance
33, 34, 311, 323

per stirpes
138, 311

petit jury
37, 261, 279
see also jury

petty offense / petty theft
34, 36

plaintiff
8, 15, 26—30, 36, 41, 42, 62—66, 68, 69, 71—
73, 75, 141, 166, 225, 251—254, 256, 257, 259,
265, 268, 289, 290, 293, 294, 300, 304, 306,
307, 309, 311, 312, 314, 315, 319, 321, 322

planned unit development (PUD)
126, 127, 130, 131, 311

plat
118, 119, 311

plea
15, 32, 33, 35, 42, 55—57, 61, 263, 289, 303,
307, 308, 311, 312, 317
plea bargain / plea bargaining
32, 33, 56, 57, 61, 263, 308, 311, 312

pleading
27, 28, 33, 35, 40, 42, 293, 294, 296, 312, 317,
319

post-conviction relief
17, 56, 302, 312

power of attorney
144, 146, 149, 175, 200, 288—290, 298, 307,
312
durable power of attorney
144, 288, 298, 307
health care power of attorney
144—146, 149, 298

precedent
4—7, 264, 293, 312, 318

prejudicial error
16, 302, 311, 312

preliminary hearing
14, 32, 34, 35, 42, 53, 291, 308, 312

preponderance of the evidence
29, 289, 292, 296, 312, 313

prescription
115—117, 289

pretermitted heir
313
see also after-born children, heir

- pre-trial motion
28
see also motion
- prevailing wage law / rate
185, 186, 197, 313
- priority of liens
114, 313
see also lien
- privacy
10, 97, 124, 148, 172, 190, 191, 197, 198, 207,
213—215, 217—219, 221—224, 226—228,
250, 257—259, 262, 271—273, 277, 278, 281,
287, 304, 315, 316
- probable cause
14, 31, 34, 53, 68, 161, 162, 234, 235, 238, 291,
292, 296, 305, 307, 309, 312, 313, 316, 321, 323
- probate / probate court
14, 26, 33, 118, 132—136, 140—143, 146—
152, 159, 172, 175, 239, 288, 293, 300, 302,
313, 315, 316, 323
- probation
40, 45, 46, 48, 51, 57, 66, 161—163, 165, 183,
235, 271, 293, 305, 308, 313, 317, 322
shock probation
46, 305
- pro bono*
240, 248, 249, 313
- procedendo*
16, 17, 313
see also extraordinary writ(s)
- procedure / rules of procedure
2, 4, 5, 7, 15, 17, 26, 31, 41, 52, 53, 56, 59, 60,
69, 94, 116, 127, 131, 140, 161, 170, 181, 183,
201, 207, 209, 210, 216, 231, 235, 236, 242,
244, 250, 264, 266, 267, 269, 289, 292, 293,
296—299, 301, 303, 306, 308, 316, 318, 323
- process / service of process
26, 27, 317
- pro hac vice*
231, 314
- prohibition
16, 314
see also extraordinary writ(s)
- property (real and personal)
1, 27—29, 31, 33, 34, 45, 47, 52—54, 57, 58,
62—64, 66—69, 71, 75, 76, 78—80, 83, 87, 93,
98—100, 106, 109—137, 140—143, 147—149,
153, 154, 156, 160, 166, 167, 169, 170, 173,
176, 184, 190, 204, 207, 214, 218, 232, 236,
237, 242, 244, 258, 259, 271, 275, 278, 289—
291, 293—311, 313—323
intellectual property
218, 271, 278, 294, 300, 303, 304
marital property
169
mixed property
308
property interest
114, 115, 129, 242, 294, 310
- property bond
118, 306
see also bond
- pro se*
56
- prosecute / prosecutor / prosecution
26, 31—35, 37—42, 44, 46, 52—54, 56—58,
62, 65, 69, 141, 220, 234, 235, 260, 261, 263,
271, 275, 283, 290, 293—295, 303, 307, 309,
311—314, 317, 323
- protected conduct
181, 182, 192, 299
- proximate cause
63, 314

public domain
109

public record
116—118, 122, 130, 148, 172, 213, 214, 235,
250, 253, 255, 258, 259, 262, 264—273, 284,
287, 314, 315, 321

Public Records Act
see Ohio Public Records Act

Public Employment Risk Reduction Program (PERRP)
186, 187, 197

punitive damages
8, 9, 62, 72, 192, 296
see also damages / exemplary damages

Q

quasi-contract
84
see also contract

quitclaim deed
115, 131, 314, 315

quo warranto
16, 315
see also extraordinary writ(s)

R

real estate agent
121, 298
see also agent

real property
see property (real and personal)

reasonable doubt
36, 40, 65, 160, 290, 292, 295, 296, 312

referendum
1, 315

Rehabilitation Act of 1973
211, 215

remainder interest
111, 116, 130, 306, 315
see also interest

remainderman
111, 306, 315

representative
112, 182, 206, 244, 302
see also agent

rescission (of contract)
83, 85, 90
see also contract

residential parent
170, 200, 310, 315

residuary estate
137, 312, 315
see also estate

respondeat superior
70, 289, 315, 316

retail installment sales
89, 94, 95, 106, 288, 315

retainer
240, 241, 244, 315, 316

retaliation
125, 181, 182, 184, 192, 196, 198, 207, 299

revolving charge account
92, 106, 316

right of cancellation
95, 157

root of title
119
see also title

round table closing
122
see also closing

rule against perpetuities
117, 316

S

schooling certificate
see age certificate

search and seizure
53, 184, 316

Section 504
see Rehabilitation Act of 1973

secured transaction
87
see also transaction

security deposit
124, 132

security interest
91—94, 106, 110, 306, 317

self-incrimination
53, 317

sentence / sentencing
3, 13, 14, 33, 36, 40, 46—61, 159, 160, 162,
269, 277, 291, 293, 296, 298, 303—305, 312,
313, 317, 322
blended sentence
160, 162, 291

settlor
143, 316, 321

severance pay
193, 194, 197, 198, 317, 318

sexual harassment
72, 177, 181, 187, 190, 192, 196, 198, 318

share(s)
71, 103, 104, 111, 112, 136—139, 294, 310,
318, 320

shared parenting
170, 173, 200, 315, 318

shock probation
46, 305
see also probation

slander
69, 296, 306, 318

small claims / small claims division
14, 15, 318
see also claim(s)

Social Security
100, 148, 153, 189, 190, 195, 197—199, 272,
273, 277

sole proprietorship
102, 103, 310, 318

solicitation
87, 95, 96, 106, 233, 302
see also home solicitation sale

special education
200, 201, 208—210, 212, 214—216, 301, 303

spousal support
14, 100, 152, 155, 166—170, 173, 175, 292,
317, 318

squatter's rights
115, 116, 289

statute of descent and distribution
136, 137, 139, 142, 149, 304, 318

statute(s) of limitations
27, 41, 72, 256, 319

statute(s) / statutory law
2—9, 11, 13, 14, 18, 24, 26, 27, 29, 31, 35, 41,
44, 46, 51, 53, 56, 57, 60, 63, 68, 72, 77, 85, 87,
102, 111, 112, 114, 119, 137, 139, 142, 149,
153, 154, 164, 166, 169, 176, 177, 181, 183,
187, 192, 193, 196, 203, 212, 218, 223, 225,
227, 256, 260, 261, 265—275, 279, 288, 290,
292, 295, 304, 307—309, 315, 316, 318—320,
322

straight liquidation
98

strict liability
44, 45, 69, 75, 295, 319
see also liability

subject-matter jurisdiction
26, 28, 305
see also jurisdiction

subpoena
37, 54, 69, 218, 221, 260—262, 281, 288, 319

summary judgment
29, 319
see also judgment, motion for summary
judgment

summary-jury trial
73, 297

summons
14, 27, 31, 32, 42, 53, 69, 125, 288, 292, 317,
319

sunshine laws
273, 284, 319

Supplemental Security Income (SSI)
143, 190

supplemental services trust
144, 320
see also trust

Supreme Court of Ohio
16, 17, 19, 24, 31, 38, 55, 56, 148, 169, 187,
229, 230, 234—236, 238, 244, 246, 247, 249,
250, 253, 255, 256, 259, 261—265, 267—272,
283, 295, 297, 302, 316, 320

Supreme Court of the United States
1, 5, 18, 19, 24, 31, 54—56, 59, 177, 217, 252—
255, 260, 262—264, 285, 295, 308, 320

surety bond
33
see also bond

survey / surveyor
118, 119

survivorship / joint tenancy
111, 112, 116, 129, 130, 136, 141, 304, 311,
320, 321
see also tenancy

suspension
66, 67, 163, 203, 205, 206, 235, 244, 296, 301,
303, 308
suspension of license
66, 163, 203, 235, 244, 301, 303
suspension from school
205, 206

T

taxation
3, 4, 102—104, 298, 307, 316
double taxation
103, 104, 298, 307

- tax-exempt organization
 - 104, 320
- tax lien
 - 113, 114, 320
 - see also* lien
- tenancy
 - 111—113, 123, 124, 129, 130, 304, 306, 320
 - joint tenancy
 - 112, 304, 320
 - tenancy in common
 - 111, 112, 129, 304, 320
 - tenancy by the entirety
 - 112, 320
 - tenancy at will
 - 306, 320
- tenant
 - 14, 76, 111—113, 115, 123—125, 128—132, 240, 293, 300, 306, 315, 320, 321
 - life tenant
 - 129, 315
- tender
 - 82, 306, 320
 - good-faith tender
 - 82
- ten percent bond
 - 320
 - see also* bond
- territorial jurisdiction
 - 15, 305, 308
 - see also* jurisdiction
- testamentary trust
 - 143, 316, 320, 321
 - see also* trust
- testate
 - 140, 321
- testator
 - 134—137, 140, 149, 292, 312, 313, 321, 323
- third-party complaint
 - 28, 312
 - see also* complaint
- tip credit
 - 185
- title
 - 16, 91, 110—112, 114—123, 127, 129—132, 237, 288, 289, 292—294, 300, 301, 307, 308, 314, 315, 321, 323
 - chain of title
 - 119
 - fee title
 - 119
 - fee simple title
 - 110—112, 115, 129, 315
 - marketable title
 - 119, 307
 - root of title
 - 119
 - title examination
 - 119, 120, 122, 123, 130, 321
 - title insurance
 - 119, 120, 122, 123, 131, 132, 292
 - see also* insurance
- Title IX of the Educational Amendments of 1972
 - 211, 215
- Torrens system
 - 118
- tort
 - 4, 5, 8, 15, 26, 62—76, 187, 251, 257—259, 290—292, 300, 304, 306, 307, 309, 314, 315, 318, 319, 321, 323
 - intentional tort
 - 321, 323
 - tort claim
 - 64, 72, 75, 321, 323
 - see also* claim

transfer-on-death (TOD) designation affidavit
116, 129, 130, 132, 133, 136, 141, 150, 321

trapping of losses
103

trespass / trespassing / trespasser
45, 64, 68, 69, 76, 131, 258, 321

truancy / truant
162, 202, 203, 214, 216, 322

true bill
34, 321

trust
103, 133, 134, 136, 141—144, 149, 150,
244, 249, 301, 311, 316, 320—323
irrevocable trust
144, 321
revocable (“living”) trust
143, 144, 316, 321
supplemental services trust
144, 320
testamentary trust
320, 321

trustee
14, 98—100, 126, 133, 143, 149, 237, 243, 301,
319, 321

truth in lending / Truth in Lending Act
89, 90, 97, 289, 311

tuition (school)
200, 201, 203, 204, 214, 216, 293

U

unemployment
100, 193, 194, 197—199, 322

Uniform Commercial Code (UCC)
87, 106, 302, 317, 322

Uniformed Services Employment and Reemployment
Rights Act (USERRA)
180, 196

United States Code
2, 46, 60, 98

United States courts of appeals
18

United States Department of Education
211, 213, 216
Office of Civil Rights
211

United States Department of Veterans Affairs
121

United States district courts
18, 22

United States Supreme Court
see Supreme Court of the United States

unjust enrichment
84, 85, 322

unsecured bail bond
33
see also bond

V

variance
126, 127, 327
area variance
126
use variance
126

venue
13, 26, 27, 41, 54, 59, 262, 291, 293, 322
change of venue
54, 59, 291

verdict
29, 30, 35, 37, 39, 40, 42, 73, 291, 303, 305,
308, 313, 317, 322

Veterans Administration (VA)
see United States Department of Veterans
Affairs

victim impact statement
48, 313, 322

voir dire
29, 36, 42, 303, 305, 311, 323

voucher program
203, 214

W

wage and hour laws
184, 185, 197, 199, 309

waiver
55, 71, 82, 89, 195, 243

ward
147, 302, 323

warranty deed
115, 315, 323

whistleblowing
181, 192, 299, 323

will / last will and testament
14, 112, 116, 130, 133—138, 140—143, 149,
150, 154, 237—240, 244, 288, 290, 292, 300,
304, 306, 310—313, 316, 319—321, 323
nuncupative / oral will
135, 310, 323
will substitute
133, 134, 136, 137, 149, 323

workers' compensation
5, 16, 72, 153, 181, 187, 188, 197—199, 299,
321, 323

work credit
189, 190

writ(s)
see extraordinary writ(s)

written contract
78, 80, 85, 97
see also contract

Z

zoning
15, 109, 111, 126, 127, 130, 132, 311, 322, 324

postscript

Every citizen should have some basic knowledge of the law and the legal system under which he or she lives and works. This book was designed to provide some of that basic knowledge, and we hope you have found it both interesting and informative. We welcome your suggestions for improving it, and your comments or criticisms. Please send suggestions, comments and criticisms to: Editor, The Law and You, P.O. Box 16562, Columbus, OH 43216-6562.